

# WEST VIRGINIA CODE: §22-5-11A

## §22-5-11a. Activities authorized in advance of permit issuance.

(a) With respect to the modifications of nonmajor stationary sources, or modifications which are not major modifications to existing major stationary sources, the following activities are authorized in advance of permit issuance. Any authorized activities undertaken by or on behalf of the permit applicant prior to the issuance of a final permitting action by the secretary are undertaken at the permit applicant's own risk and with the knowledge that the application for a permit or permit modification may be denied:

(1) Receiving or storing on-site or off-site any equipment or supplies which make up in part or in whole an emission unit or any support equipment, facilities, building or structure.

(2) A person who holds an active West Virginia air quality permit issued under this article at an existing source, and who has applied to the secretary for permission to alter, expand or modify that source or to allow a new emissions unit at that source, may begin the construction of any such alteration, expansion, modification or new emission unit in advance of permit issuance in accordance with this section. The person may not operate any altered, expanded, modified or new emission unit without first obtaining an air quality permit as required by rules promulgated by the secretary.

(3) The following sources are ineligible for submission of an application for permission to commence construction in advance of permit issuance:

(A) Sources subject to the "Federal Clean Air Act" subsections 112(g) or 112(j).

(B) Sources seeking federally enforceable permit conditions in order to avoid otherwise applicable standards;

(C) Sources requiring a specific case-by-case emission limitation or standard under 45CSR21 or 45CSR27.

(4)(A) To qualify for the authorization to construct in advance of permit issuance as provided in this section, the permittee shall submit to the secretary an application for permission to commence construction in advance of permit issuance.

(B) Such application for permission to commence construction shall include all of the following:

(1) The name and location of the source and the name and address of the permittee;

(2) The permit number of each active permit issued under this article for such source;

(3) The nature of the sources and equipment associated with

such alteration, expansion, modification or new emission unit;

(4) An estimate of the maximum hourly and annual emissions of regulated air pollutants increased as a result of such alteration, expansion, modification or new emission unit;

(5) The air pollution control devices or methods that are to be employed in connection with the alteration, expansion, modification or new emission unit;

(6) A listing of the applicable state and federal air quality regulatory requirements for alteration, expansion, modification or new emission unit, and sufficient information which, in the judgement of the secretary, will demonstrate compliance with any applicable state and federal air quality regulatory requirements;

(7) The anticipated construction or building schedule for alteration, expansion, modification or new emission unit;

(8) A certification signed by the responsible official that the source, equipment and devices that are subject to a request for construction authorization will not be operated until the permittee has obtained a permit under rules promulgated by the secretary;

(9) A certification by the responsible official that any construction undertaken prior to the issuance of a final permit under rules of the secretary is undertaken at the permittee's own risk and with the knowledge that the permittee may be denied a permit or permit modification without regard to the permittee's financial investment or addition to or modification of the source;

(10) A certification signed by the responsible official that all of the information contained in the application is complete and accurate to the best of the responsible official's knowledge and ability; and

(11) Upon submission of the application for permission to construct, the applicant shall give notice by publishing a Class I legal advertisement of the applicant's intent to alter or expand the physical arrangement or operation of an existing stationary source and the opportunity to provide written comment to the secretary within thirty calendar days of the publication. The applicant shall post a visible and accessible sign, at a minimum 2 feet square, at the entrance to the source or proposed site. The sign must be clearly marked indicating that an air quality permit has been applied for and include the West Virginia Division of Air Quality permitting section telephone number and web site for additional information. The applicant must post the sign for the duration of the public notice period. Public notice shall be in a newspaper having general circulation in the county or counties where the facility is located. The notice shall contain the information required by rules promulgated by the secretary. Within fifteen days of completion of the public comment period, the secretary shall consider and respond to all written comments. If the secretary finds that concerns raised by the public comment period give rise to issues or concerns that would cause a construction or operational permit not to be issued, the secretary may issue a revocation or stay of the

authorization to construct until those issues or concerns are resolved.

(c) The secretary shall determine whether an application for permission to commence construction in advance of permit issuance is complete within fifteen calendar days after receipt of the application at which time the secretary shall notify the applicant in writing as to whether the application is complete or specify any additional information required for the application to be complete.

(d) Within fifteen calendar days after the secretary has made a determination that an application for permission to commence construction in advance of permit issuance is complete, unless the secretary for good cause shown, extends the fifteen day time period for up to an additional fifteen calendar days, the secretary shall notify the applicant in writing of his or her determination as to whether each of the following conditions has or has not been satisfied:

(1) The applicant is and has been for a period of at least three years in substantial compliance with all other active permits and applicable state and federal air quality regulatory requirements under this article;

(2) The applicant has demonstrated that the alteration, expansion, modification or new emission unit will be in compliance with all applicable state and federal air quality regulatory requirements;

(3) The alteration, expansion, modification or new emission unit will not interfere with attainment or maintenance of an applicable ambient air quality standard, cause or contribute to a violation of an applicable air quality increment or be inconsistent with the intent and purpose of this article;

(4) The facility will be altered or expanded so that it will be used for either the same or a similar use as the use already permitted;

(5) The alteration or expansion will not result in a disproportionate increase in size of the facility already permitted; and

(6) The alteration or expansion will result in the same or substantially similar emissions as the facility already permitted.

If the secretary finds that all of the conditions have been satisfied, the notice issued by the secretary shall state that construction of the alteration, expansion, modification or new emission unit in advance of permit issuance may begin immediately. If the secretary finds that one or more of the conditions has not been met, the notice shall state that the requested construction, alteration, expansion, modification or new emission unit may not begin prior to issuance of a new or modified permit.

(e) If at any time during the construction of such alteration, expansion, modification or new emission unit, the secretary determines that the source is not likely to qualify for a permit or

permit modification under applicable rules, the secretary may order that construction cease until the secretary makes a decision on the application for a permit or permit modification. If the secretary orders that construction cease, then construction of the alteration, expansion, modification or new emission unit may resume only if the secretary either makes a subsequent written determination that the circumstances that resulted in such order have been adequately addressed or if the secretary issues a permit or permit modification under the rules that authorize construction to resume.

(f) The secretary shall evaluate an application for a permit or permit modification under the rules and make a decision on the same basis as if the construction of the alteration, expansion, modification or new emission unit in advance of permit issuance had not been authorized pursuant to this section. No evidence regarding any contract entered into, financial investment made, construction undertaken, or economic loss incurred by any person or permittee who proceeds under this section without first obtaining a permit under this article is admissible in any contested case or judicial proceeding involving any permit required under the rules. No evidence as to any determination or order by the secretary pursuant to this section shall be admissible in any contested case or judicial proceeding related to any permit required under this article.

(g) Any permittee who proceeds under this section shall be precluded from bringing any action, suit or proceeding against the state, the officials, agents, and employees of the state or the secretary for any loss resulting from any contract entered into, financial investment made, construction undertaken, or economic loss incurred by the permittee in reliance upon the provisions of this section.

(h) This section does not relieve any person of the obligation to comply with any other requirement of state law, including any requirement to obtain any other permit or approval prior to undertaking any activity associated with preparation of the site or the alteration or expansion of the physical arrangement or method of operation of a source at a facility for which a permit is required under the rules.

(i) This section does not relieve any person from any preconstruction or construction prohibition imposed by any federal requirement, federal delegation, federally approved requirement in any state implementation plan, or federally approved requirement under the Title V permitting program, as determined solely by the secretary. This section does not apply to any construction, alteration, or expansion that is subject to requirements for prevention of significant deterioration or federal nonattainment new source review, as determined solely by the secretary. This section does not apply if it is inconsistent with any federal requirement, federal delegation, federally approved requirement in any state implementation plan, or federally approved requirement under the Title V permitting program, as determined solely by the secretary.

(j) A permittee who submits an application to commence construction in advance of permit issuance under this section shall pay to the department a fee of \$200 for each application submitted to cover a portion of the administrative costs of implementing this section.

(k) The secretary, in accordance with chapter twenty-nine-a of this code, shall propose legislative rule that may be necessary to implement the provisions of this section by August 1, 2008.

(l) The secretary is directed to report back to the Joint Committee on Government and Finance by January 1, 2010, on the impact of the implementation of the expedited permits authorized pursuant to this section. The report shall include, but not be limited to, assessments regarding the number and types of facilities utilizing this section, whether the agency has found this expedited process has assisted these facilities to implement construction and make revisions to their operations efficiently, without adverse impacts on the agency, the permitting process, or statewide air quality.