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WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

STATE OF WEST VIRGINIA
SECRETARY OF STATE

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September 15, 2002

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NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Joe Manchin, Secretary of State, State Register

TO: John A. Benedict
DEP-Air Quality, Office of
7012 MacCorkle Ave. SE
Charleston, WV 25304

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Permits for Construction, Modification, Relocation and Operation of Stationary Sources of Air Pollutants, Notification Requirements...**, 45CSR13

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

- 1. Authorize the agency to promulgate the Legislative rule
 - (a) as originally filed
 - (b) as modified by the agency
- 2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached.
- 3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.
- 4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.
- 5. Recommends that the Legislative rule be withdrawn; a statement of reasons for such recommendation is attached.

SCANNED

ANALYSIS OF PROPOSED LEGISLATIVE RULE

Agency: WV DEP - Division of Air Quality

Subject: Permits for Construction, Modification, Relocation and Operation of Stationary Sources of Air Pollutants, Notification Requirements, Administrative Updates, Temporary Permits, General Permits and Procedures for Evaluation

CSR Cite: 45CSR13

Counsel: JAA

PERTINENT DATES

Filed for public comment: June 12, 2002
Public comment period ended: July 15, 2002
Filed following public comment period: July 26, 2002
Filed LRMRC: July 26, 2002
Filed as emergency: n/a

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Fiscal Impact: Reduction of permit fees payable to the agency of about \$25,000.00 per year.

ABSTRACT

Brief Summary

This rule establishes reporting requirements for stationary sources of air pollution and provides criteria for obtaining a permit to construct, modify and operate a new "non-major" stationary source, and to provide a process for non-major modifications to an existing major stationary source. The proposed changes include: increasing annual discharge limits allowed under minor permit modifications from 10 tons to 25 tons per year,

reducing permitting fees for certain applicants, and revising the list of activities deemed "de minimis" which do not require a permit.

Section Summary

Several small changes have been made in the definitions of the rule to update language and reflect organizational changes in the DEP. The definition of "modification" provided in Section 2.17 is amended. The current definition states that a modification is required if ten tons per year or more or six pounds or more an hour require a permit modification. This change has the effect of increasing the total amount of tons per year from 10 tons to 25 tons that can be emitted prior to requiring a permit modification. No more than 144 pounds can be released in a calendar day.

Section 2.26 definition of "toxic air pollutant" has been deleted.

Section 5.7 provides the time period that the agency has to complete review of permit applications and is amended to reflect two new types of general permits, class I and class II. Class I modifications must be approved or denied within 45 days of receipt and class II permit applications must be approved or denied within 90 days of receipt. Currently the agency must act within 180 days of receipt of all permit modification applications.

New Section 5.12.a. grants the Secretary of the DEP the authority to designate a permit modification either as a class I or class II. Factors for the Secretary to consider include: the nature and volume of emissions, whether the source operates on a continuous basis, proximity to the public, and length of time the source has operated. No other specific thresholds or criteria are provided for the Secretary to follow when making this decision.

Section 8 public review procedures are amended to reflect the creation of the two separate classes of permits. The existing notice criteria for Level A administrative updates is amended to include Class II general permits. The public notice for Level A is a notice published at the time of the application by the applicant notifying the public of the proposed permit modification. For Level B notice, the DEP must also publish a notice approving the

modification. These requirements will now apply to class II modifications. Section 8.4.a. is amended to provide that if required by the agency, the applicant for a Level B modification may also be required to be publish a commercial display advertisement in a general circulation newspaper. Section 8.7 is being stricken, which currently requires providing the information contained in the advertisement to the county courthouse where the source is located.

Section 21.1 establishes permit application fees. Application fees have been reduced. The current fee is \$1,000.00 for all permit modifications. New reduced fees are \$250.00 for class I general permits and \$500.00 for class II permits. Permit fee waivers are allowed for class I permit applications for small businesses as defined under the Clean Air Act.

Table 13B De Minimis Sources has been amended. Number 27 on the list " maintenance equipment used for surface coating painting, dipping or spraying" has been deleted. New Numbers 39 and 40 provide expanded lists of maintenance activities for on-site plant, commercial and residential locations which are to be included as de minimis sources.

AUTHORITY

Statutory authority: W.Va. Code, §22-5-4 provides:

(a) The director is authorized...

(4) To promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a of this code not inconsistent with the provisions of this article, relating to the control of air pollution: Provided, That no rule of the director shall specify a particular manufacturer of equipment nor a single specific type of construction nor a particular method of compliance except as specifically required by the "Federal Clean Air Act," as amended, nor shall any such rule apply to any aspect of an employer-employee relationship: Provided, however, That no legislative rule or program of the director hereafter adopted shall be any more stringent than any federal rule or program except to the limited

extent that the director first makes a specific written finding for any such departure that there exists scientifically supportable evidence for such rule or program reflecting factors unique to West Virginia or some area thereof....

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel is concerned that by allowing the two classes of general permits to be created without any standard for designating whether a permit modification will be a class I or class II, and leaving this decision purely up to the discretion of agency is insufficient as permittees and members of the public will not have any standard for determining what type of class designation a modification will receive. Legislative rules have the force and effect of law and should not contain a purely subjective process by which the agency's discretion will control a permittee's public notice and review process.

Counsel also has technical changes to recommend.