



Eric Vendel

Bill Analysis

Legislative Service Commission

S.B. 265

126th General Assembly
(As Introduced)

Sens. Spada, Carey, Mumper, Niehaus, Amstutz, Fedor, Armbruster, Clancy, Stivers

BILL SUMMARY

- Specifies that if ambiguity exists as to whether a rule, permit, variance, or order adopted or issued under Ohio's Air Pollution Control Law is more stringent than the federal Clean Air Act, the rule, permit, variance, or order must be construed to be no more stringent than the federal Clean Air Act.
- Requires the Director of Environmental Protection to consider the overall cost within Ohio of compliance with rules and the relation to benefits to the people of the state to be derived from that compliance when adopting rules for the prevention, control, and abatement of air pollution.
- Requires the Director to adopt a rule specifying that a permit to install is required only for new or modified air contaminant sources that emit an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act, an air contaminant for which the air contaminant source is regulated under the federal Clean Air Act, or an air contaminant that presents, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects or a threat of adverse environmental effects.
- Authorizes the Director to modify the rule establishing the list of air contaminants identified because of their adverse effects on human health or the environment for the purpose of adding or deleting air contaminants, and establishes procedures that the Director must follow to do so.
- Prohibits the Director from imposing additional air quality monitoring requirements for an air contaminant source when a specific monitoring,

record-keeping, or reporting requirement is established for that source under federal law.

- To the extent consistent with the federal Clean Air Act, prohibits the Director from requiring an operating restriction with respect to an air contaminant source that has the practical effect of increasing the stringency of an existing applicable emission limitation or standard.
- Repeals provisions in current law related to best available technology, and instead, with respect to permits to install issued on or after January 1, 2008, specifies that best available technology for air contaminant sources and air contaminants emitted by those sources that are subject to standards adopted under specified provisions of the federal Clean Air Act must be equivalent to and no more stringent than those federal standards.
- For an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act, specifies that best available technology only can be required to the extent required by rules for permit to install applications filed on or after January 1, 2008.
- Specifies that rules pertaining to best available technology are not permitted to apply to an air contaminant source that has the potential to emit, taking into account air pollution controls installed on the source, less than ten tons of emissions of an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act or to any existing, new, or modified air contaminant source that is subject to a plantwide applicability limit that has been approved by the Director.
- States that in a private civil action for an alleged nuisance related to the installation or operation of an air contaminant source, it is an affirmative defense if the air contaminant source is in compliance with the terms and conditions of any permit or applicable rules authorizing the installation or operation of the air contaminant source.

CONTENT AND OPERATION

Introduction

The federal Clean Air Act was initially enacted by Congress in 1970 and received major updates in 1977 and 1990. The Act mandates certain air pollution control requirements and establishes national ambient air quality standards and measures that must be used by the states to achieve those standards. Ohio has responded to the federal Clean Air Act by enacting the Air Pollution Control Law. The Ohio Environmental Protection Agency (OEPA) is charged with implementing that Law. The Agency must develop programs for the prevention, control, and abatement of air pollution. Many of the programs established by the OEPA under the state Air Pollution Control Law are derived from federal requirements. The bill makes changes to certain aspects of the Air Pollution Control Law governing the interplay between Ohio law and federal law and governing permits to install for sources of pollution, air pollution monitoring devices, best available technology, and private citizen law suits.

Ambiguity between state and federal air pollution control laws

Current law specifies that the Air Pollution Control Law, all rules adopted under it, and all permits, variances, and orders issued under it must be construed, to the extent reasonably possible, to be consistent with the federal Clean Air Act. The bill adds that if ambiguity exists as to whether a rule, permit, variance, or order adopted or issued under the Air Pollution Control Law is more stringent than the federal Clean Air Act, the rule, permit, variance, or order must be construed to be no more stringent than the federal Clean Air Act. (Sec. 3704.02.)

Air pollution control rules

Current law requires the Director of Environmental Protection to adopt rules for the prevention, control, and abatement of air pollution, including rules prescribing for the state as a whole or for various areas of the state emission standards for air contaminants and other necessary rules for the purpose of achieving and maintaining compliance with ambient air quality standards established by the federal Clean Air Act. In adopting the rules, the Director, to the extent consistent with the federal Clean Air Act, must hear and give consideration to certain evidentiary factors. One such factor is evidence relating to conditions calculated to result from compliance with the rules and their relation to benefits to the people of the state to be derived from that compliance. The bill also requires the Director to consider the overall cost within Ohio of compliance with the rules and the relation to benefits to the people of the state to be derived from that compliance. (Sec. 3704.03(E).)

Rules related to permits to install

Current law requires the Director to adopt rules requiring the issuance of a permit to install¹ prior to the location, installation, construction, or modification of any air contaminant source or any machine, equipment, device, apparatus, or physical facility intended primarily to prevent or control the emission of air contaminants. Applications for permits to install must be accompanied by plans, specifications, construction schedules, and other pertinent information and data. Further, the Director is required to specify in each permit applicable emission standards. (Sec. 3704.03(F).)

The bill requires the Director, in addition to rules adopted under current law pertaining to permits to install, not later than January 1, 2008, to adopt a rule in accordance with the Administrative Procedure Act specifying that a permit to install is required only for new or modified air contaminant sources that emit any of the following air contaminants:

(1) An air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act;

(2) An air contaminant for which the air contaminant source is regulated under the federal Clean Air Act; or

(3) An air contaminant that presents, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects, including, but not limited to, substances that are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, or neurotoxic, that cause reproductive dysfunction, or that are acutely or chronically toxic, or a threat of adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, and that is identified in the rule by chemical name and Chemical Abstract Service number (sec. 3704.03(F)(1) to (3)).

With respect to air contaminants identified because of their threat of adverse effects on human health or the environment (see item (3), above), the bill authorizes the Director to modify the rule establishing the list of air contaminants

¹ Under current law, the term "installation permit" is used as well as the term "permit to install." The term "permit to install" is the more commonly used term by the OEPA and members of the public. Therefore, amendments to current law by the bill refer only to "permits to install" and not "installation permits." However, legally there is no distinction between the two terms.

for the purpose of adding or deleting air contaminants. For each air contaminant that is contained in or deleted from the rule, the Director must include in a notice accompanying any proposed or final rule an explanation of the Director's determination that the air contaminant meets the criteria established by the bill and should be added to, or no longer meets the criteria and should be deleted from, the list of air contaminants. The explanation must include an identification of the scientific evidence on which the Director relied in making the determination. Until adoption of the new rule specified in item (3), above, the bill declares that nothing will affect the Director's authority to issue, deny, modify, or revoke permits to install under the Air Pollution Control Law.

The bill also requires the Director, not later than January 1, 2007, to adopt rules in accordance with the Administrative Procedure Act specifying activities that do not, by themselves, constitute beginning actual construction activities related to the installation or modification of an air contaminant source for which a permit to install is required such as the grading and clearing of land, on-site storage of portable parts and equipment, and the construction of foundations or buildings that do not themselves emit air contaminants. The rules also must allow specified initial activities that are part of the installation or modification of an air contaminant source, such as the installation of electrical and other utilities for the source, prior to issuance of a permit to install, provided that the owner or operator of the source has filed a complete application for a permit to install, the Director or the Director's designee has determined that the application is complete, and the owner or operator of the source has notified the Director that this activity will be undertaken prior to the issuance of a permit to install. The bill declares that any activity that is undertaken by the source under those rules is at the risk of the owner or operator. Further, the bill specifies that the rules do not apply to activities that are precluded prior to permit issuance under specified provisions of the federal Clean Air Act. (Sec. 3704.03(F).)

Monitoring devices

Under current law, the Director may require the person responsible for any air contaminant source to install, employ, maintain, and operate emissions, ambient air quality, meteorological, or other monitoring devices or methods that the Director prescribes. Further, the Director may require the person to sample emissions at such locations, at such intervals, and in such manner as the Director prescribes and to maintain records and file periodic reports with the Director containing information as to location, size, and height of emission outlets, rate, duration, and composition of emissions and any other pertinent information the Director prescribes. In requiring monitoring devices, records, and reports, the Director, to the extent consistent with the federal Clean Air Act, must give

consideration to technical feasibility and economic reasonableness and allow reasonable time for compliance. (Sec. 3704.03(I).)

The bill adds that for sources where a specific monitoring, record-keeping, or reporting requirement is specified for a particular air contaminant in an applicable regulation adopted by the United States Environmental Protection Agency under the federal Clean Air Act, the Director cannot impose an additional requirement other than the requirement specified in that applicable regulation for that air contaminant. Further, the bill specifies that to the extent consistent with the federal Clean Air Act, the Director cannot require an operating restriction that has the practical effect of increasing the stringency of an existing applicable emission limitation or standard. (Sec. 3704.03(I).)

Best available technology

Under current law, the Director is authorized to adopt procedures under which the Director must consider best available technology for the pollutants regulated by the new source performance standards established pursuant to the federal Clean Air Act in order to establish emission limits in permits to install. The emission limits must be equivalent to those new source performance standards unless the standards are more than five years old or have not been reviewed by the United States Environmental Protection Agency for more than five years. In determining what technology is best for a specific source application, the Director may consider the extent to which a technology generates pollution or waste other than air emissions and must approve the most cost effective among essentially similar efficient control technologies as demonstrated by the permit applicant to the satisfaction of the Director. Any facility that is subject to the federal prevention of significant deterioration regulations and major new source review must comply with those regulations. (Sec. 3704.03(T).)

The bill repeals the above provisions and instead authorizes the Director to require new or modified air contaminant sources to install best available technology, but only in accordance with the bill's provisions. With respect to permits to install issued on or after January 1, 2008, best available technology for air contaminant sources and air contaminants emitted by those sources that are subject to standards adopted under specified provisions of the federal Clean Air Act must be equivalent to and no more stringent than those standards. For an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act, best available technology must only be required to the extent required by rules adopted under the Administrative Procedure Act for permit to install applications filed on or after January 1, 2008. (Sec. 3704.03(T).)

Best available technology requirements established in rules adopted under the bill must be expressed only in one of the following ways that is most appropriate for the applicable source or source categories:

- (1) Work practices;
- (2) Source design characteristics or design efficiency of applicable air contaminant control devices;
- (3) Raw material specifications or throughput limitations averaged over a 12-month rolling period; or
- (4) Monthly allowable emissions averaged over a 12-month rolling period (sec. 3704.03(T)(1) to (4)).

Best available technology rules are not permitted to apply to an air contaminant source that has the potential to emit, taking into account air pollution controls installed on the source, less than ten tons of emissions of an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act. Best available technology requirements established in rules adopted under the bill also are not permitted to apply to any existing, new, or modified air contaminant source that is subject to a plantwide applicability limit that has been approved by the Director. (Sec. 3704.03(T).)

Private nuisance actions

Current law includes a clause stating that nothing in the Air Pollution Control Law can be construed to abridge, limit, or otherwise impair the right of any person to damages or other relief on account of injury to persons or property and to maintain any action or other appropriate proceedings therefor. The bill revises this provision by stating that in a private civil action for an alleged nuisance related to the installation or operation of an air contaminant source, it is an affirmative defense if the air contaminant source is in compliance with the terms and conditions of any permit or applicable rules authorizing the installation or operation of the air contaminant source. (Sec. 3704.09.)

HISTORY

ACTION	DATE
Introduced	01-31-06

s0265-i-126.doc/kl

