

Introduced Version

H. B. 4454

(By Delegate Walters)
[Introduced February 13, 2004; referred to the
Committee on the Judiciary.]

A BILL 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 and §22-25-5, all relating to establishing the performance based permitting act; setting criteria to be evaluated when applying for a permit; and rewarding compliance with expedited permits.

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 and §22-25-5, all to read as follows:

ARTICLE 25. PERFORMANCE BASED PERMITTING ACT.

§22-25-1. Short title.

This act shall be known as the "Performance Based Permitting Act."

§22-25-2. Purpose.

- (a) Permit applicants with a history of compliance with environmental laws and regulations should be eligible for an expedited permit for extended periods of time, and automatic permit renewals.
- (b) Permit applicants with a history of noncompliance with the environmental laws and regulations shall under the normal process of review and permit renewals can be denied for an appropriate period of time or until the violation is resolved.
- (c) Permit decision-making that considers past compliance history and customizes the permit in recognition of that history:
- (1) Increases protection of the environment because it encourages compliance with environmental laws;
 - (2) Improves cost benefit to the state by allowing state agencies to focus resources on the few in the regulated community with a record of poor performance; and
 - (3) Improves stewardship of natural resources because it allows permit applicants with a satisfactory record to focus their resources on site and situation improvements.
- (d) In order to maximize the benefit of a permit decision-making process that recognizes an applicant's compliance history, the evaluation of that history should be done in a reliable and predictable manner.

It is therefore declared to be the purpose of this article to enhance the protection of the state's natural resources by establishing and making available to the regulated community incentives to encourage compliance and to reward those who meet or exceed requirements; provide the department of environmental protection with clear and specific authority to consider the compliance history of permit applicants when implementing its permit program; promote statewide consistency and objectivity in the evaluation process by establishing measurable criteria for the review of compliance history and defining the permitting process for applicants with records of noncompliance.

§22-25-3. Definitions.

For the purpose of this section, the following terms have the following meanings:

- (a) "Applicant" means the owner or operator of a facility or activity seeking an environmental permit, and the proposed permittee, if different from the owner or operator of such facility or activity. If the applicant has not held a department permit during the five years preceding submittal of the permit application, the term also includes any person who has the legal or actual authority to control the owner, operator, or permittee. The term also includes any person requesting that a permit be transferred to them, and, if the transferee has not held a department permit during the five years preceding submittal of the request to transfer the permit, and person who has the legal or actual authority to control the proposed transferee.
- (b) "Department" means the department of environmental protection.
- (c) "Department statutes" means chapter twenty-two of the code of the state of West Virginia.
- (d) "Site" means a single parcel or multiple, contiguous or adjacent parcels of land on which the applicant proposes to construct or operate, or has constructed or operated, an installation, activity or facility for which a permit is required under department rules. A site is a "new site" if the applicant has not held a department permit for an installation, activity, or facility at that location during the five years preceding submission of an application.

§22-25-4. Application review process.

In determining whether a permit applicant has provided reasonable assurance of compliance with applicable statutes and department rules, the department shall consider the compliance history of the applicant during the five years preceding submission of a complete application to the department as a part of its permit application review process.

If the application is for the renewal of a department permit, or for a new permit at any site where the applicant has held a department permit for at least five years, the department shall consider only compliance history at this site.

§22-25-5. Criminal and civil violations.

(a) Category A.

(1) *Felony criminal violations.* --

(A) The applicant has been convicted of or entered a plea of guilty or nolo contendere to, or had adjudication withheld for, a felony criminal violation of any environmental statute within the last five years.

(B) For purposes of this paragraph, if the applicant is a business entity, violations include violations committed by the applicant's officers, directors, trustees, partners, or employees who have legal or actual operational control over the facility for which a permit is being sought.

(2) *Actual harm.* -- The applicant is responsible for a violation of a department statute, rule, consent order, final order, or agreement that resulted in actual harm to human health and environment.

(b) Category B.

(1) *Other criminal violations.* --

(A) The applicant has been convicted of, or entered a plea of guilty or nolo contendere to, or had adjudication withheld for, a misdemeanor criminal violation of any environmental statute within the last five years; or

(B) For purposes of this paragraph, if the applicant is a business entity, violations include violations committed by the applicant's officers, directors, trustees, partners, or employees who have legal or actual operational control over the facility for which a permit is being sought.

(3) *Circumvention or falsification.* --

(A) The applicant is responsible for a violation involving the knowing submittal of any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained by department rules, statutes, orders, or permit conditions; or

(B) The applicant is responsible for a violation involving falsifying, tampering with, or knowingly rendering inaccurate any monitoring device or method required to be maintained by department rules, statutes, orders, or permit conditions.

(C) *Actual Harm.* -- Any violation of a department statute, rule, consent order, final order or agreement that resulted in actual harm to the environment and human health.

(c) Category C.

The applicant is responsible for a violation of a department statute, rule, consent order, final order or agreement that resulted in a significant risk to human health or environment.

(d) Category D.

(4) *Pattern of Noncompliance.* --

Multiple violations of department statutes, rules, consent orders, final orders or agreements that establish a pattern of noncompliance indicating that the applicant is unwilling or unable to comply with applicable department standards and criteria.

(5) *Civil Violations.* -- The department may consider all civil violations that were committed during the relevant review period and that resulted in the initiation of a formal enforcement action by the department. However, if a civil violation has not been resolved by consent order or formally adjudicated prior to the time the department makes its determination on the application, the civil violation must be established by appropriate evidence in any subsequent proceeding challenging the department's proposed action. In all such proceedings:

(A) The permit applicant has the initial burden in any proceeding challenging the proposed agency action of establishing a prima facie case that it has provided reasonable assurance and is entitled to the permit;

(B) The department, or any party seeking to establish violations under this subsection then has the burden of presenting by appropriate evidence a prima facie case supporting the violations it contends warrant denial of the permit.

(6) *Factors to Consider.* -- If the department determines that the applicant has a history of compliance or there is no evidence of noncompliance, the department shall consider the applicant eligible for an expedited process for permit approval for a period of five years.

If the department determines that the applicant is responsible for any Category A, B, C or D violations, the department shall initiate a further review. The following factors shall be considered in order to evaluate such violations in the context of the applicant's overall performance history, and to determine whether the applicant has provided reasonable assurance of future compliance with department rules and statutes;

(A) The number of violations and the seriousness of the violations;

(B) The number of other facilities controlled by the applicant that have violations and the types of permits authorizing activities of those facilities;

(C) The extent to which the violations involved activities that are the same as or similar to the activity for which a permit is being requested;

(D) The extent to which the applicant has resolved or in good faith participated in a process to resolve any previous violations by the applicant; and

(E) Whether the applicant has developed an internal compliance program designed to eliminate or reduce the likelihood of similar violations reoccurring.

(7) *Actions.* -- After considering the applicant's compliance history, including any mitigating factors, the department may, in its discretion, take one or more of the following actions:

(A) Issue a permit for a period of five years or issue renewal of permit for a period of five years.

(B) Issue a permit for a period of five years with special conditions that address compliance issues.

(C) Issue a permit with an accompanying administrative order. The administrative order may include a schedule for coming

into compliance with department rules, statutes, orders or permit conditions, additional operating, training, or auditing procedures necessary to assure compliance, specified penalties for future noncompliance for a period of five years.

(D) Issue a permit with a duration of less than five years, if not prohibited by federal law.

(8) *Permit Denial.* -- In addition to the provisions of subsection (7) of this section, the department may, in its discretion, deny a permit application in accordance with the following:

(A) If the applicant is responsible for a Category A violation, the department may deny the permit application, and the applicant may not be entitled to apply for a permit for that installation, activity, or facility for a period of one year from the time a final order denying the permit has been entered.

(B) If the applicant is responsible for two or more Category B violations, the department may deny the permit application, and the applicant may not be entitled to apply for a permit for that installation, activity, or facility for a period of six months from the time a final order denying the permit has been entered.

(9) *Compliance Incentives.* -- Any applicant who meets the criteria set forth below is eligible for the following incentives unless otherwise prohibited by state or federal statute, department rule, or federal regulation, and provided that the applicant meets all other applicable criteria for the issuance of a permit.

(e) *Tier 1.* - An applicant is eligible for these incentives if the applicant operated the installation, facility or activity for at least two years or, if it is a new installation, facility, or activity, the applicant must have operated a similar installation, facility or conducted a similar activity under a department permit for at least two years and the applicant must have not been responsible for any Category A, B, C or D violations.

(1) *Extended permit.* - A renewal of an operation or closure permit, which may include expansions or modifications involving construction, shall be issued for a period of five years without agency action under the following conditions:

(A) At least one hundred eighty days prior to the end of the first five-year period, the applicant shall complete and submit the application to the department. Within thirty days after submission, the department shall conduct a review of the compliance history of the applicant and shall determine whether the applicant continues to meet the criteria set forth in subsection (e) of this section.

(B) The department shall conduct at least one public hearing within sixty days of submittal of the application to allow the public the opportunity to present concerns regarding the compliance history of the applicant.

(C) If the applicant no longer meets the criteria set forth in paragraph (A) of this subsection, the department shall deny the automatic permit renewal, and shall require the applicant to submit a permit renewal application in accordance with applicable department statutes and rules.

(D) If the applicant seeks to transfer the extended permit to another entity, the transferee shall submit the application for transfer. If the department determines that the transferee has met the criteria set forth in paragraph (A) of this subsection over the previous five years, and if the transfer complies with all other applicable criteria, the department shall agree to the transfer of the extended permit.

(f) *Tier 2.* - An applicant is eligible for these incentives if the applicant meets the same requirements as for Tier 1 described in paragraph (A), and must have implemented an environmental management system which results in performance surpassing the department's minimum compliance standards.

(1) Extended permits and short-form renewal applications.

(2) Fewer routing inspections.

(3) Expedited review of requests for permit modifications.

(4) Other incentives as may be provided by the department which may include secretarial recognition or program-specific incentives.

NOTE: The purpose of this bill is to establish the performance based permitting act. This act rewards compliance with environmental laws by expediting the permit process, and establishing criteria for evaluating the performance of applicants.

This article is new; therefore, strike-throughs and underscoring have been omitted.