

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; 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.

§22-5-2. Definitions.

The terms used in this article are defined as follows:

(1) "Air pollutants" means solids, liquids or gases which, if discharged into the air, may result in a statutory air pollution.

(2) "Board" means the air quality board continued pursuant to the provisions of article two, chapter twenty-two-b of this code.

(3) "Director" means the director of the division of environmental protection or such other person to whom the director has delegated authority or duties pursuant to sections six or eight, article one, chapter twenty-two of this code.

(4) "Discharge" means any release, escape or emission of air pollutants into the air.

(5) "Person" means any and all persons, natural or artificial, including the state of West Virginia or any other state, the United States of America, any municipal, statutory, public or private corporation organized or existing under the laws of this or any other state or country, and any firm, partnership or association of whatever nature.

(6) "Statutory air pollution" means and is limited to the discharge into the air by the act of man of substances (liquid, solid, gaseous, organic or inorganic) in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property.

§22-5-3. Causing statutory pollution unlawful; article not to provide persons with additional legal remedies.

It is unlawful for any person to cause a statutory air pollution, to violate the

provisions of this article, to violate any rules promulgated pursuant to this article to operate any facility subject to the permit requirements of the director without a valid permit, or to knowingly misrepresent to any person in the state of West Virginia that the sale of air pollution control equipment will meet the standards of this article or any rules promulgated pursuant to this article. Nothing contained in this article provides any person with a legal remedy or basis for damages or other relief not otherwise available to such person immediately prior to enactment of this article.

§22-5-4. Powers and duties of director; and legal services; rules.

(a) The director is authorized:

(1) To develop ways and means for the regulation and control of pollution of the air of the state;

(2) To advise, consult and cooperate with other agencies of the state, political subdivisions of the state, other states, agencies of the federal government, industries, and with affected groups in furtherance of the declared purposes of this article;

(3) To encourage and conduct such studies and research relating to air pollution and its control and abatement as the director may deem advisable and necessary;

(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;

(5) To enter orders requiring compliance with the provisions of this article and the rules lawfully promulgated hereunder;

(6) To consider complaints, subpoena witnesses, administer oaths, make investigations and hold hearings relevant to the promulgation of rules and the entry of compliance orders hereunder;

(7) To encourage voluntary cooperation by municipalities, counties, industries and others in preserving the purity of the air within the state;

(8) To employ personnel, including specialists and consultants, purchase materials and supplies, and enter into contracts necessary, incident or convenient to the accomplishment of the purpose of this article;

(9) To enter and inspect any property, premise or place on or at which a source of air pollutants is located or is being constructed, installed or established at any reasonable time for the purpose of ascertaining the state of compliance with this article and rules promulgated under the provisions of this article. No person shall refuse entry or access to any authorized representative of the director who requests entry for purposes of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such inspection: Provided, That nothing contained in this article eliminates any obligation to follow

any process that may be required by law;

(10) Upon reasonable evidence of a violation of this article, which presents an imminent and serious hazard to public health, to give notice to the public or to that portion of the public which is in danger by any and all appropriate means;

(11) To cooperate with, receive and expend money from the federal government and other sources; and the director may cooperate with any public or private agency or person and receive therefrom and on behalf of the state gifts, donations, and contributions, which shall be deposited to the credit of the "Air Pollution Education and Environment Fund" which is hereby continued in the state treasury. The moneys collected pursuant to this article which are directed to be deposited in the air pollution education and environment fund must be deposited in a separate account in the state treasury and expenditures for purposes set forth in this article are not authorized from collection but are to be made only in accordance with appropriation and in accordance with the provisions of article three, chapter twelve of this code and upon fulfillment of the provisions set forth in article two, chapter five-a of this code. Amounts collected which are found from time to time to exceed the funds needed for the purposes set forth in this article may be transferred to other accounts or funds and redesignated for other purposes by appropriation of the Legislature;

(12) To represent the state in any and all matters pertaining to plans, procedures and negotiations for interstate compacts in relation to the control of air pollution;

(13) To appoint advisory councils from such areas of the state as he or she may determine. The members shall possess some knowledge and interest in matters pertaining to the regulation, control and abatement of air pollution. The council may advise and consult with the director about all matters pertaining to the regulation, control and abatement of air pollution within such area;

(14) To require any and all persons who are directly or indirectly discharging air pollutants into the air to file with the director such information as the director may require in a form or manner prescribed by him or her for such purpose, including, but not limited to, location, size and height of discharge outlets, processes employed, fuels used and the nature and time periods of duration of discharges. Such information shall be filed with the director, when and in such reasonable time, and in such manner as the director may prescribe;

(15) To require the owner or operator of any stationary source discharging air pollutants to install such monitoring equipment or devices as the director may prescribe and to submit periodic reports on the nature and amount of such discharges to the director;

(16) To do all things necessary and convenient to prepare and submit a plan or plans for the implementation, maintenance and enforcement of the "Federal Clean Air Act," as amended: Provided, That in preparing and submitting each such plan the director shall establish in such plan that such standard shall be first achieved, maintained and enforced by limiting and controlling emissions of pollutants from commercial and industrial sources and locations and shall only provide in such plans for limiting and controlling emissions of pollutants from private dwellings and the curtilage thereof as a last resort: Provided, however, That nothing herein contained affects plans for achievement, maintenance and enforcement of motor vehicle emission standards and of standards for fuels used in dwellings;

(17) To promulgate legislative rules, in accordance with the provisions of chapter twenty-nine-a of this code, providing for the following:

(A) Procedures and requirements for permit applications, transfers and modifications and the review thereof;

(B) Imposition of permit application and transfer fees;
(C) Establishment of criteria for construction, modification, relocation and operating permits;

(D) Imposition of permit fees and of certificate fees: Provided, That any person subject to operating permit fees pursuant to section twelve of this article is exempt from imposition of the certificate fee; and

(E) Imposition of penalties and interest for the nonpayment of fees.

The fees, penalties and interest shall be deposited in a special account in the state treasury designated the "Air Pollution Control Fund", formerly the "Air Pollution Control Commission Fund", which is hereby continued to be appropriated for the sole purpose of paying salaries and expenses of the board, the office of air quality and their employees to carry out the provisions of this article: Provided, That the fees, penalties and interest collected for operating permits required by section twelve of this article shall be expended solely to cover all reasonable direct and indirect costs required to administer the operating permit program. The fees collected pursuant to this subdivision must be deposited in a separate account in the state treasury and expenditures for purposes set forth in this article are not authorized from collections but are to be made only in accordance with appropriation and in accordance with the provisions of article three, chapter twelve of this code and upon fulfillment of the provisions set forth in article two, chapter five-a of this code. Amounts collected which are found from time to time to exceed the funds needed for the purposes set forth in this article may be transferred to other accounts or funds and redesignated for other purposes by appropriation of the Legislature: Provided, however, That for fiscal year one thousand nine hundred ninety-three, expenditures are permitted from collections without appropriation by the Legislature; and

(18) Receipt of any money by the director as a result of the entry of any consent order shall be deposited in the state treasury to the credit of the air pollution education and environment fund.

(b) The attorney general and his or her assistants and the prosecuting attorneys of the several counties shall render to the director without additional compensation such legal services as the director may require of them to enforce the provisions of this article.

§22-5-5. Issuance of cease and desist orders by director; service; permit suspension, modification and revocation; appeals to board.

If, from any investigation made by the director or from any complaint filed with him or her, the director is of the opinion that a person is violating the provisions of this article, or any rules promulgated pursuant thereto, he or she shall make and enter an order directing the person to cease and desist the activity, unless the director determines the violation is of a minor nature or the violation has been abated. The director shall fix a reasonable time in such order by which the activity must stop or be prevented. The order shall contain the findings of fact upon which the director determined to make and enter the order.

If, after any investigation made by the director, or from any complaint filed with him or her, the director is of the opinion that a permit holder is violating the provisions of this article, or any rules promulgated pursuant thereto, or any order of the director, or any provision of a permit, the director may issue notice of intent to suspend, modify or revoke and reissue such permit. Upon notice of the director's intent to suspend, modify or revoke a permit, the permit holder may request a conference with the director to show cause why the permit should not be suspended, modified or revoked. The request for conference must be received by the director within fifteen days following receipt of notice. After conference or fifteen days after issuance of

notice of intent, if no conference is requested, the director may enter an order suspending, modifying or revoking the permit and send notice to the permit holder. Such order is a cease and desist order for purposes of administrative and judicial review and shall contain findings of fact upon which the director determined to make and enter the order. If an appeal of the director's order is filed, the order of the director shall be stayed from the date of issuance pending a final decision of the board.

The director shall cause a copy of any such order to be served upon the person by registered or certified mail or by any proper law-enforcement officer.

Any person upon whom a copy of the final order has been served may appeal such order to the air quality board pursuant to the provisions of article one, chapter twenty-two-b of this code.

§22-5-6. Penalties; recovery and disposition; duties of prosecuting attorneys.

(a) Any person who violates any provision of this article, any permit or any rule or order issued pursuant to this article or article one, chapter twenty-two-b of this code is subject to a civil penalty not to exceed ten thousand dollars for each day of such violation, which penalty shall be recovered in a civil action brought by the director in the name of the state of West Virginia in the circuit court of any county wherein the person resides or is engaged in the activity complained of or in the circuit court of Kanawha County. The amount of the penalty shall be fixed by the court without a jury: *Provided*, That any person is not subject to civil penalties unless the person has been given written notice thereof by the director: *Provided, however*, That for the first such minor violation, if the person corrects the violation within the time as was specified in the notice of violation issued by the director, no civil penalty may be recovered: *Provided further*, That if the person fails to correct a minor violation or for any serious or subsequent serious or minor violation, the person is subject to civil penalties imposed pursuant to this section from the first day of the violation notwithstanding the date of the issuance or receipt of the notice of violation. The director shall, by rule subject to the provisions of chapter twenty-nine-a of this code, determine the definitions of serious and minor violations. The amount of any penalty collected by the director shall be deposited in the general revenue of the state treasury according to law.

(b)(1) Any person who knowingly misrepresents any material fact in an application, record, report, plan or other document filed or required to be maintained under the provisions of this article or any rules promulgated under this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than twenty-five thousand dollars or imprisoned in the county jail not more than six months or both fined and imprisoned: *Provided*, That if the violation occurs on separate days or is continuing in nature, the fine shall be no more than twenty-five thousand dollars for each day of such violation.

(2) Any person who knowingly violates any provision of this article, any permit or any rule or order issued pursuant to this article or article one, chapter twenty-two-b of this code is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than twenty-five thousand dollars for each day of such violation or imprisoned in the county jail not more than one year or both fined and imprisoned.

(c) Upon a request in writing from the director it is the duty of the attorney general and the prosecuting attorney of the county in which any such action for penalties accruing under this section or section seven of this article may be brought to institute and prosecute all such actions on behalf of the director.

(d) For the purpose of this section, violations on separate days are separate offenses.

§22-5-7. Applications for injunctive relief.

The director may seek an injunction against any person in violation of any provision of this article or any permit, rule or order issued pursuant to this article or article one, chapter twenty-two-b of this code. In seeking an injunction, it is not necessary for the director to post bond nor to allege or prove at any stage of the proceeding that irreparable damage will occur if the injunction is not issued or that the remedy at law is inadequate. An application for injunctive relief brought under this section or for civil penalty brought under section six of this article may be filed and relief granted notwithstanding the fact that all administrative remedies provided in this article have not been exhausted or invoked against the person or persons against whom such relief is sought.

In any action brought pursuant to the provisions of section six or of this section, the state, or any agency of the state which prevails, may be awarded costs and reasonable attorney's fees.

§22-5-8. Emergencies.

Whenever air pollution conditions in any area of the state become such as, in the opinion of the director, to create an emergency and to require immediate action for the protection of the public health, the director may, with the written approval of the governor, so find and enter such order as it deems necessary to reduce or prevent the emission of air pollutants substantially contributing to such conditions. In any such order the director shall also fix a time, not later than twenty-four hours thereafter, and place for a hearing to be held before it for the purpose of investigating and determining the factors causing or contributing to such conditions. A true copy of any such order shall be served upon persons whose interests are directly prejudiced thereby in the same manner as a summons in a civil action may be served, and a true copy of such order shall also be posted on the front door of the courthouse of the county in which the alleged conditions originated. All persons whose interests are prejudiced or affected in any manner by any such order shall have the right to appear in person or by counsel at the hearing and to present evidence relevant to the subject of the hearing. Within twenty-four hours after completion of the hearing the director shall affirm, modify or set aside said order in accordance and consistent with the evidence adduced. Any person aggrieved by such action of the director may thereafter apply by petition to the circuit court of the county for a review of the director's action. The circuit court shall forthwith fix a time for hearing de novo upon the petition and shall, after such hearing, by order entered of record, affirm, modify or set aside, in whole or in part, the order and action of the director. Any person whose interests shall have been substantially affected by the final order of the circuit court may appeal the same to the supreme court of appeals in the manner prescribed by law.

§22-5-9. Powers reserved to secretary of the department of health and human resources, commissioner of bureau of public health, local health boards and political subdivisions; conflicting statutes repealed.

Nothing in this article affects or limits the powers or duties heretofore conferred by the provisions of chapter sixteen of this code upon the the secretary of the department of health and human resources, the commissioner of the bureau of public health, county health boards, county health officers, municipal health boards, municipal health officers, combined boards of health or any other health agency or political subdivision of this state except insofar as such powers and duties might otherwise apply to the control, reduction or abatement of air pollution. All existing statutes or parts of statutes are, to the extent of their inconsistencies with the provisions of this article and to the extent that they might otherwise apply to the control, reduction or abatement of air pollution, hereby repealed: Provided, That no ordinance previously adopted by any municipality relating to the control, reduction or abatement of air pollution is repealed by this article.

§22-5-10. Records, reports, data or information; confidentiality; proceedings upon request to inspect or copy.

All air quality data, emission data, permits, compliance schedules, orders of the director, board orders and any other information required by a federal implementation program (all for convenience hereinafter referred to in this section as "records, reports, data or information") obtained under this article shall be available to the public, except that upon a showing satisfactory to the director, by any person, that records, reports, data or information or any particular part thereof, to which the director has access under this article if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the director shall consider such records, reports, data or information or such particular portion thereof confidential: Provided, That such confidentiality does not apply to the types and amounts of air pollutants discharged and and that such records, reports, data or information may be disclosed to other officers, employees or authorized representatives of the state or of the federal environmental protection agency concerned with enforcing this article, the federal Clean Air Act, as amended, or the federal Resource Conservation and Recovery Act, as amended, when relevant to any official proceedings thereunder: Provided, however, That such officers, employees or authorized representatives of the state or federal environmental protection agency protect such records, reports, data or information to the same degree required of the director by this section. The director shall promulgate legislative rules regarding the protection of records, reports, data or information, or trade secrets, as required by this section.

All requests to inspect or copy documents must state with reasonable specificity the documents or type of documents sought to be inspected or copied. Within five business days of the receipt of such a request, the director or his or her designate shall: (a) Advise the person making such request of the time and place at which the person may inspect and copy the documents; or (b) deny the request, stating in writing the reasons for such denial. For purposes of judicial appeal, a written denial by the director shall be deemed an exhaustion of administrative remedies. Any person whose request for information is denied, in whole or in part, may appeal

from such denial by filing with the director a notice of appeal. Such notice shall be filed within thirty days from the date the request for information was denied, and shall be signed by the person whose request was denied or the person's attorney. The appeal shall be taken to the circuit court of Kanawha County, where it shall be heard without a jury. The scope of review is limited to the question of whether the records, reports, data or other information, or any particular part thereof (other than emission data), sought to be inspected or copied, would, if made public, divulge methods or processes entitled to protection as trade secrets. The said court shall make findings of fact and conclusions of law based upon the evidence and testimony. The director, the person whose request was denied, or any other person whose interest has been substantially affected by the final order of the circuit court may appeal to the supreme court of appeals in the manner prescribed by law.

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

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 section.

The director 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 director, 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 director.

The director shall, within a reasonable time not to exceed twelve months for major sources, as defined by the director, and six months for all other sources after the receipt of a complete application, issue such permit unless he or she determines that the proposed construction, modification or relocation will not be in accordance with this article or rules promulgated thereunder, in which case the director shall issue an order for the prevention of such construction, modification or relocation. For the purposes of this section, a modification is deemed to be 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 such source above a de minimis level set by the director.

§22-5-12. Operating permits required for stationary sources of air pollution.

No person may operate a stationary source of air pollutants without first obtaining an operating permit as provided in this section. The director shall promulgate legislative rules, in accordance with chapter twenty-nine-a of this code, which specify classes or categories of stationary sources which are required to obtain an operating permit. The legislative rule shall provide for the form and content of the application procedure including time limitations for obtaining the required permits. Any person who has filed a timely and complete application for a permit or renewal thereof required by this section, and who is abiding by the requirements of this article and the rules promulgated pursuant thereto is in compliance with the requirements of this

article and any rule promulgated thereunder until a permit is issued or denied. Any legislative rule promulgated pursuant to the authority granted by this section shall be equivalent to and consistent with rules and regulations adopted by the administrator of United States environmental protection agency pursuant to Title IV and Title V of the Clean Air Act Amendments of 1990, 42 U.S.C. §7651 et seq. and 42 U.S.C. §7661 et seq., respectively: Provided, That such legislative rule may deviate from the federal rules and regulations where a deviation is appropriate to implement the policy and purpose of this article taking into account such factors unique to West Virginia.

§22-5-13. Consolidation of permits.

For permits required by sections eleven and twelve of this article, the director may incorporate the required permits with an existing permit or consolidate the required permits into a single permit.

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

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 director may appeal such action of the director to the air quality board pursuant to article one, chapter twenty-two-b of this code.

§22-5-15. Motor vehicle pollution, inspection and maintenance.

(a) As the state of knowledge and technology relating to the control of emissions from motor vehicles may permit or make appropriate and in furtherance of the purposes of this article, the director may provide by legislative rule for the control of emissions from motor vehicles. The legislative rule may prescribe requirements for the installation and use of equipment designed to reduce or eliminate emissions and for the proper maintenance of such equipment and of vehicles. Any legislative rule pursuant to this section shall be consistent with provisions of federal law, if any, relating to control of emissions from the vehicles concerned. The director shall not require, as a condition precedent to the initial sale of a vehicle or vehicular equipment, the inspection, certification or other approval of any feature or equipment designed for the control of emissions from motor vehicles, if such feature or equipment has been certified, approved or otherwise authorized pursuant to federal law.

(b) Except as permitted or authorized by law or legislative rule, no person shall fail to maintain in good working order or remove, dismantle or otherwise cause to be inoperative any equipment or feature constituting an operational element of the air pollution control system or mechanism of a motor vehicle required by rules of the director to be maintained in or on the vehicle. Any such failure to maintain in good working order or removal, dismantling or causing of inoperability subjects the owner or operator to suspension or cancellation of the registration for the vehicle by the department of transportation, division of motor vehicles. The vehicle is not thereafter eligible for registration until all parts and equipment constituting operational elements of the motor vehicle have been restored, replaced or repaired and are in good working order.

(c) The department of transportation, division of motor vehicles, department of administration, information and communication services division and the state police shall make

available technical information and records to the director to implement the legislative rule regarding motor vehicle pollution, inspection and maintenance. The director may promulgate a legislative rule establishing motor vehicle pollution, inspection and maintenance standards and imposing an inspection fee at a rate sufficient to implement the motor vehicle inspection program and shall do so when required pursuant to federal law regarding attainment of ambient air quality standards.

(d) The director may promulgate a legislative rule requiring maintenance of features of equipment in or on motor vehicles for the purpose of controlling emissions therefrom and shall do so when required pursuant to federal law regarding attainment of ambient air quality standards, and no motor vehicle may be issued a division of motor vehicles registration certificate, or the existing registration certificate shall be revoked, unless the motor vehicle has been found to be in compliance with the director's legislative rule.

(e) The remedies and penalties provided in this section and section one, article three, chapter seventeen-a of this code, apply to violations hereof and the provisions of sections six or seven of this article do not apply thereto.

(f) As used in this section "motor vehicle" has the same meaning as in chapter seventeen-c of this code.

§22-5-16. Small business environmental compliance assistance program, compliance advisory panel.

The secretary of the department of commerce, labor, and environmental resources shall establish a small business stationary source technical and environmental compliance assistance program which meets the requirements of Title V of the Clean Air Act Amendments of 1990, 42 U.S.C. §7661 et seq. A compliance advisory panel composed of seven members appointed as follows shall be created to periodically review the effectiveness and results of this assistance program:

(a) Two members who are not owners, nor representatives of owners, of small business stationary sources, selected by the governor to represent the general public;

(b) One member selected by the speaker of the House of Delegates who is an owner or who represents owners of small business stationary sources;

(c) One member selected by the minority leader of the House of Delegates who is an owner or who represents owners of small business stationary sources;

(d) One member selected by the president of the Senate who is an owner or who represents owners of small business stationary sources;

(e) One member selected by the minority leader of the Senate who is an owner or who represents owners of small business stationary sources; and

(f) One member selected by the director to represent the director.

§22-5-17. Interstate ozone transport.

(a) This section of the Air Pollution Control Act may be referred to as the Interstate Ozone Transport Oversight Act.

(b) The Legislature hereby finds that:

(1) The federal Clean Air Act, as amended, contains a comprehensive regulatory scheme for the control of emissions from mobile and stationary sources, which will improve ambient air quality and health and welfare in all parts of the nation.

(2) The number of areas unable to meet national ambient air quality standards for ozone has been declining steadily and will continue to decline with air quality improvements resulting from implementation of the federal Clean Air Act amendments of 1990, and the mobile and stationary source emission controls specified therein.

(3) Scientific research on the transport of atmospheric ozone across state boundaries is proceeding under the auspices of the United States environmental protection agency (U.S. EPA), state agencies, and private entities, which research will lead to improved scientific understanding of the causes and nature of ozone transport, and emission control strategies potentially applicable thereto.

(4) The northeast ozone transport commission established by the federal Clean Air Act Amendments of 1990 has proposed emission control requirements for stationary and mobile sources in certain northeastern states and the District of Columbia in addition to those specified by the federal Clean Air Act amendments of 1990.

(5) Membership of the northeast ozone transport commission includes, by statute, representatives of state environmental agencies and governors' offices; similar representation is required in the case of other ozone transport commissions established by the Administrator of the United States environmental protection agency pursuant to Section 176A of the federal Clean Air Act, as amended.

(6) The northeast ozone transport commission neither sought nor obtained state legislative oversight or approval prior to reaching its decisions on mobile and stationary source requirements for states included within the northeast ozone transport region.

(7) The Commonwealth of Virginia and other parties have challenged the constitutionality of the northeast ozone transport commission and its regulatory proposals under the guarantee, compact, and joinder clauses of the United States Constitution.

(8) The United States environmental protection agency, acting outside of the aforementioned statutory requirements for the establishment of new interstate transport commissions, is encouraging the state of West Virginia and twenty-four other states outside of the northeast to participate in multistate negotiations through the ozone transport assessment group; such negotiations are intended to provide the basis for an interstate memorandum of understanding or other agreement on ozone transport requiring reductions of emissions of nitrogen oxides or volatile organic compounds in addition to those specified by the federal Clean Air Act amendments of 1990, membership of the ozone transport assessment group consists of state and federal air quality officials, without state legislative representation or participation by the governor.

(9) Emission control requirements exceeding those specified by federal law can adversely affect state economic development, competitiveness, employment, and income without corresponding environmental benefits; in the case of electric utility emissions of nitrogen oxides, it is estimated that control costs in addition to those specified by the federal Clean Air Act could exceed five billion dollars annually in a thirty-seven state region of the eastern United States, including the state of West Virginia.

(10) Requiring certain eastern states to meet emission control requirements more stringent than those otherwise applicable to other states and unnecessary for environmental protection would unfairly affect interstate competition for new industrial development and employment opportunities.

(c) It is therefore directed that:

(1) Not later than ten days subsequent to the receipt by the director of the division

of environmental protection of any proposed memorandum of understanding or other agreement by the ozone transport assessment group, or similar group, potentially requiring the state of West Virginia to undertake emission reductions in addition to those specified by the federal Clean Air Act, the director of the division of environmental protection shall submit such proposed memorandum or other agreement to the president of the Senate and the speaker of the House of Delegates for consideration.

(2) Upon receipt of the aforesaid memorandum of understanding or agreement, the President and the Speaker shall refer the understanding or agreement to one or more appropriate legislative committees with a request that such committees convene one or more public hearings to receive comments from agencies of government and other interested parties on its prospective economic and environmental impacts on the state of West Virginia and its citizens, including impacts on energy use, taxes, economic development, utility costs and rates, competitiveness and employment.

(3) Upon completion of the public hearings required by the preceding subdivision, the committees(s) shall forward to the president and the speaker a report containing its findings and recommendations concerning any proposed memorandum of understanding or other agreement related to the interstate transport of ozone. The report shall make findings with respect to the economic, health, safety and welfare and environmental impacts on the state of West Virginia and its citizens, including impacts on energy use, taxes, economic development, utility costs and rates, competitiveness and employment.

(4) Upon receipt of the report required by the preceding subdivision, the president and speaker shall thereafter transmit the report to the governor for such further consideration or action as may be warranted.

(5) Nothing in this section shall be construed to preclude the Legislature from taking such other action with respect to any proposed memorandum of understanding or other agreement related to the interstate transport of ozone as it deems appropriate.

(6) No person is authorized to commit the state of West Virginia to the terms of any such memorandum or agreement unless specifically approved by an act of the Legislature.

§22-5-18. Market-based banking and trading programs, emissions credits; director to promulgate rules.

(a) The director shall propose legislative rules for promulgation in accordance with article three, chapter twenty-nine-a of this code, to the full extent allowed by federal and state law, one or more rules establishing a voluntary emissions trading and banking program that provides incentives to make progress toward the attainment or maintenance of the national ambient air quality standards, the reduction or prevention of hazardous air contaminants or the protection of human health and welfare and the environment from air pollution.

(b) The director shall establish a system by legislative rule for quantifying, verifying, determining eligibility, registering, trading and using all emissions reduction credits, for banking and trading if achieved after the first day of January, one thousand nine hundred ninety-one, to the extent permitted by federal law. Credits also shall be available for permanent shutdowns. Ten percent of any emission reduction credits registered with the director shall be retired from future use: *Provided*, That fifty percent of any emission reduction credits generated from permanent shutdowns prior to the effective date of the legislative rule or rules promulgated

pursuant to this section shall be retired from future use. All other emissions reduction credits registered shall remain in effect until used and debited or retired. Credits not used within ten years shall be retired from future use. The director may charge a reasonable transaction fee at the time any credits are registered and shall deposit the fees in the air pollution control fund.

The division may establish the emissions trading program as a state, multistate or regional program as long as the program contributes to the goal of improving the air quality in West Virginia and in the air quality region where the source is located.