

CHAPTER 284**(HB 809)**

AN ACT relating to access for the abatement of a surface mining violation and declaring an emergency.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 350.280 is amended to read as follows:

- (1) (a) *As used in this section, "he or she" includes "person" as defined in KRS 350.010.*
- (b) *If a permittee or operator has been issued a notice or order directing abatement of a violation on the basis of an imminent danger to health and safety of the public or significant imminent environmental harm, and the violation involves an order of cessation and immediate compliance or an order to abate and alleviate in which the cabinet directs the permittee or operator to begin immediate abatement of the violation, and the notice or order requires access to property for which the permittee or operator does not have the legal right of entry necessary in order to abate that violation, and the owner or legal occupant of that property has refused access, an easement of necessity is recognized on behalf of the permittee or operator for the limited purpose of abating that violation. The easement of necessity becomes effective, and the permittee or operator is authorized to enter the property to undertake immediate action to abate the violation if he or she concurrently:*
 1. *Provides to the property owner or legal occupant a copy of the cabinet's order;*
 2. *Provides to the property owner or legal occupant and cabinet an affidavit that he or she has been denied access to the property; and*
 3. *Provides to the property owner or legal occupant a statement that he or she, the permittee or operator, will obtain an appraisal completed by a certified real estate appraiser or other qualified appraiser of the damages to the property, including loss of use, that will result from the violation, as abated, and those that are likely to occur to the property when the permittee or operator enters the property in order to abate the violation, that the appraisal will be completed and provided to the property owner or legal occupant within three (3) days of entry of the operator or permittee, and that he or she will pay the property owner or legal occupant the amount of the damages in the permittee or operator's appraisal at that time.*
- (c) *Following the effective date of the easement of necessity, the following procedure shall be followed with respect to the appraisal of the damages that will result from the violation, as abated, and those that are likely to occur to the property when the permittee or operator enters the property in order to abate the violation:*
 1. *The permittee or operator shall have an appraiser on the site and have his or her appraisal completed and submitted to the property owner or legal occupant within three (3) days of entry on the property by the operator or permittee;*
 2. *The property owner or legal occupant shall accept or reject this appraisal in writing within three (3) days of receipt of the completed appraisal;*
 3. *If the property owner or legal occupant rejects this appraisal, he or she may hire a certified real estate appraiser or other qualified appraiser to appraise*

the damages, including loss of use, that will result from the violation, as abated, and those that are likely to occur to the property if the permittee or operator is allowed to enter the property in order to abate the violation. Upon receipt of the invoice the permittee or operator shall pay for the property owner or legal occupant's appraisal up to the amount he or she paid for his or her own appraisal; and

4. *If the property owner or legal occupant has the appraisal done, he or she shall have it completed and provided to the permittee or operator within seven (7) days of receipt of the permittee or operator's completed appraisal.*
- (d) *If the property owner or legal occupant has an appraisal done, and if, based on his or her appraisal and the permittee or operator's appraisal, an agreement is not reached on the appraised damages, the permittee or operator shall pay the property owner or legal occupant the amount of the permittee or operator's appraisal damages, and if the property owner or legal occupant's appraisal damages are for more than the permittee or operator's, the permittee or operator shall pay the difference to the circuit clerk, in the county in which the majority of the property lies, to be placed in an interest-bearing account in a bank until final resolution of the matter by agreement or court or jury judgment. If the property owner or legal occupant is granted award of some or all of the difference, he or she shall also receive the interest on that portion of the difference.*
 - (e) *If the property owner or legal occupant does not accept or reject the permittee or operator's appraisal and offer of funds for damages, the operator or permittee shall pay the appraised damages to the Circuit Clerk within three (3) business days of the nonacceptance. These funds shall be placed in an interest-bearing account in a bank until resolution of the matter by agreement or court or jury judgment.*
- (2) *If a permittee or operator has been issued a notice or order directing abatement of a violation other than one described in subsection (1) of this section, and the notice or order requires access to property for which the permittee or operator does not have the legal right of entry necessary in order to abate that violation, and the owner or legal occupant of that property has refused access, an easement of necessity is recognized on behalf of the permittee or operator, for the limited purpose of allowing a certified real estate appraiser or other qualified appraiser, chosen by the permittee or operator, to enter upon the property to which the owner or legal occupant has refused access in order for the appraiser to appraise the damages, including loss of use, that will result from the violation, as abated, and those that are likely to occur to the property if the permittee or operator is allowed to enter the property in order to abate the violation.*
- (3) (a) *The easement for the limited purpose of allowing the appraisal shall be recognized and take effect when the operator or permittee:*
 1. *Provides to the property owner or legal occupant a copy of the cabinet's order;*
 2. *Provides to the property owner or legal occupant and cabinet a plan of remedial measures to abate the violation;*
 3. *Provides to the property owner or legal occupant and cabinet an affidavit that he or she has been denied access to the property; and*
 4. *Provides to the property owner or legal occupant a statement that he or she, the permittee or operator, will within seven (7) days of entry of the appraiser*

obtain an appraisal, by a certified real estate appraiser or other qualified appraiser, of the damages to the property including loss of use, that will result from the violation, as abated, and those that are likely to occur to the property when the permittee or operator enters the property in order to abate the violation, and that upon completion of the appraisal he or she will provide the appraisal to the property owner or legal occupant and pay the property owner or legal occupant the amount of the appraisal.

- (b) When the easement takes effect, the property owner or legal occupant shall allow access for the permittee or operator's certified real estate appraiser or other qualified appraiser to conduct the appraisal.*
- (4) Following the effective date of the easement of necessity, the following procedure shall be followed with respect to the appraisal of the damages to the property that will result from the violation, as abated, and those that are likely to occur, under this subsection:*
 - (a) The permittee or operator shall have an appraiser on the site and have his or her appraisal completed and submitted to the property owner or legal occupant within seven (7) days of the entry of the appraiser on the property.*
 - (b) The property owner or legal occupant shall accept or reject this appraisal within three (3) days of receipt of the completed appraisal;*
 - (c) If the property owner or legal occupant rejects this appraisal, he or she may hire a certified real estate appraiser or other qualified appraiser to appraise the damages to the property, including loss of use, that will result from the violation, as abated, and those that are likely to occur to the property if the permittee or operator is allowed to enter the property in order to abate the violation. Upon receipt of the invoice, the permittee or operator shall pay for the property owner or legal occupant's appraisal up to the amount he or she paid for his or her own appraisal; and*
 - (d) If the property owner or legal occupant has the appraisal done, he or she shall have it completed and provided to the permittee or operator within seven (7) days of receipt of the permittee or operator's appraisal.*
- (5) (a) If the property owner or legal occupant has an appraisal done, and if, based on his or her appraisal and the permittee or operator's appraisal, an agreement is not reached on the appraised damages, the permittee or operator shall pay the property owner or legal occupant the amount of the permittee or operator's appraisal damages.*
 - (b) If the property owner or legal occupant's appraisal damages are for more than the permittee or operator's, the permittee or operator shall pay the difference to the circuit clerk.*
 - (c) The difference shall be placed in an interest-bearing account in a bank until final resolution of the matter by agreement or court or jury judgment.*
 - (d) If the property owner or legal occupant is granted award of some or all of the difference, he or she shall also receive the interest on that portion of the difference.*
- (6) If the property owner or legal occupant does not accept or reject the permittee or operator's appraisal and offer of funds for damages, the operator or permittee shall pay the appraised damages to the circuit clerk within three (3) business days. These funds*

shall be placed in an interest-bearing account in a bank until resolution of the matter by agreement or court or jury judgment.

(7) In cases under subsection (2) of this section, when the procedures in subsections (4) and (5)(a) and (b) of this section, or subsections (4)(a) and (b) and (6) of this section, have been satisfied, the permittee or operator may enter the property to abate the violation.

~~(2) If a violation other than one described in subsection (1) cannot be abated because the permittee or operator responsible for abatement of the violation has been denied access to the land necessary to allow abatement of the violation, the cabinet shall terminate the notice of noncompliance or cessation order issued for the violation, if the following conditions are met:~~

~~(a) Prior to terminating a notice of noncompliance or cessation order under this subsection, and within thirty (30) days of a request by a permittee or operator to terminate a violation based on a lack of access, the cabinet shall verify the denial of access and advise the surface owners of record and the legal occupants of the affected land of the consequences of refusing to allow access to the property for the purpose of enabling abatement of the violation; and~~

~~(b) The cabinet shall explain the consequences by certified mail, return receipt requested, and shall make a good faith effort to notify all owners of interest and legal occupants verbally, that:~~

~~1. Refusal to allow access to the property will result in termination of the violation as uncorrectable;~~

~~2. If there is damage that occurs to public or private property due to the uncorrected violation condition on the property, that the property owner may also be responsible under law for any property damage to private or public property that may result from the unreclaimed condition; and~~

~~3. While the landowner may seek damages or injunctive relief in an action against the permittee or operator, the refusal to grant access in order to allow abatement of the violation shall result in the state terminating the requirement that the permittee or operator undertake work necessary for abatement of the violation, and that while penalties may be assessed, the performance bond shall not be forfeited on the basis of the violation.~~

~~(3) The cabinet shall not terminate any notice of noncompliance or cessation order under this section if the cabinet determines that the denial of access necessary to abate the violation has been procured through collusion between the permittee or operator and the landowner or legal occupant of the affected land who is refusing to allow the necessary access. "Collusion," for the purpose of this section, includes any agreement, understanding, or contract by which the landowner refuses access to the property in return for any consideration, whether involving money or otherwise. Any act of collusion shall subject the permittee or operator to penalties under this chapter for willful and knowing refusal to correct the violation.~~

~~(4) No noncompliance or cessation order may be terminated under this section where there is any common ownership or control between the permittee or operator and the landowner or legal occupant. No noncompliance or cessation order may be terminated under this section where there is any other legal relationship between the permittee or operator and the~~

~~landowner or legal occupant, except where a court of competent jurisdiction has determined that the legal relationship does not provide for a right of access.~~

- ~~(5) Where a violation may impact public or private property other than land for which access has been denied, the cabinet shall direct abatement measures to be taken by the permittee or operator to prevent damage to those lands for which access has not been denied.~~
- ~~(6) Termination of a notice of noncompliance or cessation order under this section shall not affect the assessment of a civil penalty for the violation.]~~
- (8) Nothing in this section shall affect any person's right for damages or injunctive relief.

Section 2. Whereas abatement of violations can be delayed unless an easement of necessity is obtained, and those delays can have negative effects on a permittee or operator, and on the environment, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

Approved April 9, 2002