

HB 4438

FILED

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OFFICE OF THE CLERK
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2008



ENROLLED

**COMMITTEE SUBSTITUTE
FOR
House Bill No. 4438**

(By Delegates Morgan, Swartzmiller, Cann, Browning,
Craig, Pethel, Sobonya, C. Miller and Stalnaker)



Passed March 8, 2008

In Effect Ninety Days from Passage

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(BY DELEGATES MORGAN, SWARTZMILLER, CANN, BROWNING,
CRAIG, PETHTEL, SOBONYA, C. MILLER AND STALNAKER)

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AN ACT to amend and reenact §22-5-1, §22-5-11 and §22-5-14 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §22-5-11a, all relating to air pollution control; allowing for the expedited review of complete permit applications for sources other than major sources; allowing all facilities with complete applications for permission to commence construction and which have received written permission from the secretary to construct an altered or expanded source provided that operations of the altered or expanded source do not commence until its permit or permit modification is issued; setting timelines for permitting actions; making other clarifications of the secretary's duties in minor source air permitting; requiring the promulgation of legislative rules; and requiring a legislative report.

Be it enacted by the Legislature of West Virginia:

That §22-5-1, §22-5-11 and §22-5-14 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new section, designated §22-5-11a, all to read as follows:

ARTICLE 5. AIR POLLUTION CONTROL.

§22-5-1. Declaration of policy and purpose.

1 It is hereby declared to be the public policy of this state
2 and the purpose of this article to achieve and maintain such
3 levels of air quality as will protect human health and safety,
4 and to the greatest degree practicable, prevent injury to plant
5 and animal life and property, foster the comfort and
6 convenience of the people, promote the economic and social
7 development of this state and facilitate the enjoyment of the
8 natural attractions of this state.

9 To these ends it is the purpose of this article to provide
10 for a coordinated statewide program of air pollution
11 prevention, abatement and control; to facilitate cooperation
12 across jurisdictional lines in dealing with problems of air
13 pollution not confined within single jurisdictions; to assure
14 the economic competitiveness of the state by providing for
15 the timely processing of permit applications and other
16 authorizations under this article; and to provide a framework
17 within which all values may be balanced in the public
18 interest.

19 Further, it is the public policy of this state to fulfill its
20 primary responsibility for assuring air quality pursuant to the
21 "Federal Clean Air Act," as amended.

**§22-5-11. Construction, modification or relocation permits
required for stationary sources of air pollutants.**

1 (a) Unless otherwise specifically provided in this article,
2 no person shall construct, modify or relocate any stationary
3 source of air pollutants without first obtaining a construction,
4 modification or relocation permit as provided in this article.

5 (b) The secretary shall by rule specify the class or
6 categories of stationary sources to which this section applies.
7 Application for permits shall be made upon such form, in
8 such manner, and within such time as the rule prescribes and
9 shall include such information, as in the judgment of the
10 secretary, will enable him or her to determine whether such
11 source will be so designed as to operate in conformance with
12 the provisions of this article or any rules of the secretary.

13 (c) Unless otherwise specifically provided in this article,
14 the secretary shall issue a permit for a major stationary source
15 within a reasonable time not to exceed three hundred sixty-
16 five calendar days, after the secretary determines that the
17 application is complete.

18 (d) Unless otherwise specifically provided in this article,
19 the secretary shall issue a permit for all other sources
20 including modifications of existing major stationary sources
21 which are not major modifications within a reasonable time
22 not to exceed ninety calendar days, after the date the
23 secretary determines the application is complete. The
24 Secretary may extend this time by thirty calendar days to
25 allow for public comment.

26 (e) A permit application will be denied if the secretary
27 determines that the proposed construction, modification or
28 relocation will not be in accordance with this article or rules
29 promulgated thereunder.

30 (f) For purposes of this section, a modification is any
31 physical change in, or change in the method of operation of,

32 a stationary source which increases the amount of any air
33 pollutant discharged by a source above the de minimis level
34 set by the secretary.

35 (g) With respect to the construction of new nonmajor
36 stationary sources, or modifications of nonmajor stationary
37 sources, or modifications which are not major modifications
38 to existing major stationary sources, or relocations of
39 nonmajor stationary sources, the following requirements
40 apply:

41 (1) The secretary shall issue an administrative update to
42 a permit issued under this section with respect to any of these
43 sources, unless he or she determines that the proposed
44 administrative update will not be in accordance with this
45 article or rules promulgated hereunder, in which case the
46 secretary shall issue an order denying the administrative
47 update. Any administrative update shall be issued by the
48 secretary within a reasonable time not to exceed sixty
49 calendar days after receipt of a complete application.
50 Administrative updates are minor revisions of existing
51 permits as further described and authorized by rule.

52 (2) The secretary shall, within a reasonable time not to
53 exceed forty-five calendar days after the date the secretary
54 determines that an application is complete, issue a
55 registration under a general permit applicable to any of these
56 sources, unless he or she determines that the proposed
57 construction, modification or relocation will not be in
58 accordance with this article or rules promulgated hereunder.
59 General permits are permits authorizing the construction,
60 modification or relocation of a category of sources by the
61 same owner or operator or involving the same or similar
62 processes or pollutants upon the terms and conditions
63 specified in the general permit for those types of sources.

64 (3) The secretary shall, within a reasonable time not to
65 exceed forty-five calendar days after receipt of a complete
66 application, issue a temporary permit or a relocation permit,
67 unless he or she determines that the proposed construction,
68 modification or relocation will not be in accordance with this
69 article or rules promulgated hereunder. Temporary permits
70 are permits authorizing the owner or operator to make limited
71 changes for limited periods of time as further described and
72 authorized by rule.

73 (h) The secretary shall determine whether an application
74 filed under this section is complete within thirty calendar
75 days after receipt of that application at which time the
76 secretary shall notify the applicant in writing as to whether
77 the application is complete or specify any additional
78 information required for the application to be complete.

79 (i) The secretary, shall propose rules for legislative
80 approval in accordance with the provisions of article three,
81 chapter twenty nine-a of this code, to implement the
82 provisions of this section by the first day of August, two
83 thousand eight.

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

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

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

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

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

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

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

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

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

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

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

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

45 (3) The nature of the sources and equipment associated
46 with such alteration, expansion, modification or new
47 emission unit;

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

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

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

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

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

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

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

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

101 the secretary may issue a revocation or stay of the
102 authorization to construct until those issues or concerns are
103 resolved.

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

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

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

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

127 (3) The alteration, expansion, modification or new
128 emission unit will not interfere with attainment or
129 maintenance of an applicable ambient air quality standard,
130 cause or contribute to a violation of an applicable air quality

131 increment or be inconsistent with the intent and purpose of
132 this article;

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

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

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

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

151 (e) If at any time during the construction of such
152 alteration, expansion, modification or new emission unit, the
153 secretary determines that the source is not likely to qualify
154 for a permit or permit modification under applicable rules,
155 the secretary may order that construction cease until the
156 secretary makes a decision on the application for a permit or
157 permit modification. If the secretary orders that construction
158 cease, then construction of the alteration, expansion,
159 modification or new emission unit may resume only if the
160 secretary either makes a subsequent written determination
161 that the circumstances that resulted in such order have been

162 adequately addressed or if the secretary issues a permit or
163 permit modification under the rules that authorize
164 construction to resume.

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

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

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

194 (i) This section does not relieve any person from any
195 preconstruction or construction prohibition imposed by any
196 federal requirement, federal delegation, federally approved
197 requirement in any state implementation plan, or federally
198 approved requirement under the Title V permitting program,
199 as determined solely by the secretary. This section does not
200 apply to any construction, alteration, or expansion that is
201 subject to requirements for prevention of significant
202 deterioration or federal nonattainment new source review, as
203 determined solely by the secretary. This section does not
204 apply if it is inconsistent with any federal requirement,
205 federal delegation, federally approved requirement in any
206 state implementation plan, or federally approved requirement
207 under the Title V permitting program, as determined solely
208 by the secretary.

209 (j) A permittee who submits an application to commence
210 construction in advance of permit issuance under this section
211 shall pay to the department a fee of two hundred dollars for
212 each application submitted to cover a portion of the
213 administrative costs of implementing this section.

214 (k) The secretary, in accordance with chapter
215 twenty-nine-a of this code, shall propose legislative rule that
216 may be necessary to implement the provisions of this section
217 by the first day of August, two thousand eight.


218 (l) The Secretary is directed to report back to the Joint
219 Committee on Government and Finance by the first day of
220 January, two thousand ten on the impact of the
221 implementation of the expedited permits authorized pursuant
222 to this section. The report shall include, but not be limited
223 to, assessments regarding the number and types of facilities
224 utilizing this section, whether the agency has found this
225 expedited process has assisted these facilities to implement
226 construction and make revisions to their operations

227 efficiently, without adverse impacts on the agency, the
228 permitting process, or state-wide air quality.


§22-5-14. Administrative review of permit actions.

1 Any person whose interest may be affected, including,
2 but not necessarily limited to, the applicant and any person
3 who participated in the public comment process, by a permit
4 issued, modified or denied by the Secretary, or construction
5 authorization pursuant to section eleven-a of this article, may
6 appeal such action of the Secretary to the air quality board
7 pursuant to article one, chapter twenty-two-b of this code.

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.

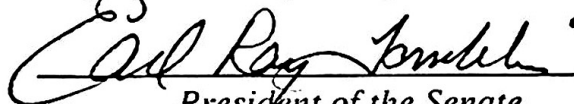
In effect ninety days from passage.



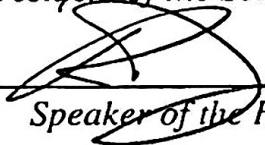
Clerk of the Senate



Clerk of the House of Delegates



President of the Senate



Speaker of the House of Delegates

The within is approved this the 28th
day of March 2008.



Governor

PRESENT:
GOVERNOR:

MAR 25 2000

Time 10:20am