

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #3

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2013 JUL 26 PM 4:04

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: WV State Tax Department TITLE NUMBER: 110

CITE AUTHORITY: Legislative

AMENDMENT TO AN EXISTING RULE: YES ___ NO x

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 29

TITLE OF RULE BEING PROPOSED: SPECIAL RECLAMATION TAX CREDIT

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Authorized Signature

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: June 26, 2013

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) State Tax Department, Legal Division, 1001 Lee Street, East, Charleston, WV 25324-1005 (304) 558-5330

LEGISLATIVE RULE TITLE: Special Reclamation Tax Credit

1. Authorizing statute(s) citation West Virginia Code §11-10-11c

2.
 - a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 9, 2013

 - b. What other notice, including advertising, did you give of the hearing?
None

 - c. Date of Public Hearing(s) or Public Comment Period ended:
July 19, 2013

 - d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached Comments received from Coal Association, responses and amendments

 - e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)
July 26, 2013

 - f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Mark S. Morton, General Counsel for Revenue Operations

State Tax Department - Legal Division, P.O. Box 1005, Charleston, WV

304-558-5330 (tel) 304-558-8728 (fax)

Mark.S.Morton@wv.gov

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

- b. Date of hearing or comment period:

N/A

- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

- d. Attach findings and determinations and reasons:

Attached N/A

**PROPOSED
TITLE 110
LEGISLATIVE RULE
TAX DEPARTMENT
SERIES 29
SPECIAL RECLAMATION TAX CREDIT
STATEMENT OF CIRCUMSTANCES**

The passage of H.B. 2352 in the 2013 Legislative Session provided a tax credit against the special reclamation tax for remediation and reclamation of mine sites upon which a bond has been forfeited. This rule provides clarification on the application of the credit, the effective date of the credit, what should be provided in an application for the credit, ineligibility for the credit, and general administration.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Special Reclamation Tax Credit (110 CSR 29)

Rule Title: _____

Type of Rule: Legislative Interpretive Procedural

Agency: State Tax Department

Address: 1001 Lee Street
Charleston, WV 25301

Phone Number: (304) 558-5330 Email: _____

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The Rule, as written, sets forth the procedures and requirements for administration of the Special Reclamation Tax Credit as authorized by W. Va. Code §22-3-11(g)(2)(A). Since the bill merely clarifies procedures and eligibility requirements and does not increase or decrease the tax credit, approval of the Rule will have no impact on State costs and revenues.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Special Reclamation Tax Credit (110 CSR 29)

Rule Title: _____

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

Approval of this proposed rule will not increase or decrease the Special Reclamation Tax Credit.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: _____

Signature of Agency Head or Authorized Representative

TITLE 110
LEGISLATIVE RULE
STATE TAX DEPARTMENT

SERIES 29
SPECIAL RECLAMATION TAX CREDIT

FILED
2013 JUL 26 PM 4:04
OFFICE WEST VIRGINIA
SECRETARY OF STATE

§110-29-1. General.

1.1. Scope. – This legislative rule sets forth the procedures and requirements for administration of the special reclamation tax credit as authorized by W. Va. Code §22-3-11(g)(2)(A).

1.2. Authority. – West Virginia Code §§22-3-11(h).

1.3. Filing Date. - 2013.

1.4. Effective Date. – 2013

1.5. Applicability. – The special reclamation tax credit is available to qualified operators for taxable years beginning on or after July 12, 2013.

§110-29-2. Definitions.

Unless the context in which used clearly requires a different meaning, the definitions contained in W. Va. Code §§ 22-3-3 and 38 C.S.R. 2 § 2 apply to this rule, in addition to those definitions set forth below.

2.1. "Act." – means the West Virginia Surface Coal Mining and Reclamation Act codified at W. Va. Code §22-3-1 et seq. and the rules promulgated thereunder.

2.2. "Bond forfeited mine site" means a mine site at which the Department of Environmental Protection has revoked a mine permit and forfeited the associated bond in accordance with W. Va. Code § 22-3-17(b).

2.3. "Qualified operator" means the person that obtains a permit under the Act to mine coal and perform reclamation on a bond forfeited mine site and that qualifies for the special reclamation tax credit as provided below.

2.4. The "Secretary" means the Secretary of the Department of Environmental Protection or his or her designee.

2.5. "Tax Commissioner" means the chief executive officer of the State Tax Division or his or her designee.

§110-29-3. Tax Credit Authorized; Effective Date; Administration.

3.1. Effective July 12, 2013, W. Va. Code §22-3-11 authorizes a tax credit for reclamation and remediation at bond forfeiture sites when performed to the standards of the permit and the Act.

3.2. In accordance with W. Va. Code §§22-3-11a and 23-3-11(g)(2)(C), the tax imposed by West Virginia Code §22-3-11 and the tax credit authorized thereunder are administered under W. Va. Code §11-10-1 *et seq.*

3.2.a. The tax credit authorized under W. Va. Code §22-3-11 for reclamation and remediation at bond forfeiture mine sites when performed to the standards of the permit and the Act shall first apply to a particular taxpayer for taxable years beginning on or after July 12, 2013 pursuant to the mandate of W. Va. Code § 11-10-5p:

Any amendment to any article administered under [W. Va. Code §11-10-1 *et seq.*] shall first apply to a particular taxpayer for taxable years beginning on or after the effective date of the act of the Legislature containing such amendment, as determined under article six, section thirty of the constitution of this state, unless the language of the act provides a controlling internal effective date provision.

3.2.b. W. Va. Code §22-3-11(i) states that:

(i) This special reclamation tax shall be collected by the State Tax Commissioner in the same manner, at the same time and upon the same tonnage as the minimum severance tax imposed by article twelve-b, chapter eleven of this code [WV Code article 12B, chapter 11] is collected

Emphasis added.

3.2.c. W. Va. Code §11-12B-4(a) specifies the applicable tax year as follows:

(a) *General rule.*

For purposes of the tax imposed by this article [the minimum severance tax imposed by article 12B, chapter 11], a taxpayer's taxable year shall be the same as the taxpayer's taxable year for federal income tax purposes.

3.2.d. Therefore, in accordance with the mandates of W. Va. Code §§22-3-11(i) and 11-12B-4(a), the special reclamation tax credit shall first apply to a particular taxpayer for the first taxable year (as determined for federal income tax purposes) beginning on or after July 12, 2013.

3.3. The tax credit is taken only against the special reclamation tax imposed under W. Va. Code §22-3-11.

3.3.a. The credit cannot be applied to offset any other tax.

§110-29- 4. Application for and Amount of Tax Credit.

4.1. If an operator applies for an Article 3 permit or enters into a reclamation agreement with the Department of Environmental Protection for a bond forfeited mine site, the Secretary shall certify to the Tax Commissioner the project costs, as shown in the records of the Secretary, that would have been spent from the Special Reclamation Fund and the Special Reclamation Water Trust Fund on the subject bond forfeited mine site.

4.2. At the conclusion of each calendar year the qualified operator reclaims a bond forfeited mine site pursuant to either an Article 3 permit or a reclamation agreement, the qualified operator may apply to the Tax Commissioner for the special reclamation tax credit. Before the qualified operator can receive the tax credit, the Secretary shall certify to the Tax Commissioner the amount of reclamation work completed pursuant to the Article 3 permit or reclamation agreement and the resultant amount of credit to be granted.

4.3. The amount of tax credit granted to the qualified operator shall be determined using the project costs the Secretary previously certified to the Tax Commissioner for the subject bond forfeited mine site.

4.4. The application for the tax credit by the authorized operator will be on a form approved by the Tax Commissioner and filed at the same time and manner as the special reclamation tax.

§110-26-5. Ineligibility for Tax Credit; Limitation of Tax Credit.

5.1 The qualified operator must be in good standing with the Tax Commissioner before receiving or claiming any credit. For the purposes of this rule, "good standing" means that the qualified operator has filed all required tax returns and related reports and that every tax administered under the West Virginia Tax Procedure and Administration Act imposed on the qualified operator has been paid or provided for.

5.2 A qualified operator that held an Article 3 permit for the bond forfeited mine site that was revoked by the Secretary and its bond forfeited, shall not be eligible for the special reclamation tax credit earned as a result of performing reclamation on the subject bond forfeited mine site.

5.3 Beginning in the year in which the Tax Commissioner issues a certification of tax credit to a qualified operator.

5.3.a The qualified operator may use the credit to offset its payment of or liability for the special reclamation tax for the tax year.

5.3.b If any credit remains after application of the credit as provided in subsection 5.2.a. above, such remaining credit may be claimed only by any related entity, as that term is defined in W.Va. Code §11-24-3a, that engages in a unitary business, as that term is defined in W.Va. Code §11-24-3a, with the qualified operator. Provided, that the qualified operator is in good standing as provided in section 5.1. of this rule.

5.3.c If any credit remains after application of subsections 5.2.a and 5.2.b above, such credit may be carried forward for use in future tax years as provided herein, until no credit is remaining.

5.3.d The credit is not refundable, it may not be carried back to a prior tax year and may not be transferred except as provided in section 5.3. of this rule

§110-29-6. General Procedure and Administration.

6.1. Requirements to Claim the Tax Credit. -- To claim a tax credit, the qualified operator shall comply with The Act and this rule and shall timely provide complete and accurate forms, returns, schedules and other information required by the Tax Commissioner or the Secretary.

6.2. Applicability of Various Tax Laws. -- Application of this credit and eligibility for this credit shall not affect or abrogate application of the provisions of the Act; and the following articles of chapter eleven of the Code of West Virginia: Article 10, "The West Virginia Tax Procedure and Administration Act;" Article 12, "Business Registration Tax;" Article 12B, "Minimum Severance Tax," Article 13A, "Severance and Business Privilege Tax Act;" Article 13V, "Workers' Compensation Debt Reduction Act;" Article 21, "Personal Income Tax;" Article 24, "Corporation Net Income Tax," and rules issued pursuant to those statutes, with respect to any qualified operator to the extent that they may be subject to the provisions of those laws.

6.3. Maintenance of Records. A qualified operator shall maintain the records required to verify the validity of its eligibility for the tax credit and the accuracy of the amount of the tax credit claimed. Failure to do so may result in denial of the tax credit.

6.4. The qualified operator is subject to audit by the Tax Commissioner or his or her designee.



West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 • (304) 342-4153 • Fax 342-7651 • www.wvcoal.com

July 19, 2013

West Virginia Department of Tax and Revenue

Mr. Mark Morton

1001 Lee Street

Charleston, WV 25301

Via electronic mail: mark.s.morton@wv.gov

Re: **Comments on Proposed Rule to Implement House Bill 2352- Special Reclamation Fund Tax Credit**

Pursuant to the public notice published by the West Virginia Department of Tax and Revenue (Tax Department), the West Virginia Coal Association (WVCA) offers the following comments regarding the agency's proposed rule to implement the provisions of House Bill (HB) 2352, which statutorily created a tax credit for the voluntary reclamation of bond forfeiture sites that are currently the responsibility of the state's alternative bonding system, the Special Reclamation Fund (SRF). As we explain in more detail in the paragraphs that follow, **WVCA believes the proposed rule will "nullify" the effectiveness of the statute and prevent the beneficial reclamation of bond forfeiture sites by active mining operators.**

The West Virginia Coal Association (WVCA) is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's general members account for 95

percent of the Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal removal, processing, transportation and consumption through reasonable, equitable and achievable state and federal policy and regulation. WVCA is the largest state coal trade association in the nation.

WVCA is uniquely positioned to offer substantive comments on the proposed rule. Our general members routinely obtain the regulatory permits required to initiate and sustain coal production such as state-issued West Virginia Surface Coal Mining and Reclamation (WV SCMRA) permits and Clean Water Act (CWA) Section 402 National Pollutant Discharge Elimination System (NPDES) permits. Additionally, WVCA has been intimately involved in the development of the state's mining regulatory program since its creation.

WVCA and its members have participated in the regulatory development of the program as statutory revisions and administrative rules proceeded through the rulemaking process, the West Virginia Legislature and finally review and approval by the federal Office of Surface Mining (OSM). Additionally, WVCA and its members have a thorough understanding of the state's alternative bond system for coal mining operations. And WVCA serves as a statutory appointment on the Special Reclamation Fund Advisory Council, a body created to monitor the performance and financial condition of the SRF. WVCA's coal producing general members serve as the primary source of revenue for the

SRF's activities through a dedicated per-ton tax of 27.9 cents collected on all coal produced in West Virginia. Additionally, WVCA worked closely with the Legislature as it drafted the language that ultimately became HB 2352 and, along with WV DEP, offered testimony before various committees as members of that body considered the legislation.

As currently proposed, the rule represents a fundamental misunderstanding of the mining regulatory program and substantial departure from the authorizing statute. First, it is worth restating that the coal industry is the single source of revenue for the SRF and the continued financial stability of the fund is central to the operation of the mining regulatory program in West Virginia. As the mining regulatory program has matured, the per ton tax has been increased to assure the SRF satisfies its regulatory function to serve as the primary component of the state's OSM-approved alternative bonding system. As a member of the SRF Advisory Council, the Coal Association periodically updates its members on the performance of the SRF and the adequacy of the per ton assessment.

Several provisions of the proposed rule conflict with the clear language of the statute and thus conflict with the intent of the Legislature. For example, the proposed rule at 110 CSR 4.2 restricts application for the credit until after a mine operator has obtained phase III bond release on a former bond forfeiture site. The statutory language contained in HB 2352 at 22-3-11(c) states "the mine operator shall from time to time file with the Tax Commissioner a written application seeking the amount of the credit earned" (emphasis added). Based on the reference to the language "from time to time"

it is clear the Legislature envisioned a credit amount that may be granted at certain “increments” as the mine operator completes reclamation of the site that and commensurately reduces the liability once associated with the bond forfeiture site. Further, as was explained in testimony as the bill progressed through the Legislature, the very nature of the mining and reclamation process will create a scenario where liability to the SRF is reduced progressively as reclamation activities are completed in various stages. Incrementally applying the credit would be no different than current reclamation contracts awarded to non-coal producers where receipt of payment is tied to achievement of reclamation standards contained in the contract.

Any activity undertaken by an active mining operator on a bond forfeiture site would, at a minimum, require a reclamation agreement with WV DEP and/or a WV SCMRA permit submission and approval by the agency. Any agreement would contain specific requirements for reclamation that would have to be achieved by the mine operator. Fulfillment of these reclamation benchmarks and the corresponding reduction in liability to the SRF should serve as the basis for granting the tax credit contemplated in the statute. The same would be true for a bond forfeiture site where the mining operator re-permitted the area. The new mining permit issued by WV DEP would include a mining and reclamation plan that would contain benchmarks for the completion of reclamation. Again, these benchmarks, which are enforceable provisions of the mining permit, should serve as the basis for receiving the tax credit from “time to time” as contemplated by the Legislature.

To the extent the language tying receipt of the tax credit to phase III release is based on some concern for the financial stability of the SRF, we would first note again that the active coal industry is the single source of revenue for this program. Should the SRF require additional dollars to function, WV DEP and the Legislature will turn, as they have in every instance in the past, to the per ton tax on coal production. This concern is further misplaced when considered in the context of a re-permitted bond forfeiture site. Once the site has been permitted by an active mine operator, the liability for reclaiming that site now belongs to the operator as a function of the reclamation agreement and/or the new permit. Operating costs and reclamation obligations for the site have become the legal responsibility of the mine operator and must be reflected in the corporate accounting of that company. The terms and conditions of the new permit are legally enforceable against the permit holder through WV DEP's mining regulatory program. ***In short, from a practical standpoint, the entire liability for the site has been removed from the SRF once a new permit has been issued by WV DEP to an active mining operator.*** On sites where the active mining operator re-permits the former bond forfeiture site, an additional safeguard to the fund will exist- the mine operator must post a new bond to cover the permitted area in order to obtain the permit. So, the SRF would have the original, forfeited bonding instrument and, in the unlikely event the permittee would fail to complete reclamation, the amount of the bond posted by the new operator.

Tying receipt of the tax credit to phase III release is impractical from the standpoint of the mining regulatory process. Complete bond release under the mining regulatory

program cannot occur in certain instances, specifically sites where water treatment is required to meet applicable effluent limits under the CWA. Under the rule as proposed the credit could never be claimed by an active mine operator even though the majority of the liability to the SRF has been eliminated. Worse still, making receipt of the credit contingent on phase III release will prevent active mine operations from potentially assuming a water treatment obligation that currently belongs to the SRF in order to claim the credit for land reclamation.

Since phase III release cannot be granted by WV DEP on sites where water treatment is ongoing, the language in the proposed rule again directly contradicts the language of the statute. At 22-3-11(B), the Legislature specified the credit would be “equal to the amount...that would have been spent from the Special Reclamation Fund or *Special Reclamation Water Trust Fund* to accomplish the reclamation or remediation performed by the mine operator, *including expenditures for water treatment*” (emphasis added). The Legislature clearly anticipated that active mine operators may assume the costs of water treatment at a bond forfeiture site. From testimony offered by WV DEP and WVCA, the Legislature understood that such an assumption would obligate the active mine operator to maintain bond coverage on a water treatment site since the regulatory program generally prohibits phase III bond release where active water treatment is required. If the goal of the statute was to restrict application of the credit to phase III bond release, then the Legislature would not have included references to water treatment and the Special Reclamation Water Trust Fund since an operator is unlikely to obtain phase III release of any such permit on these sites. While phase III

release may be unobtainable, the mine operator will likely substantially reduce the liability of the SRF by first simply assuming that treatment cost and completing land remediation costs by performing the reclamation requirements contained in the new permit.

WVCA is also concerned that the proposed rule has unfairly and irrationally restricted the eligibility for the credit. At 110 CSR 29.5.6.b, the proposed rule would prohibit application of the credit to “any parent or subsidiary of the qualified operator...” There is no rational basis for such a restriction.

First, the authorizing statute is silent on this issue. Second, other taxes paid by the coal industry are many times paid according to corporate organization, with some or all paid by the parent company for named subsidiaries. Finally, this restriction again represents a misunderstanding of the nature of many bond forfeiture sites.

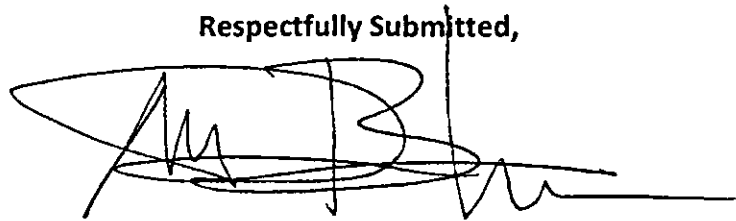
It is highly likely that many bond forfeiture sites assumed by an active mine operator will never produce coal. That is, the mine operator will simply conduct reclamation or remediation activities on the site.

The performance of those reclamation activities may be undertaken by a subsidiary company that produces no coal but is corporately responsible only for reclamation duties. The parent company will be a coal producer as a function of the first prerequisite to qualify for the credit, so there is no rational reason to restrict applicability of the credit based on parent-subsidiary relationship. As written, the rule discourages use of the credit by active operators.

Any concerns related to the financial and control structure of subsidiaries and the parent corporations are also addressed through the comprehensive Applicant Violator System maintained under the federal and state surface mining laws.

The Coal Association appreciates the opportunity to offer comments on this proposed rule and looks forward to working with the Tax Department, WV DEP and the sponsors of the original, authorizing legislation to craft a rule that better reflects the goals of the statute.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Jason D. Bostic', with a long horizontal line extending to the right.

**Jason D. Bostic
Vice-President**

Cc: Randy C. Huffman
Cabinet Secretary
West Virginia Department of Environmental Protection

Thomas L. Clarke
Director
Division of Mining & Reclamation
West Virginia Department of Environmental Protection

**TITLE 110
LEGISLATIVE RULE
TAX DEPARTMENT
SERIES 29
SPECIAL RECLAMATION TAX CREDIT
RESPONSE TO COMMENTS**

Comments received from West Virginia Coal Association:

Comment 1: The proposed rule at 110 CSR 4.2 restricts application for the credit until after a mine operator has obtained phase III bond release on a former bond forfeiture site. The statutory language contained in HB 2352 at 22-3-11(c) states "the mine operator shall from *time to time* file with the Tax Commissioner a written application seeking the amount of the credit earned" (emphasis added). Based on the reference to the language "from time to time" it is clear the Legislature envisioned a credit amount that may be granted at certain "increments" as the mine operator completes reclamation of the site that and commensurately reduces the liability once associated with the bond forfeiture site.

Any activity undertaken by an active mining operator on a bond forfeiture site would, at a minimum, require a reclamation agreement with WV DEP and/or a WV SCMRA permit submission and approval by the agency. Any agreement would contain specific requirements for reclamation that would have to be achieved by the mine operator. Fulfillment of these reclamation benchmarks and the corresponding reduction in liability to the SRF should serve as the basis for granting the tax credit contemplated in the statute. The same would be true for a bond forfeiture site where the mining operator re-permitted the area. The new mining permit issued by WV DEP would include a mining and reclamation plan that would contain benchmarks for the completion of reclamation. Again, these benchmarks, which are enforceable provisions of the mining permit, should serve as the basis for receiving the tax credit from "time to time" as contemplated by the Legislature.

Response: The agency accepts this comment. The rule has been modified in section 4.2. to reflect the ability of a mine operator to annually apply for the tax credit as various phases are completed. Under this scenario, the mine operator may enter an agreement with WV Department of Environmental Protection. Credit would be granted on an annual basis, and costs would be certified yearly by the Secretary of DEP depending on the portion of the project that is completed in the taxable year.

Comment 2: Since phase III release cannot be granted by WV DEP on sites where water treatment is ongoing, the language in the proposed rule again directly contradicts the language of the statute. At 22-3-11(B), the Legislature specified the credit would be "equal to the amount...that would have been spent from the Special Reclamation Fund or Special Reclamation Water Trust Fund to accomplish the reclamation or remediation performed by the mine operator, including expenditures for water treatment".

Response: The agency accepts this comment. The rule has been modified in section 4.2. to reflect the ability of a mine operator to annually apply for the tax credit as various phases are completed. Under this scenario, the mine operator may enter an agreement with WV Department of Environmental Protection. Credit would be granted on an annual basis, and costs would be certified yearly by the Secretary of DEP depending on the portion of the project that is completed in the taxable year.

Comment 3: At 110 CSR 29.5.6.b, the proposed rule would prohibit application of the credit to "any parent or subsidiary of the qualified operator ... " There is no rational basis for such a restriction.

First, the authorizing statute is silent on this issue. Second, other taxes paid by the coal industry are many times paid according to corporate organization, with some or all paid by the parent company for named subsidiaries. Finally, this restriction again represents a misunderstanding of the nature of many bond forfeiture sites. It is highly likely that many bond forfeiture sites assumed by an active mine operator will never produce coal. That is, the mine operator will simply conduct reclamation or remediation activities on the site.

The performance of those reclamation activities may be undertaken by a subsidiary company that produces no coal but is corporately responsible only for reclamation duties. The parent company will be a coal producer as a function of the first prerequisite to qualify for the credit, so there is no rational reason to restrict applicability of the credit based on parent-subsidiary relationship. As written, the rule discourages use of the credit by active operators.

Response: The agency accepts this comment. The rule has been modified in section 5 to allow all related members of a unitary business, as that term is defined in W.Va. Code § 11-24-3a(a)(43), to claim any credit earned by the qualified operator provided the company that earned the credit remains in good standing with the tax department. However, the credit will remain non-transferable to any company not related to the operator and in the unitary business.