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
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.

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

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

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

§22-5-11. Construction, modification or relocation permits required for stationary sources of air pollutants.
(a) Unless otherwise specifically provided in this article, no person shall construct, modify or relocate any stationary source of air pollutants without first obtaining a construction, modification or relocation permit as provided in this article.

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

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

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

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

(f) For purposes of this section, a modification is any physical change in, or change in the method of operation of,
a stationary source which increases the amount of any air pollutant discharged by a source above the de minimis level set by the secretary.

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

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

(2) The secretary shall, within a reasonable time not to exceed forty-five calendar days after the date the secretary determines that an application is complete, issue a registration under a general permit applicable to any of these sources, unless he or she determines that the proposed construction, modification or relocation will not be in accordance with this article or rules promulgated hereunder. General permits are permits authorizing the construction, modification or relocation of a category of sources by the same owner or operator or involving the same or similar processes or pollutants upon the terms and conditions specified in the general permit for those types of sources.
(3) The secretary shall, within a reasonable time not to exceed forty-five calendar days after receipt of a complete application, issue a temporary permit or a relocation permit, unless he or she determines that the proposed construction, modification or relocation will not be in accordance with this article or rules promulgated hereunder. Temporary permits are permits authorizing the owner or operator to make limited changes for limited periods of time as further described and authorized by rule.

(h) The secretary shall determine whether an application filed under this section is complete within thirty calendar days after receipt of that 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.

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

§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
(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 two hundred dollars 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 the first day of August, two thousand eight.

(l) The Secretary is directed to report back to the Joint Committee on Government and Finance by the first day of January, two thousand ten 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 state-wide air quality.


Any person whose interest may be affected, including, but not necessarily limited to, the applicant and any person who participated in the public comment process, by a permit issued, modified or denied by the Secretary, or construction authorization pursuant to section eleven-a of this article, may appeal such action of the Secretary to the air quality board 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