



WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

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December 9, 1999

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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FILED

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Edward L. Kropp
Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311-2599

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Air Pollutant Emissions Banking and Trading, 45CSR28**

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 Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached.

ANALYSIS OF PROPOSED LEGISLATIVE RULE

Agency: Office of Air Quality
Subject: Air Pollutant Emissions Banking and Trading
CSR Cite: 45 CSR 28
Counsel: JAA

PERTINENT DATES

Filed for public comment: December 2, 1998
Public comment period ended: January 5, 1999
Filed following public comment period: February 1, 1999
Filed LRMRC: February 1, 1999
Filed as emergency: n/a

OFFICE OF AIR QUALITY
SECRETARY OF STATE

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Fiscal Impact: The rule envisions establishing a registry in the Office of Air Quality [OAQ] to administer the program. The program would be self supporting by fees charged by the OAQ for registering emission credits. The estimated annual expense to the agency is \$127,000.00.

ABSTRACT

Brief Summary

This rule is new and establishes a voluntary air pollutant emissions trading program for volatile organic compounds, oxides of nitrogen and all criteria pollutants, excluding ozone. Producers of these emissions will be allowed to bank credits awarded when they surpasses air quality emission standards. Credits are banked and may be used by the producer to counter any violation of emission limits at other times or locations or sold to other producers to help them compensate for any violations. This rule has been proposed to fulfill the requirements of HB. 4578 (1998) which mandates the establishment of this program. The state program must meet minimum federal air quality standards. Interstate trading of credits will be allowed.

Section Summary

Section 1 provides that the purpose of this rule is to establish a voluntary statewide air pollutant emissions trading program.

Section 2 provides definitions. "Baseline" is defined the level of emission beyond which reductions must occur before an emission reduction credit is granted. Credits can only be earned for emission reductions beyond the baseline. "Emission reduction credit" means the unit of reduction in actual emissions measured in tons of pollutant.

Section 3 states that this program is voluntary. Emission reduction credits for stationary sources may only be traded with other stationary sources. Mobile source emission reduction credits may only be traded in conformity with federal requirements for mobile sources.

Section 4 establishes prohibitions and restrictions of trading. No credit may be used when its use would cause a violation of any national ambient air quality standard. In designated non-attainment areas, credits may only be applied to show "reasonable further progress" for the non-attainment area. This section also establishes tonnage limits of emissions which require further air quality analysis prior to allowable use of credits. Section 4.2 prohibits the use of credits in place of installing upgraded technologies as required for certain pollutants under the Clean Air Act. Other specific circumstances where use of credits is prohibited are delineated in Sections 4.3 through 4.13.

Section 5 provides that any credits generated for VOCs or oxides of nitrogen during the "ozone season" may be used in the ozone season, while credits received off season must only be used off season. The "ozone season" is the period when pollution has the greatest impact to the ozone and is defined in the rule as April 1 through October 31 of each year.

Section 6 [page 8] establishes the criteria for setting baselines for emission reduction credits. Specific guidelines are provided for stationary sources, and federal requirements for mobile sources must be followed.

Section 7 provides specific methodology for calculation of emission credits. Credits for reduced emissions can be awarded back to January 1, 1991. Procedures in which credits can be earned include installing new air pollution control equipment,

modification of processes, reformation of fuels or other products, implement of energy conservation programs, operational changes or pollution prevention programs, or shut down of a pollution source.

Section 8 provides emission monitoring verification procedures. All protocols must meet federal requirements for individual pollutants. Any alternative protocol must provide prior agency notice before to undertaking a new banking process. This section provides the calculation methods and other criteria needed for approval for banking of credits.

Section 9 requires that participants must keep records as required by the Director. Records associated with each emission reduction credit must be kept for five years.

Section 10 establishes requirements for use of emission reduction credits within and between geographic areas and sources. Use of credits is authorized between geographic areas and source categories consistent with federal requirements. New or modified facilities emission sources credits can only earn credit if the participant is located in an area of non-attainment. Specific requirements are established for nitrogen dioxides and VOC credits in non-attainment areas.

Section 11 provides that 10% of all emission credits earned shall be retired and not used, the remaining 90% are eligible for trading. All credits expire after ten years if not used.

Section 12 establishes the registration process for credits. Each credit shall be registered with the OAQ. A fee is to be collected to cover the cost of administering the registry. A form shall be provided by the OAQ for each credit granted, providing information about the credit. Documentation and other requirements for credit applicants are also established.

Section 13 sets out specific information that has to be provided to the AOQ prior to being awarded credits. Information required includes: a description of the type of credit claimed and how the credit are proposed to be used; air quality analysis as required by this rule; proof of public notice of the claimed credit; and certification by an responsible official that all information is true and correct. The OAQ will review the application for completeness, and make a determination within 60 days of submission, placing any awarded credits in the registry for use. Other notice requirements are provided. Any emission rates established to accommodate the use of the credits are legally enforceable operating requirements for the participant. Other requirements regarding use of the credits are established.

Section 14 establishes the emission trading registry. Credits granted shall be maintained on the registry. All credits awarded must be posted within five days of being awarded. The fee for the registering a credit is \$2.00 per ton for the first year of the program. After the first year, the agency can assess a credit, not to exceed \$6.00 per ton, based on the expenses incurred by OAQ administering the registry.

Section 15 provides enforcement authority of OAQ. It is the duty of all participants to report any insufficient emission reductions for credits claimed to the agency. A reconciliation period of 30 days may be granted to make up the deficiency if the participant has acted in good faith and the participant meets several other criteria specified in this section. These criteria include: the circumstances causing the shortfall have not occurred before; information on how the insufficiencies were discovered; and providing a corrective statement on actions taken to prevent this shortfall in the future. Failure to report emission reduction shortfalls shall cause a loss of three times the amounts of credits granted to the participant. If the OAQ determines that a shortfall does exist, the burden is on the participant to show that no shortfall exists.

Section 16 establishes requirements for periodic program evaluations and audits. The evaluation shall be conducted at least every three years and shall look at whether the program has improved ambient air quality standards or reduced emissions, and whether the program has caused any adverse localized effects. The agency shall prepare a report and make recommendations on any necessary or recommended changes, and provide any rule modification to the Legislature within 12 months of completion of the report. The agency is also authorizing to audit individual participants to assure that the credits are appropriate and that the procedures used to claim credits meet all state and federal requirements.

Section 17 provides for interstate trading of credits. All credits, except for ozone, are available for interstate credit trading. The agency shall enter into memorandums of understanding with other states to share information and costs associated with the program and place and other necessary restrictions on trading as is determined necessary to meet federal and state program requirements.

AUTHORITY

Statutory authority: W.Va. Code, §22-5-18, which reads as follows:

(a) Within one hundred eighty days after the effective date of this section, 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) Any person reducing air emission from a source to a greater extent than otherwise required by state or federal law is entitled to an emissions credit in the amount of the excess emission reduction. The director shall establish a system by legislative rule for quantifying, verifying and registering all emissions reduction credits, which are eligible 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: *Provided*, That the credits may be transferred by the depositor to the state office of economic development or to a public interest group of the depositor's designation. Except for voluntary reductions of nitrogen oxides, ten percent of any emission credits registered with the director shall be credited to an account for the benefit of the state and retired from future use, if not used within ten years. All other emissions reduction credits registered shall remain in effect until used and debited or retired, if not used

within ten years. 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.

(c) Emission credits registered by a person in accordance with subsection (b) of this section may be used by the person to satisfy emission reduction requirements that would otherwise be required under state or federal law or the credits may be used for the same purpose at another source, by the person who registered the credit or by another person to whom the credit was transferred. Same source use of banked emission credits requires prior notification to the West Virginia office of air quality. The rules may not prohibit the transfer of credits among persons, but shall establish procedures by which transfers are identified, tracked and accounted for in the program. 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.

(d) The director may propose legislative rules for promulgation in accordance with article three, chapter twenty-nine-a of this code, establishing classes of volatile organic compounds, and shall allow banking and trading of different volatile organic compounds within the same class. In lieu thereof, trading shall be allowed among all volatile organic compounds where not inconsistent with federal law and where similar degrees of hazard and qualitative impact are anticipated with respect to air quality. For any emissions banking and trading program used for the purpose of making progress toward attaining or maintaining the national ambient air quality standard for ozone, the director may allow reductions of volatile organic compounds to be substituted for required reductions of oxides of nitrogen, or reductions of oxides of nitrogen to be substituted for required

reductions of volatile organic compounds, where appropriate, if not inconsistent with federal law.

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. However, there are conflicts within the statute itself because the statute establishes specific trading criteria and also provides that the state program must meet necessary federal requirements. Since certain specific provisions of the code conflict or are insufficient to meet federal requirements, the OAQ must propose portions of the rule which conflict with the statute's authorizing language, otherwise the program will not be authorized by the EPA. As a result, for the state to have an approved air pollution emissions banking and trading program, the rule will have to vary from some specific provisions contained in §22-5-28. An example of this is the rule provision requiring a retirement of 10% of all nitrogen oxides credits banked. This is a federal requirement which conflicts with the state statute. The rule adopts this federal requirement.

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 has technical modifications to suggest.