WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2004

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ENROLLED

COMMITTEE SUBSTITUTE
FOR
House Bill No. 4027

(By Mr. Speaker, Mr. Kiss, and Delegate Trump)
[By Request of the Executive]

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Passed March 11, 2004

In Effect Ninety Days from Passage
AN ACT to amend the code of West Virginia, 1931, as amended, by adding thereto a new article, designated §22-25-1, §22-25-2, §22-25-3, §22-25-4, §22-25-5, §22-25-6, §22-25-7, §22-25-8, §22-25-9, §22-25-10, §22-25-11, §22-25-12, and §22-25-13, all relating to establishing a voluntary environmental excellence program; creating certain incentives for businesses that exceed the requirements of certain state and federal environmental laws and regulations and increase the quantity and quality of public participation; establishing legislative findings and purpose; defining certain terms; directing the secretary of the department of environmental protection to develop and implement the environmental excellence program; authorizing the secretary of the department of environmental protection to propose certain legislative rules regarding the environmental excellence program; establishing eligibility and application requirements for participation; authorizing the department of environmental protection to
enter into environmental performance agreements with qualified entities and timely review applications; providing for certain program elements; providing for appeal of certain adverse application decisions; providing for the withdrawal, enforcement and termination of participation under certain circumstances; providing for certain incentives to be established for participating in the program; providing certain guidelines for the content of environmental performance agreements; establishing the environmental excellence administrative fund; allowing for gifts and donations to be received by the fund; providing for public participation in the environmental excellence program; providing for a performance review of the program; and providing for expiration of the program in two thousand nine.

Be it enacted by the Legislature of West Virginia:

That the code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §22-25-1, §22-25-2, §22-25-3, §22-25-4, §22-25-5, §22-25-6, §22-25-7, §22-25-8, §22-25-9, §22-25-10, §22-25-11, §22-25-12 and §22-25-13, all to read as follows:

ARTICLE 25. ENVIRONMENTAL EXCELLENCE PROGRAM.

§22-25-1. Legislative findings.

The Legislature finds that:

(1) Regulated and nonregulated entities that demonstrate a commitment to the environment by going beyond compliance with environmental laws and rules positively impact the quality of life for all citizens of the state by improving the economy and the environment by increasing consumer and public confidence, boosting management and employee morale, and operating in a safe and sensible manner that lessens impacts on the environment.
(2) While West Virginia's existing environmental laws play an important role in protecting the environment, environmental protection could be further enhanced by authorizing innovative advances in environmental regulatory methods and approaches.

(3) Enhanced public involvement allows the public and community to meaningfully participate in finding solutions for environmental issues in their community while maintaining the vitality of the local and state economy and strengthening ties between businesses, nonbusiness entities and community.

(4) Increased use of pollution prevention strategies, more cost-effective options for compliance with environmental standards, improvement of environmental performance, and reduction in occurrences of noncompliance with environmental standards can be achieved through the establishment and implementation of a voluntary environmental excellence program pursuant to this article. This voluntary program will provide entities with the opportunity to enter into an agreement with the department of environmental protection through which the department shall grant recognition and other benefits to participating entities that comply with a prescribed number of program elements established by the secretary of the department of environmental protection designed to reduce environmental impacts beyond those achieved by compliance with environmental laws and permits alone.

§22-25-2. Purpose.

The purpose of this article is to authorize the department of environmental protection to establish and administer an environmental excellence program to promote, reward, and encourage superior environmental performance in this state. The environmental excellence program will establish a system to encourage voluntary environmental performance that will exceed existing regulatory standards for health and the environ-
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ment and result in continual improvement in the state’s environment, economy, and quality of life. The program should, if practical, be compatible with other federal programs which create incentives for achieving environmental performance beyond the regulatory requirements, such as the United States environmental protection agency’s national performance track program. The environmental excellence program will be established and implemented to accomplish the following:

(1) Encourage facility owners and operators to assess the environmental impact of their operations;

(2) Encourage innovation by and measure success through facility owners and operators setting measurable and verifiable goals;

(3) Increase public participation and encourage stakeholder consensus in the development of innovative environmental regulatory approaches and methods and in monitoring the environmental performance of projects under this article;

(4) Focus resources toward achieving positive environmental goals that are important to the community and the state;

(5) Report environmental performance information and ambient environmental data to the public in a manner that is accurate, timely, credible, relevant and usable to interested parties;

(6) Provide for the measurement of environmental performance in terms of accomplishing goals and objectives, and require the reporting of those results;

(7) Provide facility owners and operators with flexibility to implement the most effective pollution prevention, source reduction, or other pollution reduction strategies for their
particular facilities, while complying with verifiable and enforceable pollution limits;

(8) Encourage superior environmental performance and continuous improvement toward sustainable levels of resource usage and minimization of pollution discharges, emissions and releases;

(9) Promote the transfer of technological and practical environmental innovations that improve environmental performance in a more efficient, effective, and safe manner; and

(10) Strive to lower transaction costs associated with environmental performance.


As used in this article, unless the context otherwise requires:

(a) “Cross-media transfer” means a pollutant transfer from one environmental media to another, such as air to water.

(b) “Department” means the department of environmental protection.

(c) “Environmental goals” means the environmental performance objectives proposed by a qualified applicant that demonstrates superior environmental performance and which may support variances from environmental laws.

(d) “Environmental laws” means the following articles of chapter twenty-two of the code of West Virginia, two thousand two, as amended: Four, five, eleven, twelve, fifteen, sixteen, seventeen, and eighteen and legislative rules adopted under one of those articles, or a policy, rule, permit, license, other approval or order issued by the department under one of those
articles. "Environmental laws" do not include any provision of
the code of West Virginia or of any municipal ordinance or
enactment that regulates the selection of a location for a new
facility.

(e) "Environmental management system" means a formal
set of voluntary procedures and policies used to evaluate
environmental performance and to achieve measurable or
noticeable improvements in that environmental performance
through planning and changes in operations, based on a
commitment to superior environmental performance. An
environmental management system is the part of the overall
management system that includes organizational structure,
planning activities, responsibilities, practices, procedures,
processes, and resources for developing, implementing,
achieving, reviewing, and maintaining an environmental policy.
An environmental management system includes the following
elements:

(1) Adoption of an environmental policy that includes a
commitment to maintain or exceed compliance with environ-
mental and other requirements, pollution prevention, and
continual improvement;

(2) An analysis of the environmental aspects and impacts
of the organization’s activities;

(3) Significance ranking of environmental aspects and
procedures;

(4) Plans and procedures to achieve, maintain and exceed
requirements set forth by environmental laws;

(5) Identification of all legal requirements applicable to the
organization’s environmental performance;
(6) Setting environmental objectives and developing appropriate environmental management programs to meet the objectives;

(7) Establishment of a structure for operational control and responsibility for environmental performance;

(8) An employee training program to develop awareness of and competence to manage environmental issues;

(9) A plan for taking preventive, corrective and emergency action to address environmental problems;

(10) A communication plan to collaborate with employees, the public and department on the design of the projects and activities to achieve superior environmental performance;

(11) Document control and record keeping of environmental performance;

(12) Third party audits of the environmental management system;

(13) Third party audits of environmental compliance;

(14) Senior management review;

(15) Monitoring and measurement of environmental performance; and

(16) Other criteria as established by the secretary.

(f) “Environmental management system audit” means a systematic and documented third party verification process of evaluating whether an organization’s environmental management system conforms to the criteria set forth by the department.
(g) "Environmental performance agreement" means an agreement entered into between the department and a participant of the program that specifies the participant's commitment to superior environmental performance, enhanced public involvement, and the incentives to be provided to the participant.

(h) "Environmental performance baseline" means the actual emissions, discharges, and impact to the environment by a facility at the time the application to participate in the environmental excellence program is filed with the department.

(i) "Hazardous substance" or "toxic substance" means those chemicals defined as hazardous substances under section 313 of the federal Superfund Amendments and Reauthorization Act of 1986 (SARA Title III), including any subsequent amendments, and sections 101(14) and 102 of the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended.

(j) "Participant" means a qualified applicant that has been admitted into the environmental excellence program through the execution of an environmental performance agreement with the department. Participant is limited to the site or facility where the environmental goals will be achieved and does not include the entire company where the company operates multiple sites or facilities.

(k) "Pollution prevention" means any practice that reduces the use of any hazardous substance or amount of a pollutant or contaminant prior to reuse, recycling, treatment, or disposal, and reduces the hazards to public health and the environment associated with the use and release of hazardous substances, pollutants or contaminants. Pollution prevention does not include cross-media pollution transfers that do not result in a
net decrease of discharge, emission or impact to the environment.

(l) "Program" means the environmental excellence program created pursuant to this article.

(m) "Qualified applicant" means any regulated or nonregulated facility of a government entity, corporation, partnership, sole proprietorship, municipality, county, city and county, or special district located and doing business in this state that meets the requirements for participation in the program set forth by this article.

(n) "Regulated entity" means an entity that requires a permit issued under one of the environmental laws to legally operate in this state or is otherwise subject to enforcement of environmental laws.

(o) "Nonregulated entity" means an entity that does not require a permit issued pursuant to environmental laws to legally operate in this state.

(p) "Secretary" means the secretary of the department of environmental protection.

(q) "Significant impact to the environment" means a release of a substance into the environment which has caused or may cause an adverse affect to natural resources, organisms, flora, fauna or the ecosystem.

(r) "Significant impact to human health" means a release of a substance into the environment which has caused or may cause an acute or chronic affect to human health.

(s) "Source reduction" means any practice which reduces the amount of any pollutant, contaminant, or hazardous substance entering any waste stream or otherwise being
132 released into the environment, including fugitive emissions,  
133 prior to recycling, treatment, or disposal and reduces the  
134 hazards to public health and the environment associated with  
135 the release of these pollutants, contaminants, or hazardous  
136 substances. “Source reduction” includes equipment or technol-  
137 ogy modifications, process or procedure modifications, refor-  
138 mulation or redesign of products, substitution of raw materials,  
139 and improvements in housekeeping, maintenance, training or  
140 inventory control. “Source reduction” does not include any  
141 practice which alters the physical, chemical, or biological  
142 characteristics or the volume of a hazardous substance, pollut-  
143 ant or contaminant through a process or activity which itself is  
144 not integral to and necessary for the production of a product or  
145 the providing of a service.

146 (t) “Superior environmental performance” means environ-  
147 mental performance that results in measurable or discernable  
148 improvement in the quality of the air, water, land or natural  
149 resources or in the protection of the ecosystem beyond that  
150 which is actually being achieved by the qualified applicant  
151 under compliance with current environmental laws. “Superior  
152 environmental performance” does not include pollutant  
153 reductions resulting from cross-media pollutant transfers unless  
154 it can be demonstrated that such transfer results in an overall  
155 improvement to the quality of the air, water, land and natural  
156 resources. “Superior environmental performance” may include,  
157 but is not limited to, any of the following:

158 (1) An entity limits the discharges or emissions of pollut-  
159 ants from, or in some other way minimizes the negative effects  
160 on air, water, land, natural resources, or human health of, a  
161 facility that is owned or operated by the entity or an activity  
162 that is performed by the entity to an extent that is greater than  
163 is required by applicable environmental laws.
(2) An entity minimizes the negative impact on air, water, land, natural resources, or human health of the raw materials used by the entity or the products or services produced or provided by the entity to an extent that is greater than is required by applicable environmental laws.

(3) An entity voluntarily engages in restoring, reclaiming, enhancing, or preserving natural resources.

(4) An entity organizes segmented or uncoordinated entities that are producing environmental harm into a program that achieves positive environmental results.

(5) An entity reduces waste, hazardous substances, or toxic substances in the design, production, delivery, use or reuse of goods and services.

(6) An entity reduces or conserves energy, nonrenewable or renewable natural resources through more efficient and sustainable methods.

(u) "Toxic use reduction" means changes in production processes, products, or raw materials that reduce, avoid or eliminate the use of toxic or hazardous substances and the generation of hazardous byproducts per unit of production, so as to reduce the overall risks to the health of workers, consumers or the environment without creating new risks of concern.

§22-25-4. Powers and duties of the department.

(a) Within one year after the effective date of this section, the secretary, after consultation with representatives from the regulated community, local governments, environmental advocacy groups and other interested citizens, shall develop and implement a voluntary environmental excellence program in accordance with this article. The secretary shall propose legislative rules for promulgation in accordance with article
three, chapter twenty-nine-a of this code necessary to establish and implement all necessary program elements for the environmental excellence program as established in this article. Such program elements shall include, but are not limited to, the following criteria:

1. Participation and entry into the program;
2. Public involvement;
3. Environmental management system;
4. Commitment to superior environmental performance;
5. Communication of program results to the public; and
6. Incentives.

(b) In establishing the environmental excellence business program, the secretary may establish classes, categories, or tiers of environmental performance agreements as the secretary considers appropriate, taking into consideration the diversity of businesses and industries in the state, the impact these entities may have on the environment, and the incentives sought by the qualified applicant.

(c) The secretary may negotiate with federal regulatory agencies to obtain authority to grant incentives under federal regulatory programs.

(d) Participation in the program by any participant is voluntary and is subject to review every three years.

§22-25-5. Eligibility and application requirements.

(a) The secretary shall establish by rule the minimum criteria for participation in the environmental excellence
program. The minimum criteria shall include, but not be limited
to, the following:

1. An identified number of years with no serious civil
   noncompliance;

2. An identified number of years without any criminal
   noncompliance;

3. An identified number of years with no activities that
   resulted in a significant negative impact to human health or the
   environment;

4. The existence and maintenance of an environmental
   management system;

5. The existence and maintenance of an environmental
   management system audit program;

6. The establishment of quantifiable environmental goals
   which are designed to achieve superior environmental perfor-
   mance;

7. The existence and maintenance of verifiable, quantita-
   tive and qualitative measures or methods to document attain-
   ment of environmental goals; and

8. The existence or establishment of a public participation
   plan as approved by the secretary that demonstrates that the
   proposal has broad support, its environmental implications are
   fully understood by all interested parties, and assures ongoing
   engagement of the public.

(b) The secretary shall establish alternative elective
program elements in addition to the mandatory program
elements set forth in subsection (a) of this section. Qualified
applicants shall select from among the alternative elective

31 program elements and complete those selected within a
32 specified time period. The number of elective program elements
33 shall be determined by the secretary and based on the activity
34 of the participant and the nature of the proposal. All elective
35 program elements shall be designed to result in measurable
36 improvement and enhancement of the environmental quality of
37 the state or shall be activities that are beneficial to the environ-
38 ment. Elective program elements may include, but are not
39 limited to:

40 (1) Development and maintenance of programs that provide
41 technical assistance or mentoring to one or more specified
42 organizations to encourage technology transfers;

43 (2) Active participation in industry or business environmen-
44 tal improvement programs;

45 (3) Publication and public distribution of annual environ-
46 mental performance summary reports;

47 (4) Promotion, sponsorship and participation in community
48 environmental and advisory programs;

49 (5) Development and maintenance of management pro-
50 grams that encourage and reward employees for meeting or
51 exceeding requirements of environmental laws or permits and
52 for participation in voluntary environmental activities; and

53 (6) Development and implementation of programs that
54 reduce adverse environmental impact of development, manu-
55 facturing, distribution and marketing of the participant’s
56 products or services.

57 The secretary may establish additional alternative elective
58 program elements so long as the elements are designed to result
59 in the measurable improvement and enhancement of the
60 environmental quality of this state. Any additional alternative
elective program elements established by the secretary shall have a reasonable nexus to the industry or business to which it applies.

(c) The secretary shall establish application requirements and application forms for entities to submit proposals to participate in the program. The department shall review all applications submitted for the program and shall notify the eligible applicant that the application is complete or that the application is incomplete. If the application is incomplete, the department shall describe what additional information is required to complete the application. The applicant may correct the application and resubmit it at any time.

(d) Applicants accepted into an equivalent federal program at the time of submitting an application to the department may satisfy some or all of the eligibility and application requirements pursuant to this article at the secretary’s discretion.

§22-25-6. Application review and authority to enter into environmental performance agreement.

(a) The secretary shall review all completed applications within a reasonable period of time. If the secretary determines that the application meets the requirements for the program, the secretary shall notify the applicant in writing, and the application shall be incorporated into a written agreement. If the secretary determines the application does not meet the requirements of the program, the secretary shall notify the applicant in writing and shall provide an adequate opportunity for the applicant to address the outstanding items.

(b) The secretary may enter into one or more agreements with a participant as necessary to implement the provisions of this article. The agreement shall describe the requirements for continued participation and incentives to be provided to the participant.
(c) The secretary shall not enter into any environmental performance agreement that would:

(1) Violate or waive any specific statutory provision;

(2) Waive any federal regulation, unless specifically authorized by the federal government;

(3) Result in an increase in emissions, discharges, or other releases above those allowable under the otherwise applicable regulatory requirements; or

(4) Address past or ongoing violations or noncompliance by a qualified applicant.

(d) The following documents shall be made available for public review:

(1) The application, including documentation of compliance with environmental laws and permits applicable to the facility over the last three years, information regarding an appropriate environmental management system, a description of the current status of proposed performance indicators, and an outline of the measures by which the program will be evaluated;

(2) The executive’s determination regarding their application; and

(3) The agreement described in subsections (a) and (b) of this section.

§22-25-7. Judicial review of department decision on acceptance of application to participate in the environmental excellence program.

The decision of the department to refuse to accept an application for participation in the environmental excellence program is not subject to judicial review. The decision of the
department to enter into an environmental performance agreement may be appealed to the environmental quality board by any person aggrieved or adversely affected by the action being appealed, pursuant to the provisions of article one, chapter twenty-two-b of this code.

§22-25-8. Withdrawal, enforcement and termination from the program.

(a) Any participant may elect to withdraw from participation in the program at any time upon written notice to the secretary.

(b) The secretary shall terminate the participation of any participant in the program if a serious violation is discovered or occurs and the violation is not properly disclosed in accordance with the law or is not corrected or remedied in a timely manner to the satisfaction of the secretary.

(c) The secretary may continue the participation of a participant in the program if a serious violation is discovered or occurs and the violation is properly disclosed in accordance with law and is corrected or remedied in a timely manner to the satisfaction of the secretary.

(d) A participant’s participation in the program shall be suspended from the time the serious violation is discovered or occurs until the time it is corrected or remedied to the satisfaction of the secretary.

(e) If the secretary determines at any time a participant is failing to perform in accordance with the environmental performance agreement, and if, after written notice to the participant, the participant does not come into conformance within a reasonable period of time, as established by the secretary, the secretary may terminate the participant’s participation in the program.
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(f) All incentives provided by the state pursuant to section nine of this article shall be withdrawn, effective upon termination or withdrawal of the participant’s participation in the program. If a participant withdraws or is terminated from the program, any unused incentives will be forfeited.

(g) The secretary shall establish, by rule, procedures and criteria that set forth circumstances under which a participant’s participation shall be suspended or terminated and criteria for a transition plan for returning to otherwise applicable environmental laws if the environmental performance agreement is terminated by the participant for any reason or by the secretary for failure to meet the agreement’s stated environmental goals, despite good faith efforts.


The secretary shall propose rules for legislative approval, pursuant to the provisions of chapter twenty-nine-a of this code, establishing incentives to be granted to any participant that complies with all of the mandatory program elements and the prescribed number of elective program elements, as determined by the secretary. Participants may seek some or all of the incentives established pursuant to this subsection.


(a) The environmental performance agreement shall clearly establish the environmental goals of the participant; public involvement requirements; incentives; reporting requirements; and all other terms to ensure that the proposal is properly implemented and enforceable.

(b) In entering into environmental performance agreements, the secretary shall require stricter monitoring, or take other appropriate steps to ensure accountability, for proposals with greater uncertainty of meeting their stated environmental goals.
(c) A final environmental performance agreement shall specify:

(1) Any otherwise applicable rules, requirements, policies, or practices, modified, waived or replaced;

(2) The specific environmental goals of the agreement and the criteria for determining whether the agreement is meeting those goals;

(3) A description of how compliance with the agreement will be monitored and enforced, including any penalties that may be imposed for failure to carry out the terms of the agreement;

(4) The duration of the agreement and terms for renewal or extension;

(5) A transition plan for returning to otherwise applicable environmental laws in the event the agreement is terminated by either the participant or the department;

(6) A plan for integrating into the agreement any relevant regulations that are promulgated during the duration of the agreement; and

(7) Criteria for determining whether agreement may be transferred in the event of a transfer of ownership of the facility subject to the terms and conditions of the agreement and when applicable, the procedures for transferring the agreement.

§22-25-11. Recovery of costs to department in developing, negotiating and publicizing environmental performance agreement; deposition of moneys collected; creation of environmental excellence program administrative fund.

To recover the costs to the department in developing, negotiating and publicizing an environmental performance
agreement, the secretary may establish by legislative rule reasonable application, renewal, and administration fees. An “Environmental Excellence Program Administrative Fund” is hereby created in the state treasury. The funds shall be dedicated and appropriated to the department to administer the program. Expenditures are not authorized from collections but are to be made only in accordance with appropriation by the Legislature and in accordance with the provisions of article three, chapter twelve of this code and upon the fulfillment of the provisions of article two, chapter five-a of this code: Provided, That for the fiscal year ending the thirtieth day of June, two thousand five, expenditures are authorized from collections rather than pursuant to appropriation by the Legislature. Any moneys not utilized by the department for the purposes set forth herein by the thirtieth day of June, two thousand nine, shall revert to the state general revenue fund and the environmental excellence program administration fund shall be dissolved.


To promote a participatory process that will conform to the legislative rules adopted pursuant to section four of this article, to the extent that resources are available in the environmental excellence program administration fund and appropriated by the Legislature, the secretary is authorized to provide logistical and technical support to assure balanced and timely participation in any public process associated with this program.

§22-25-13. Review and repeal of the environmental excellence program.

(a) The joint committee on government operations shall, pursuant to authority granted in article ten, chapter four of this code, conduct a preliminary performance review of the department of environmental protection’s compliance with the
provisions of this article, and whether it is appropriate to continue this program. In conducting a preliminary performance review, the committee shall follow the guidelines established in section ten, article ten, chapter four of this code. The committee may direct that the focus of the preliminary performance review be on a specific area of operation and may direct further inquiry, when necessary and desirable.

(b) This article and any rules promulgated thereunder shall remain in effect until the thirtieth day of June, two thousand nine, at which time this article and any rules promulgated thereunder shall be repealed.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 25th day of March, 2004.

Governor
PRESENTED TO THE
GOVERNOR
DATE 3/19/04
TIME 2:30 P.M.