

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003**

**SESSION LAW 2003-428
SENATE BILL 945**

AN ACT TO CLARIFY THE EXTENT TO WHICH A PROSPECTIVE APPLICANT FOR AN AIR QUALITY PERMIT FOR A NEW FACILITY MAY ENGAGE IN CONSTRUCTION PRIOR TO OBTAINING THE AIR QUALITY PERMIT AND TO SPECIFY THE CIRCUMSTANCES UNDER WHICH A PERSON WHO HOLDS AN AIR QUALITY PERMIT MAY ALTER OR EXPAND THE FACILITY UPON GIVING NOTICE TO THE ENVIRONMENTAL MANAGEMENT COMMISSION AND THE PUBLIC OF THE PERMITTEE'S INTENT TO APPLY FOR MODIFICATION OF THE PERMIT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-215.108(a) reads as rewritten:

"(a) Except as provided in subsections (a1) and (a2) of this section, no person shall do any of the following things or carry out any of the following activities ~~which that~~ contravene or will be likely to contravene standards established pursuant to G.S. 143-215.107 or set out in G.S. 143-215.107D unless that person has obtained from the Commission a permit therefor from the Commission and has complied with any conditions of this the permit:

- (1) Establish or operate any air contaminant source;source, except as provided in G.S. 143-215.108A.
- (2) Build, erect, use or operate any equipment ~~which that~~ may result in the emission of an air contaminants-contaminant or which that is likely to cause air ~~pollution;pollution,~~ except as provided in G.S. 143-215.108A.
- (3) Alter or change the construction or method of operation of any equipment or process from which air contaminants are or may be ~~emitted;emitted.~~
- (4) ~~Enter into an irrevocable contract for the construction and installation of any air cleaning device, or allow or cause such device to be constructed, installed, or operated."~~

SECTION 2. G.S. 143-215.108(f) reads as rewritten:

"(f) An applicant for a permit under this section for a new facility or for the expansion of a facility permitted under this section shall request each local government having jurisdiction over any part of the land on which the facility and its appurtenances are to be located to issue a determination as to whether the local government has in effect a zoning or subdivision ordinance applicable to the facility and whether the proposed facility or expansion would be consistent with the ordinance. The request to the local government shall be accompanied by a copy of the draft permit application and shall be delivered to the clerk of the local government personally or by certified mail. The determination shall be verified or supported by affidavit signed by the official designated by the local government to make the determination and, if the local government states that the facility is inconsistent with a zoning or subdivision ordinance, shall include a copy of the ordinance and the specific reasons for the determination of inconsistency. A copy of any such determination shall be provided to the applicant when it is submitted to the Commission. The Commission shall not act upon an application for a permit under this section until it has received a determination

from each local government requested to make a determination by the applicant. If a local government determines that the new facility or the expansion of an existing facility is inconsistent with a zoning or subdivision ordinance, and unless ~~Unless~~ the local government makes a subsequent determination of consistency with all ordinances cited in the determination or the proposed facility is determined by a court of competent jurisdiction to be consistent with the cited ordinances, the Commission shall attach as a condition of the permit a requirement that the applicant, prior to construction or operation of the facility under the permit, comply with all lawfully adopted local ordinances, including those cited in the determination, that apply to the facility at the time of construction or operation of the facility. If a local government fails to submit a determination to the Commission as provided by this subsection within 15 days after receipt of the request, the Commission may proceed to consider the permit application without regard to local zoning and subdivision ordinances. This subsection shall not be construed to affect the validity of any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance or to affect the responsibility of any person to comply with any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance. This subsection shall not be construed to limit any opportunity a local government may have to comment on a permit application under any other law or rule. This subsection shall not apply to any facility with respect to which local ordinances are subject to review under either G.S. 104E-6.2 or G.S. 130A-293."

SECTION 3. Article 21B of Chapter 143 of the General Statutes is amended by adding a new section to read:

"§ 143-215.108A. Control of sources of air pollution; construction of new facilities; alteration or expansion of existing facilities.

(a) New Facilities. – A person may not, without obtaining a permit under G.S. 143-215.108, construct or operate an air contaminant source, equipment, or associated air cleaning device at a site or facility where, at the time of the construction, there is no other air contaminant source, equipment, or associated air cleaning device for which a permit is required under G.S. 143-215.108. A person may, however, undertake the following activities prior to obtaining a permit if the person complies with the requirements of this section:

- (1) Clearing and grading.
- (2) Construction of access roads, driveways, and parking lots.
- (3) Construction and installation of underground pipe work, including water, sewer, electric, and telecommunications utilities.
- (4) Construction of ancillary structures, including fences and office buildings, that are not a necessary component of an air contaminant source, equipment, or associated air cleaning device for which a permit is required under G.S. 143-215.108.

(b) Permitted Facilities. – A person who holds a permit under G.S. 143-215.108 may apply to the Commission for a modification of the permit to allow the person to alter or expand the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device in a manner that alters the emission of air contaminants. The permittee may not operate the altered, expanded, or additional air contaminant source, equipment, or associated air cleaning device in a manner that alters the emission of any air contaminant without obtaining a permit modification under G.S. 143-215.108. A permittee may, however, alter or expand the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device at a facility permitted under G.S. 143-215.108 if the permittee complies with the requirements of this section. At least 15 days prior to commencing alteration or expansion under this subsection, the permittee shall give notice by publication and shall submit to the Commission a notice of the permittee's intent to alter or expand the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device. Notice by publication shall be in a newspaper having general circulation in the county or counties where the facility is to be located; shall be

at the permittee's own expense; shall include a statement that written comment may be submitted to the Commission, that the Commission will consider any comment that it receives, and the Commission's address for submission of written comment; and shall include all the information required by subdivisions (1) through (6) of this subsection. The permittee shall submit a proof of publication of the notice to the Commission within 15 days of the date of publication. The notice of intent to the Commission shall include all of the following:

- (1) The name and location of the facility and the name and address of the permittee.
 - (2) The permit number of each permit issued under G.S. 143-215.108 for the facility.
 - (3) The nature of the air contaminant sources and equipment associated with the proposed modification of the permit.
 - (4) An estimate of total regulated air contaminant emissions associated with the proposed modification of the permit.
 - (5) The air cleaning devices that are to be employed to address each of the air contaminant sources associated with the modification of the permit.
 - (6) The schedule for alteration or expansion of the facility associated with the proposed modification of the permit.
 - (7) An acknowledgment by the permittee that the air contaminant sources, equipment, and associated air cleaning devices may not be operated in a manner that alters the emission of any air contaminant until the permittee has obtained a modified permit under G.S. 143-215.108.
 - (8) An acknowledgment by the permittee that any alteration or expansion of the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device prior to the modification of a permit under G.S. 143-215.108 is undertaken at the permittee's own risk and with the knowledge that the permittee may be denied a modification of the permit under G.S. 143-215.108 without regard to the permittee's financial investment or alteration or expansion of the facility.
 - (9) A certification under oath that all of the information contained in the notice of intent is complete and accurate to the best of the permittee's knowledge and ability, executed by the permittee or, if the permittee is a corporation, by the appropriate officers of the corporation.
- (c) Review and Determination by the Commission. –
- (1) Upon receipt of a complete notice of intent required under subsection (b) of this section, the Commission shall determine whether:
 - a. The permittee is and has been in substantial compliance with other permits issued the permittee.
 - b. 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.
 - c. The alteration or expansion will not result in a disproportionate increase in the size of the facility already permitted.
 - d. The alteration or expansion will result in the same or substantially similar emissions as that of the facility already permitted.
 - e. The alteration or expansion will not have a significant effect on air quality.
 - f. The Commission is likely to issue the permit modification.
 - (2) Within 15 days after the Commission receives a complete notice of intent required under subsection (b) of this section, the Commission shall notify the permittee of its determination as to whether each of the conditions set out in subdivision (1) of this subsection has or has not been met. If the Commission finds that all of the conditions have been

met, the notice shall state that the alteration or expansion of the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device may begin. If the Commission finds that one or more of the conditions has not been met, the notice shall state that the alteration or expansion of the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device may not begin.

(d) Order to Cease Construction, Alteration, or Expansion. – If at any time during the construction, alteration, or expansion of the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device, the Commission determines that the permittee will not qualify for a permit or permit modification under G.S. 143-215.108, the Commission may order that the construction, alteration, or expansion cease until the Commission makes a decision on the application for a permit or permit modification. If the Commission orders that construction, alteration, or expansion cease, then construction, alteration, or expansion may resume only if the Commission either makes a subsequent determination that the circumstances that resulted in the order to cease construction, alteration, or expansion have been adequately addressed or if the Commission issues a permit or permit modification under G.S. 143-215.108 that authorizes construction, alteration, or expansion to resume.

(e) Evaluation of Permit Applications; Administrative and Judicial Review of Permit Decisions. – The Commission shall evaluate an application for a permit or permit modification under G.S. 143-215.108 and make its decision on the same basis as if the construction, alteration, or expansion allowed under this section had not occurred. The Commission shall consider any written comment that it receives in response to a notice by publication given pursuant to subsection (b) of this section. No evidence regarding any contract entered into, financial investment made, construction, alteration, or expansion undertaken, or economic loss incurred by any person or permittee who proceeds under this section without first obtaining a permit under G.S. 143-215.108 is admissible in any contested case or judicial proceeding involving any permit required under G.S. 143-215.108. No evidence as to any determination or order by the Commission pursuant to subsection (c) or (d) of this section shall be admissible in any contested case or judicial proceeding related to any permit required under G.S. 143-215.108.

(f) State, Commission, and Employees Not Liable. – Every person, permittee, and owner of a facility who proceeds under this section shall hold the State, the Commission, and the officials, agents, and employees of the State and the Commission harmless and not liable for any loss resulting from any contract entered into, financial investment made, construction, alteration, or expansion undertaken, or economic loss incurred by any person, permittee, or owner of any facility pursuant to this section.

(g) Local Zoning Ordinances Not Affected. – This section shall not be construed to affect the validity of any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance or to affect the responsibility of any person to comply with any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance.

(h) Compliance With Other State Laws Not Affected. – 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 operation of an air contaminant source, equipment, or associated air cleaning device at a facility for which a permit is required under G.S. 143-215.108.

(i) Federal Air Quality Programs Not Affected. – 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 Commission or by a local air pollution control program certified by the Commission as provided in G.S. 143-215.112. 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 Commission or by a local air pollution control program certified by the Commission as provided in G.S. 143-215.112. 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 Commission or by a local air pollution control program certified by the Commission as provided in G.S. 143-215.112.

(j) Fee. – A permittee who submits a notice of intent under subsection (b) of this section shall pay a fee of two hundred dollars (\$200.00) for each notice of intent submitted to cover a portion of the administrative costs of implementing this section."

SECTION 4. This act is effective when it becomes law and applies to the construction of any new facility and the alteration or expansion associated with the modification of a permit for an existing facility that commences on or after the date on which this act becomes law. This act does not apply to any application for a permit or permit modification under G.S. 143-215.108 that is submitted to the Environmental Management Commission prior to the date on which this act becomes law.

In the General Assembly read three times and ratified this the 17th day of July, 2003.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 1:25 p.m. this 19th day of August, 2003