

**WEST VIRGINIA  
SECRETARY OF STATE**

KEN HECHLER

**ADMINISTRATIVE LAW DIVISION**

FORM #4

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**FILED**

**JAN 21 2 56 PM '00**

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF RULE MODIFICATION OF A PROPOSED RULE**

AGENCY: Div Environmental Protection, Office of Air Quality TITLE NUMBER: 45

CITE AUTHORITY: W. Va. Code §22-5-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES  NO


IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 28

TITLE OF RULE BEING PROPOSED: "Air Pollutant Emissions Banking and Trading"

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

  
Authorized Signature



Executive Office  
#10 McJunkin Road  
Nitro, WV 25143-2506  
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## West Virginia Bureau of Environment

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Cecil H. Underwood  
Governor

Michael C. Castle  
Commissioner

January 21, 2000

Ms. Judy Cooper  
Director, Administrative Law  
Division  
Secretary of State's Office  
Capitol Complex  
Charleston, WV 25305

RE: 45CSR28 - "Air Pollutant Emissions Banking and Trading"

Dear Ms. Cooper:

This letter will serve as my approval to file the above-referenced rule as a "Notice of Rule Modification" with your office and the Legislative Rule-Making Review Committee.

Your cooperation in this regard is very much appreciated. If you should have questions or require additional information, please contact Carrie Chambers in my office at 759-0515.

Sincerely yours,

Michael C. Castle  
Commissioner

MCC:cc

Attachment

cc: Karen Watson  
Carrie Chambers

FILED

TITLE 45  
LEGISLATIVE RULE  
DIVISION OF ENVIRONMENTAL PROTECTION  
OFFICE OF AIR QUALITY

JAN 21 2 55 PM '00

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SERIES 28  
AIR POLLUTANT EMISSIONS  
BANKING AND TRADING

**§45-28-1. General.**

1.1. Scope. -- The purpose of this rule is to establish a voluntary statewide air pollutant emissions trading program which provides incentives to make progress toward the attainment or maintenance of the national ambient air quality standards, the reduction or prevention of hazardous air pollutant emissions and the protection of human health, welfare and the environment.

1.2. Authority. -- W.Va. Code §§22-5-1 et seq.

1.3. Filing Date. --

1.4. Effective Date --

**§45-28-2. Definitions.**

2.1. Definitions of all terms used, but not defined in this section shall have the meaning given them in W.Va. Code §22-5-2.

2.2. "Actual emissions" means the average rate, in tons per year, tons per ozone season, or other applicable averaging period at which the source, process, or process equipment actually emitted an air pollutant during a selected averaging period.

2.3. "Area sources" means stationary sources that are not individually included in the stationary source emissions inventory but are reported collectively.

2.4. "Attainment area" means any area of the state designated or redesignated by the administrator of the United States Environmental Protection Agency in accordance with section 107(d) of the federal clean air act and 40 C.F.R. part 81 as having attained the relevant national ambient air quality standard for a given criteria pollutant.

2.5. "Attainment demonstration" means a federally approved plan that is in compliance with the requirements of section 172(c) and section 182 of the federal clean air act.

2.6. "Baseline" means, as it pertains to the generation of emission reduction credits, the level of emissions beyond which reductions must occur for an emission reduction credit to be

generated and shall in all cases be the lower of actual or allowable emissions from the generating source. Alternate emission limits above an applicable reasonably available control technology emission limit may not be used as a baseline. As it pertains to the use of emission reduction credits, the term “baseline” means the allowed level of emissions specified by the applicable requirement with which emission reduction credits will be used to maintain compliance.

2.7. “Bias” means a systematic error in the result of a measurement or estimate.

2.8. “Code” means W.Va. §§22-5-1 et seq.

2.9. “Calendar year” means the period of time between January 1 and December 31 inclusive for a given year.

2.10. “Conservative results” means, as it applies to calculations of emission reduction credits generated or used under this rule, that the number of emission reduction credits generated are not over estimated and that the number of emission reduction credits needed are not under estimated.

2.11. “Criteria pollutants” means air pollutants listed by the administrator of the United States Environmental Protection Agency pursuant to section 108 of the federal clean air act.

2.12. “Curtailement” means a permanent reduction in the hours of operation or the process rate, excluding operational changes to mobile sources.

2.13. “Emission inventory” means the source, process, and process equipment inventory and emission reports required to be submitted annually to the director for sources of an air pollutant, pursuant to the Code and, in addition, the source, process, and emission data for stationary, area, and mobile sources upon which the director evaluates air quality and upon which the federally approved state implementation plan or the most recent state implementation plan revision submittal is based.

2.14. “Emission monitoring and quantification protocol” means an accurate and replicable method or procedure for determining the amount, rate, and characteristics of baseline emissions, and emission reductions below baseline emissions, for purposes of emission reduction credit generation under this rule.

2.15. “Emission reduction credit” means the unit of reduction in actual emissions of a pollutant which is expressed in tons of pollutant reduced during a specified calendar year or ozone season and which is entered into the emission trading registry.

2.16. “Enforceable” means any standard, requirement, limitation, or condition which is established by an applicable federal or state regulation or specified in a permit issued or order entered under a federal or state regulation or which is contained in a state implementation plan approved by the administrator of the United States Environmental Protection Agency and which can be enforced by the director and the administrator of the United States Environmental Protection Agency.

2.17. “Federal clean air act” means the federal Clean Air Act, as amended; 42 U.S.C. §§7401 et seq.

2.18. “Geographic area” means any specific region designated by the director, considering the pollutant, topography, air quality contribution of sources, and any air quality concerns relevant to that region.

2.19. “Hazardous air pollutant” means an air pollutant listed pursuant to 42 U.S.C. §7412(b).

2.20. “Mobile source” means any vehicle or engine that is used for on-highway or non-road purposes, the mobile source-related fuel or fuel delivery system used by the vehicle or engine, or both, and the operation strategies associated with the vehicle or engine. For the purpose of this definition, non-road vehicles and engines include all non-road vehicles and engines used in marine vessels, locomotives, and airplanes, as well as non-road vehicles and engines described in the definition of “non-road” contained in the federal clean air act or federal guidance.

2.21. “National ambient air quality standard” means a primary or secondary standard established by the administrator of the United States Environmental Protection Agency pursuant to section 109 of the federal clean air act.

2.22. “Netting” means the generation and use of an emission reduction credit at a modified stationary source to lower the net emissions increase below significant levels so that the modified stationary source is not subject to new source review requirements under federal or state regulations.

2.23. “New source review” means the permitting requirements for new and modified sources contained in 45CSR13, 45CSR14, 45CSR19 and in parts C and D of title I of the federal clean air act and in 40 C.F.R. §§51.165, 51.166, and 52.21.

2.24. “Nonattainment area” means any area of the state designated by the administrator of the United States Environmental Protection Agency in accordance with section 107(d) of the federal clean air act and 40 C.F.R. part 81 as having not attained the relevant national ambient air quality standard for a given criteria pollutant.

2.25. “Offset” means the use of an emission reduction credit to compensate for emission increases of volatile organic compounds or criteria pollutants, except ozone, from a major new or major modified stationary source subject to the requirements of 45CSR19 and section 173 of the federal clean air act.

2.26. “Overage” means emissions above those specified by an applicable requirement.

2.27. “Ozone season” means the period of time beginning on and including April 1 and continuing through October 31 of each calendar year.

2.28. “Permanent” means that the relevant change in operating procedures, control equipment or other source of emission reductions shall be continuous for the period during which emission reductions are made for the purpose of generating emission reduction credits.

2.29. “Quantifiable” means that the amount, rate, and characteristics of emissions and emission reductions can be measured through an accurate, reliable, and replicable method established by an applicable requirement or approved by the director and the administrator of the United States Environmental Protection Agency.

2.30. “Real” means a change in the operation or control of a source, process, or process equipment that results in a reduction in actual emissions.

2.31. “Reasonable further progress” means any incremental emission reductions required to fulfill the requirements of section 182(b)(1)(a) and (c)(2)(b) of the federal clean air act or specified in the federally approved state implementation plan.

2.32. “Replicable” means the use of a collection, analytical, or quantification method or procedure that will yield results equivalent to results obtained by the application of the method or procedure by different persons.

2.33. “Responsible official” means one of the following:

2.33.a. For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities generating, trading or using emission reduction credits and either (i) the facilities employ more than two hundred fifty (250) persons or have gross annual sales or expenditures exceeding twenty five (\$25) million (in second quarter 1990 dollars), or (ii) a representative delegated with such authority and approved in advance by the director.

2.33.b. For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

2.33.c. For a municipality, State, Federal, or other public entity: either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of the United States Environmental Protection Agency); or

2.33.d. The designated representative delegated with such authority and approved in advance by the director.

2.34. “Retire” means to permanently remove emission reductions or emission reduction credits from circulation to provide an environmental benefit.

2.35. “Shutdown” means the permanent cessation of operation of a source, process, or process equipment for any purpose, excluding vehicle scrappage.

2.36. “Source” means a stationary source, an area source, or a mobile source.

2.37. “State implementation plan” means the state implementation plan and revisions to the plan that have been approved by the administrator of the United States Environmental Protection Agency pursuant to the applicable provisions of the federal clean air act.

2.38. “Stationary source” means any building, structure, facility, installation, process or process equipment which emits or may emit any air pollutant and which is reported as an individual source in the State’s Emission Inventory System or is otherwise individually regulated under specific emission control requirements established pursuant to the Code or federal clean air act.

2.39. “Surplus” means those emission reductions made below an established source baseline which are not required in the state implementation plan, any applicable federal implementation plan, any applicable attainment demonstration, reasonable further progress plan, or maintenance plan and which are not mandated by any applicable requirement.

2.40. “Trade” means the purchase, sale, conveyance, or other transfer of a registered emission reduction credit from one person to another person.

2.41. “Use” means the application of a registered emission reduction credit at a source to compensate for an emission overage of equal magnitude above a level that has been established by an applicable requirement within the specified life of the emission reduction credit or to provide an emissions offset for a new or modified stationary source.

### **§45-28-3. Applicability.**

3.1. This rule applies to all persons who voluntarily choose to participate in an emission reduction credit trading program.

3.2. The use of emission reduction credits under this rule applies only to volatile organic compounds as a class of compounds, oxides of nitrogen as an ozone precursor, and all criteria pollutants, except ozone.

3.3. Emission reduction credits generated by a stationary source may be used by another stationary source in accordance with this rule and in conformance with the federal clean air act. Emission reduction credits may be generated by area and mobile sources only to the extent that such credits are generated in accordance with this rule and employ baseline determinations and quantification protocols approved by the director and the United States Environmental Protection Agency. Emission reduction credits may be used only to comply with conformity with respect to compliance requirements for mobile sources under the federal clean air act and shall be used for conformity only as approved by the director and the United States Environmental Protection Agency.

3.4. Nothing in this rule shall be construed to prohibit offsetting and netting to the extent authorized under 45CSR13, 45CSR14, 45CSR19, sections 165 and 173 of the federal clean air act, or 40 C.F.R. parts 51 and 52.

**§45-28-4. Prohibitions and restrictions.**

4.1. The use of emission reduction credits in an attainment area shall not cause a violation of a national ambient air quality standard, a prevention of significant deterioration increment, or an applicable attainment area maintenance plan. The use of emission reduction credits in a nonattainment area shall result in emission reductions consistent with the requirements for reasonable further progress for the nonattainment area and the attainment demonstration specified in the state implementation plan.

The proposed use of emission reduction credits resulting in increased actual emissions or overages equivalent to or exceeding any of the following amounts at a facility shall require air quality analyses employing procedures approved by the director demonstrating that the provisions of this subsection are met:

PM <sub>10</sub> :	15 tons per year
SO <sub>2</sub> :	40 tons per year
NO <sub>2</sub> /NO <sub>x</sub> :	40 tons per year
CO:	100 tons per year
VOC:	40 tons per year
Lead:	0.6 ton per year

The director on a case-by-case basis may require an air quality analysis for use of emission reduction credits in amounts below those above based upon the proposed short-term rate of emissions, source emissions parameters and air quality in the geographic area of emission reduction credit use.

4.2. The use of emission reduction credits is prohibited for both of the following:

4.2.a. In place of installing equipment determined to constitute, or for the purposes of complying with a best available technology requirement for a specific toxic air pollutant established under 45CSR27, an emission limitation or work practice standard established by federal new source performance standards under section 111 of the federal clean air act and 40 C.F.R. part 60, an emission limitation or work practice standard established under the national emission standards for hazardous air pollutants under section 112 of the federal clean air act and 40 C.F.R. part 61, or a maximum achievable control technology requirement established for a hazardous air pollutant under section 112 of the federal clean air act and 40 C.F.R. part 63.

4.2.b. In place of installing necessary equipment and complying with an emission limitation determined to constitute best available control technology pursuant to section 165 of the federal clean air act or 45CSR14 or the lowest achievable emission rate established under section 173 of the federal clean air act or 45CSR19.

4.3. The use of emission reduction credits shall not result in an actual emissions increase of any hazardous air pollutant at a particular facility nor shall one or more hazardous air pollutants be traded for a different group of hazardous air pollutants, provided that emission reduction credits generated by reductions of hazardous air pollutants which are volatile compounds or particulate matter may be used to allow increases of volatile organic compounds or particulate



matter, respectively, which do not contain hazardous air pollutants.

4.4. The director may prohibit the use of emission reduction credits if he or she determines that such use would be inconsistent with the Code, the federal clean air act or protection of human health and welfare and the environment, including any disproportionate air quality impacts.

4.5. Emission reduction credits for one criteria pollutant shall not be used to allow overages or satisfy emission offset requirements for another criteria pollutant. Emission reduction credits for volatile organic compounds shall not be used to allow emission overages or to satisfy emission offsets for nitrogen oxides or vice versa unless such emissions trading conforms with a federally-approved implementation plan to attain and maintain attainment with the national ambient air quality standard for ozone.

4.6. Emission reduction credits of volatile organic compounds, as a class of compounds, may be used to compensate for emission overages of volatile organic compounds, as a class of compounds, but shall not be used to allow emission overages of a specific volatile organic compound, except where a demonstration has been made to the director that the use would result in an environmental benefit in the use area.

4.7. The use of emission reduction credits to comply with a federal requirement in any area that has or needs a federally approved attainment demonstration or maintenance plan is prohibited where the emission reduction credits were generated through the shutdown of a source, process or process equipment, except where the director has demonstrated, to the satisfaction of the United States Environmental Protection Agency, that the relevant approved attainment demonstration or maintenance plan will not be compromised by the use of these emission reduction credits.

4.8. Nothing in this rule shall be construed to relieve any person of the requirement to obtain a permit under the provisions 45CSR13, 45CSR14, 45CSR19 and 45CSR30. Emission reduction credits may only be used in a manner consistent with federal new source review requirements.

4.9. The use of sulfur dioxide or oxides of nitrogen emission reduction credits under this rule at affected sources subject to sulfur dioxide or oxides of nitrogen allowance allocations under the 1990 amendments to title IV of the clean air act is allowed only to the extent that the sulfur dioxide or oxides of nitrogen emission reduction credits are not used or transferred under the 1990 amendments to title IV of the federal clean air act. Nothing in this rule shall be construed to interfere with the free trade provisions under the 1990 amendments to title IV of the federal clean air act.

4.10. Emission reductions made to correct violations of any applicable emission standard or limitation or emission reductions resulting from a source, process, or process equipment in violation of an applicable monitoring, reporting, or recordkeeping requirement shall not be eligible to generate emission reduction credits to be used or traded under this rule.

4.11. Any source which participates in a regional nitrogen oxides trading program established pursuant to final rules promulgated by the United States Environmental Protection Agency shall be prohibited from generating, trading or using nitrogen oxides emissions reduction credits under this rule.

4.12. Emission reductions that are not real, surplus, enforceable, permanent, and quantifiable shall not be eligible for emission reduction credit generation, use, or trading.

4.13. Where emission reduction credits are generated and used within the same facility, the use of emission reduction credits for a specific pollutant shall not result in an overall increase in the emissions of the specific pollutant from that facility.

4.14. An emission reduction credit represents a limited authorization to emit an air pollutant and does not have associated property rights.

#### **§45-28-5. Ozone season restrictions.**

5.1. Emission reduction credits for volatile organic compounds and oxides of nitrogen generated during an ozone season may be used any time during a calendar year, but emission reduction credits used for the purpose of compliance with an ozone season emission limitation for volatile organic compounds or oxides of nitrogen shall have been generated during an ozone season.

5.2. Emission reduction credits generated for volatile organic compounds and oxides of nitrogen exclusively during the non-ozone season shall be used only during the non-ozone season in the same or a subsequent calendar year.

#### **§45-28-6. Emission reduction credit baseline.**

6.1. The emission baseline from which emission reduction credits may be generated shall be established to determine the amount of actual emissions from a source, process, or process equipment before the initiation of an activity to reduce emissions for the purposes of creating emission reduction credits. The emission baseline shall be expressed in tons of pollutant emitted per ozone season or per year.

6.2. The emission baseline from which emission reduction credits may be generated shall be determined by using the most representative, accurate, and reliable process and emission data available for the source, process, or process equipment according to the following hierarchy:

6.2.a. When required to demonstrate compliance with an applicable requirement or where such measurement is practicable and reasonable, continuous emission monitoring or other direct measurement, parametric monitoring, or other surrogates for the measurement of emissions shall be used to determine the emission baseline. The baseline shall be established for the 2-year period or two (2) ozone seasons before the date that an emission reduction occurs, unless it can be demonstrated to the director that a different time period is more representative of historical operations and is consistent with the state implementation plan.

6.2.b. Where continuous emission monitoring or other direct measurement, parametric monitoring, or other surrogate measurement of emissions is not required by an applicable requirement or is not practical and reasonable, the emissions shall be calculated according to whichever of the following provisions is applicable:

6.2.b.1. For a stationary source, the emission baseline shall be established by using process and emission data for a source, process, or process equipment for the 2-year period or two (2) ozone seasons before the date that an emission reduction occurs, unless it can be demonstrated to the director that a different time period is more representative of historical operations and is consistent with the state implementation plan. The emission baseline from which emission reduction credits may be generated shall be measured using an emission monitoring and quantification protocol which satisfies the requirements of section 8. The emission baseline shall be determined by using actual emission data or operational parameters of process equipment, actual operating hours, production rates and quantities of materials processed, stored, or combusted, and the emission monitoring methods specified by an applicable requirement or approved by the director. The stationary source baseline shall be calculated by using the following equation:

$$BL = ER \times CU \times H$$

Where:

*BL* = Baseline, expressed in tons of pollutant per ozone season or year, whichever is applicable.

*ER* = The lower of the actual or allowable emission rate for the source, process, or process equipment, expressed as the quantity of emissions per unit of production, time, or other parameter consistent with the units of the capacity utilization factor and calculated pursuant to this subdivision and subsection 6.3.

*CU* = Capacity utilization factor, which is representative of the historical level of operation or production rate of the source, process, or process equipment based on average historical values calculated pursuant to this subdivision and subsection 6.3. The capacity utilization factor shall not exceed an emission standard or limitation specified by an applicable requirement.

*H* = Hours of operation of the source, process, or process equipment based on the average of actual operating hours representative of historical operations as determined pursuant to this subdivision.

6.2.b.2. For area and mobile sources the emissions baseline shall be determined by procedures approved by the director and the United States Environmental Protection Agency.

6.3. Quantification of emissions for purposes of emission reduction credit generation for criteria pollutants, volatile organic compounds, and oxides of nitrogen, shall be based on a time period specified by an applicable requirement. Where an applicable requirement does not exist for quantifying emissions, the director shall establish an appropriate averaging time for purposes of calculating emission reduction credits not to exceed a 30-day rolling average determined on a daily basis.

6.4. Quantification methods that are more representative, accurate, and reliable than methods specified by an applicable requirement may be used to determine the emission baseline upon approval by the director and the administrator of the United States Environmental Protection Agency.

6.5. Any baseline calculated pursuant to subsection 6.2 shall be adjusted by subtracting from the baseline any emission increases from another source, process, or process equipment in the same source category and under common ownership or control resulting from a shutdown or curtailment of the source, process, or process equipment making the emission reductions. If no such emission increases will occur as a result of shutdown or curtailment, the person registering emission credits generated from shutdown or curtailment shall so certify in the notice provided under section 12.

**§45-28-7. Eligibility of emission reductions for emission reduction credits; generation and calculation.**

7.1. For emission reductions to be eligible to generate emission reduction credits, all of the following conditions shall be met:

7.1.a. For all criteria pollutants, in addition to volatile organic compounds and oxides of nitrogen, the emissions shall be consistent with West Virginia's State Emission Inventory System.

7.1.b. The emission reductions shall have been generated on or after January 1, 1991, and shall not have been used or have been committed to satisfy prior or continuing emission offset requirements under section 173 of the federal clean air act or 45CSR19, for demonstrating attainment or maintenance of any applicable national ambient air quality standard under the state implementation plan, or for netting requirements under section 173 of the federal clean air act, 45CSR19, and section 165 of the federal clean air act and 45CSR14, or for emission netting if authorized under 45CSR13.

7.1.c. The emission reductions shall be real, surplus, enforceable, permanent, and quantifiable.

7.1.d. Persons intending to register emission reduction credits associated with the shutdown of a source, process, or process equipment which occurred prior to the effective date of this rule shall, within sixty (60) days of the effective date of this rule, provide notice to the director of such intent to register emission reduction credits in accordance with Section 12 of this rule. Failure to timely submit a notice of intent in accordance with subsection 12.7 shall make emission reductions associated with such shutdowns ineligible for registration as emission reduction credits.

7.2. Emission reductions for generation of emission reduction credits may be created using any of the following procedures:

7.2.a. Installation or modification of air pollution control equipment.

7.2.b. Modification of process or process equipment.

7.2.c. Reformulation of fuels, raw materials or products.

7.2.d. Implementation of energy conservation programs.

7.2.e. Implementation of operational changes.

7.2.f. Implementation of pollution prevention programs.

7.2.g. Curtailment or shutdown of a source, process, or process equipment.

7.2.h. Implementation of early emission reductions before any compliance dates established by an applicable requirement.

7.2.i. Implementation of area and mobile source controls if a baseline can be established using procedures approved by the director and the United States Environmental Protection Agency and emission monitoring and quantification protocols and compliance monitoring methods are approved by the director and the administrator of the United States Environmental Protection Agency.

7.2.j. Any activity which is approved by the director, results in emission reductions, and otherwise conforms with the provisions of this rule and the federal clean air act.

7.3. Emission reductions eligible for registration as emission reduction credits shall be determined by either of the following methods, as applicable:

7.3.a. For emission reductions that have already occurred, subtracting from the baseline the actual annual emissions after the emission reduction method has been implemented, which shall be calculated in a manner consistent with that used to establish the baseline pursuant to section 6.

7.3.b. For emission reductions that will occur, subtracting from the baseline the expected annual emissions after the proposed emission reduction method is implemented, calculated in a manner consistent with that used to establish the baseline pursuant to section 6.

7.4. Emission reduction credits may be generated for volatile organic compounds, as a class of compounds, and criteria pollutants, except ozone, by emission reductions resulting from the installation of a maximum achievable control technology required for a hazardous air pollutant pursuant to section 112 of the federal clean air act. Emission reduction credits generated in this manner shall not be used to satisfy emission offset requirements under section 173 of the federal clean air act or 45CSR19.

7.5. Emission reductions resulting from a curtailment of operations at a source, process, or process equipment shall be eligible for emission reduction credit generation only if the notice of emission reduction credit generation and certification corresponding to the emission reductions is submitted before the curtailment of operations.

7.6. Emission reduction credits shall have been generated before being used or traded.

**§45-28-8. Emission monitoring and quantification.**

8.1. Each person who generates emission reduction credits under this part shall comply with an emission monitoring and quantification protocol which has been federally approved for the purpose of emission reduction credit trading, where such a protocol exists for the source category. Modifications to an existing federally approved emission monitoring and quantification protocol for purposes of emission reduction credit trading shall be approved by the director and federally approved as a revision to West Virginia's State Implementation Plan.

8.2. Where a federally approved emission monitoring and quantification protocol for the purpose of emission reduction credit trading does not exist for a source category, a person who generates emission reduction credits under this rule shall comply with one of the following:

8.2.a. An existing emission monitoring and quantification protocol which has been approved by the director and the United States Environmental Protection Agency for purposes of demonstrating compliance with applicable requirements, provided such protocol meets the criteria specified in subsection 8.7, and, if applicable, subsection 8.8.

8.2.b. A new or alternate emission monitoring and quantification protocol which has been approved by the director and the United States Environmental Protection Agency for purposes of emission reduction credit trading pursuant to subsection 8.3.

8.3. The owner or operator of a source seeking approval to use a new or alternate emission monitoring and quantification protocol shall submit a written request to the director not less than thirty (30) days before the submittal of the notice of generation. The written request shall include the information specified in subsections 8.7 and 8.8, as applicable.

8.4. Emission reduction credits shall be quantified in units of tons per year for criteria pollutants, excluding oxides of nitrogen and ozone, and in units of tons per year or tons per ozone season for volatile organic compounds and oxides of nitrogen.

8.5. Emission monitoring and quantification protocols to quantify emissions, emission reductions, and the use of emission reduction credits shall be credible, accurate, workable, enforceable, and replicable and may employ any of the following:

8.5.a. Continuous emission monitoring, parametric monitoring, stack testing, sampling of fuels and materials, or other direct and indirect measurements of emissions.

8.5.b. Calculations using equations that are a function of process and control equipment design and operation.

8.5.c. Mass-balance calculations.

8.5.d. Emission factors, emission calculation methods, or emission quantification protocols approved for use at the time of emission reduction generation by the director and the administrator of the United States Environmental Protection Agency.

8.6. Methods, procedures, and calculations used to quantify emissions and emission reductions must ensure that conservative results are obtained.

8.7. Emission monitoring and quantification protocols to be used for purposes of emission reduction credit generation under this rule shall meet all of the following requirements, as applicable:

8.7.a. Actual, direct emissions data shall be used where it is available.

8.7.b. Sufficient data shall be collected to characterize the source, process, or process equipment and its operation.

8.7.c. Instrumentation shall have sufficient sensitivity, selectivity, precision, accuracy, and range to measure the applicable parameters which characterize the operation of the source, process, or process equipment.

8.7.d. Where applicable, quality assurance/quality compliance plans for data collection shall be adhered to.

8.7.e. Applicable test methods which have been approved by the United States Environmental Protection Agency shall be used where available, unless an alternate test method is approved by the director and the United States Environmental Protection Agency.

8.7.f. Where applicable, oxides of nitrogen emissions shall be measured as nitrogen oxide and nitrogen dioxide, but shall be reported on a nitrogen dioxide basis.

8.7.g. Where applicable, volatile organic compound emissions shall be calculated on the basis of actual emissions if the source, process or process equipment uses specified measurement techniques. If volatile organic compound emission measurements are based on a surrogate compound, but information is available on the emissions composition, then volatile organic compound emissions shall be calculated based on the known composition.

8.7.h. Continuous or predictive emission monitoring systems must be used where they are already in place, and the following requirements shall be met by these monitoring systems as applicable or appropriate for the source, process, or process equipment:

8.7.h.1. The provisions of 40 C.F.R. Part 60, Appendix B and Appendix F, for continuous emission monitoring systems.

8.7.h.2. The provisions of 40 C.F.R. Part 75 for continuous emission monitoring systems measuring sulfur dioxide and nitrogen oxides.

8.7.h.3. Promulgated state and federal procedures which are intended for the development of emission monitoring and quantification protocols.

8.8. Notwithstanding the provisions of subsection 8.7, emission monitoring and quantification protocols for use under this rule for the generation of emission reduction credits at

mobile sources shall be consistent with the following, as applicable:

8.8.a. Federally approved mobile models for the emission reduction credit generation year.

8.8.b. Measurement and calculation methods which have been approved for use by the director and the administrator of the United States Environmental Protection Agency.

8.8.c. Promulgated state and federal procedures which are intended for the development of emission monitoring and quantification protocols.

8.9. The director shall make any pre-approved emission monitoring and quantification protocol available upon request.

**§45-28-9. Recordkeeping requirements.**

9.1. A person who generates, uses, or trades emission reduction credits under this rule shall keep records of all information required to be submitted pursuant to sections 12 and 13, as applicable, as well as other records required under this rule and any other records specified by an applicable requirement.

9.2. Records shall be kept in a manner acceptable to the director and shall be maintained at the source or sources where the emission reduction credits are generated and used or other location acceptable to the director. The records associated with each emission reduction credit shall be maintained by the generator, trader and user for not less than five (5) years after the date each emission reduction credit is used or retired.

**§45-28-10. The use of emission reduction credits within and between geographic areas and sources.**

10.1. Except as otherwise provided by the director or the provisions of subsection 4.1, the use of emission reduction credits may take place within and between geographic areas and source categories as specified in this section.

10.2. Intersector use of emission reduction credits among mobile sources, stationary sources, and area sources may occur, only to the extent allowed under section 3, section 4 and the federal clean air act.

10.3. Emission reduction credits used to provide emission offsets at a new or modified source shall be in compliance with all of the following provisions:

10.3.a. Be generated in the nonattainment area where the new or modified source is to be located or an adjacent nonattainment area of equal or higher classification that contributes to the exceedance of a national ambient air quality standard in the nonattainment area where the new or modified source is to be located.



10.3.b. Be in accordance with sections 173 and 182 of the federal clean air act and 45CSR19. Where emission reduction credits are used to comply with new source review requirements, all of the following conditions shall be met:

10.3.b.1. The director shall approve the use of emission reduction credits that meet the following criteria:

10.3.b.1.A. For a new source, the emission reduction credits shall cover a minimum of 2½ years of operation.

10.3.b.1.B. For a modified source, the emission reduction credits shall cover the period of time beginning on the date of issuance of the new source review permit and continuing until the date of issuance or renewal of an operating permit.

10.3.b.1.C. For renewal of an operating permit, the emission reduction credits shall cover a period of five (5) years or the term for which the permit is issued.

10.3.b.2. The new source review permit shall contain an enforceable commitment that, before receiving any operating permit or operating permit renewal, the operating permit shall contain an enforceable condition that requires the source to obtain offsets for a period of five (5) years or the period of time for which the operating permit is issued before continuing to operate.

10.3.b.3. Operating permits shall contain an enforceable condition that requires the source to either provide or obtain additional offsets before renewal of an operating permit and continuing to operate.

10.4. Oxides of nitrogen emission reduction credits may be used under this rule in any area of the state of West Virginia, provided at least one of the following conditions is satisfied:

10.4.a. The emission reduction credits are proposed to be used in the same geographic area where the emission reduction credits were generated.

10.4.b. The geographic area where the emission reduction credits are proposed to be used is an attainment area for nitrogen dioxide.

10.4.c. The geographic area where the emission reduction credits are proposed to be used is a nonattainment or maintenance area for nitrogen dioxide, and the area where the emission reduction credits were generated is an adjacent area which contributes to the nitrogen dioxide air quality problem in the proposed use area.

10.5. Volatile organic compound emission reduction credits are eligible to be used under this rule in any area of the state of West Virginia which is an attainment area for ozone not subject to a maintenance plan.

10.6. The use of volatile organic compound emission reduction credits in an ozone nonattainment or maintenance area shall only be allowed where at least one of the following conditions is satisfied:

10.6.a. The source, process, or process equipment which generated the emission reduction credits is located in the ozone nonattainment or maintenance area where the emission reduction credits are proposed to be used.

10.6.b. The source, process, or process equipment which generated the emission reduction credits is located within 100 kilometers of the nearest border of the nonattainment or maintenance area where the emission reduction credits are proposed to be used.

10.7. The use of other criteria pollutant emission reduction credits shall only be allowed where at least one of the following criteria and the provisions of subsection 4.1 are satisfied:

10.7.a. The emission reduction credits are proposed to be used in the same geographic area where the emission reduction credits were generated.

10.7.b. The geographic area where the emission reduction credits are proposed to be used is an attainment area for the criteria pollutant and the source generating the credits used contributes to air quality in the area impacted by the user source.

10.7.c. The geographic area where emission reduction credits are proposed to be used is a nonattainment or maintenance area for the criteria pollutant, and the area where the emission reduction credits were generated is an adjacent area which contributes to the relevant air quality problem in the proposed use area.

**§45-28-11. Emissions reduction credit discounts and emission reduction credit retirement for air quality benefit.**

11.1. Unless otherwise provided under this rule, other rules promulgated under the Code or the federal clean air act, emission reduction credits entered into the registry created pursuant to section 14 shall be discounted or retired as follows:

11.1.a. For all criteria air pollutants, volatile organic compounds and nitrogen oxides, ten (10) percent of all creditable emission reductions shall be retired to provide a net air quality benefit from trading. The remaining ninety (90) percent of creditable emission reductions shall be listed on the registry as emission reduction credits, and shall be eligible for trading or use for a period of ten (10) calendar years from the year of emission reduction credit generation. All such emission reduction credits unused at the end of the ten (10) year period shall also be retired to provide a net air quality benefit from trading.

11.1.b. Emission reduction credits generated by source shutdowns which are in compliance with all eligibility requirements of this rule and which were generated after January 1, 1991 and before the effective date of this rule shall be discounted by 50%. The discounted emission reduction credits shall be retired in lieu of the 10% air quality benefit discount provided under subdivision 11.1.a.

11.2. Any person who generates or acquires emission reduction credits may voluntarily retire such emission reduction credits to benefit air quality.

11.3. The director shall retire and remove from the registry, created pursuant to section 14, all excess emission reduction credits donated to the director under subsection 15.3.

11.4. Emission reduction credits generated by emission reductions which are necessary to comply with a proposed applicable requirement, and which occur after the date the applicable requirement is proposed and before final compliance dates specified by or pursuant to the rule creating the applicable requirement, may be used or traded for a period of 5 calendar years after the year of generation or 1 calendar year after the effective date of final compliance, whichever occurs first.

**§45-28-12. Registration of emission reductions for the generation of emission reduction credits to be used or traded.**

12.1. A person applying to register emission reductions to generate emission reduction credits shall provide, to the director, notice and certification of the emission reductions being generated and shall pay a registration fee in accordance with section 14 and subsection 12.5.

12.2. For emission reductions generated between January 1, 1991 and the effective date of this rule, the notice and certification required by subsection 12.1 shall be submitted within twelve (12) months of the effective date of this rule.

12.3. The notification required by subsections 12.1 and 12.2 shall utilize a form provided by the director and include all of the following information:

12.3.a. The name and location, by address and county, of the sources, processes, or process equipment at which emission reductions have been or will be made and where the records are or will be kept.

12.3.b. The name, address, and telephone number of the responsible official providing notice and certification of the emission reductions being generated.

12.3.c. The total emission reductions, in tons per year or tons per ozone season, by pollutant and attainment status for the pollutant in the generation source area, to be registered.

12.3.d. An identification of the source, process, or process equipment at which the emission reduction occurs to generate an emission reduction credit.

12.3.e. A brief description of the method or methods used to reduce emissions.

12.3.f. The effective date that the emission reduction occurred or will occur and the duration of the emission reduction strategy.

12.3.g. Calculations of either of the following, as applicable:

12.3.g.1. For emission reductions that have already occurred, actual emissions after the emission reduction method has been implemented, which shall be calculated in a manner consistent with the method used to calculate the baseline.

12.3.g.2. For emission reductions that will occur, expected emissions after the proposed emission reduction method is implemented, which shall be calculated in a manner consistent with the method used to calculate the baseline.

12.3.h. The following documentation shall be included for the emission monitoring and quantification protocol required by section 8:

12.3.h.1. An identification of all applicable emission monitoring and quantification protocols used for purposes of emission reduction credit generation and for purposes of determining compliance with applicable air quality requirements, where such protocols exist. The identification of the specific emission monitoring and quantification protocol used to quantify emissions for mobile sources shall be provided where applicable.

12.3.h.2. A description of the emission monitoring and quantification protocols considered for use under this rule, and an explanation of the rationale for using the chosen emission monitoring and quantification protocol.

12.3.h.3. Example calculations, including both of the following:

12.3.h.3.a. Calculations of baseline emissions and emission reductions from the baseline.

12.3.h.3.b. Calculations to substantiate the measured activity level during the baseline determination period and the period of emission reduction credit generation. Units of operation or activity level during both the baseline determination period and the period of emission reduction credit generation shall be appropriate for the specified emission monitoring and quantification protocol and shall be consistent with each other.

12.3.h.4. The location of all data, including test runs.

12.3.h.5. An explanation of steps taken to address bias.

12.3.h.6. Where use of an alternative emission monitoring and quantification protocol is proposed in place of an emission monitoring and quantification protocol specified by an applicable requirement, technical information to demonstrate that the proposed alternative method is at least as credible, accurate, workable, enforceable, and replicable as the method specified by the applicable requirement.

12.3.i. If the emission reductions which generated the emission reduction credits include reductions of hazardous air pollutant emissions or were accompanied by or cause increases in criteria air pollutants or hazardous air pollutants, such decreases or increases must be identified by pollutant and amount of pollutant. The sources at which such increases or decreases occur

must also be identified if different than the sources identified in subdivision 12.3.d.

12.3.j. Any other information required on the form provided by the director which the director has found reasonably necessary to determine if the generation of emission reduction credits complies with the Code and applicable state and federal rules.

12.4. The notice required under this rule shall be accompanied by a certification by the responsible official of all of the following:

12.4.a. That to the best of the responsible official's knowledge, the information contained in the notice is true, accurate, and complete.

12.4.b. That the emission reductions generated are real, surplus, enforceable, permanent, and quantifiable.

12.4.c. That the emission reduction strategy began on or before the period of emission reduction credit generation start date specified in a notice determined to be complete by the director, and that the emission reduction strategy will either continue through, or will terminate upon, the period of emission reduction credit end date specified in a notice determined to be complete by the director .

12.4.d. That the emission reductions were not used elsewhere as emission reduction credits or retired.

12.4.e. That the emission reduction credits and any associated emission increases or decreases have been calculated in accordance with an emission quantification protocol meeting the requirements of this rule and comply with all eligibility, prohibition and limitation provisions of this rule.

12.4.f. That emission reductions being registered from a source shutdown or curtailment will not result in emission increases from other sources, processes, or process equipment under common control.

12.5. The notice and certification required under this rule shall be submitted to the director by certified mail or, if authorized by the director, electronically for a determination of completeness. Within sixty (60) days of receipt of the notice and certification for emission reductions generated after the effective date of this rule, the director shall make a determination and provide a written response to the person submitting the notice and certification as to the completeness of the submittal. For emission reductions generated before the effective date of this rule, the director shall make such determination and provide a written response within one hundred and eighty (180) days of receipt of the notice and certification. A determination of completeness or incompleteness made by the director shall be considered a final agency decision subject to review by the air quality board pursuant to the Code and W.Va. Code §§22B-1-1 et seq. A determination of completeness does not constitute an approval by the director. The director shall notify the person requesting registration of emission reduction credits of the amount of registration fees required pursuant to subsection 14.6 within the notice of completeness provided under this subsection. Within five (5) business days of the date of receipt of payment of the required registration fee the director shall enter the information required by

section 14 in the emission trading registry. Immediately upon entry in the emission trading registry, the information in the notice and certification shall be available to the public, except for information that is determined to be confidential under W.Va. Code §22-5-10 and 45CSR31. If the notice and certification are determined by the director to be incomplete, the proposed emission reductions are not eligible to generate emission reduction credits and no registration fee shall be assessed. A notice of incompleteness shall not preclude or prejudice a person from submitting a corrected or revised notice and certification.

12.6. The methods used, or operational changes made, to create emission reductions for the generation of emission reduction credits for which a complete notice and certification is submitted to the director shall become legally enforceable operating requirements upon the start date of the period of emission reduction credit generation, specified in a notice determined to be complete by the director. The methods used and operational changes made to reduce emissions and the conditions and requirements for the generation of emission reduction credits shall continue to be legally enforceable operating requirements throughout the period of emission reduction credit generation, and shall be incorporated into an operating permit, permit to construct/modify, or permit to operate if required by the Code, rules promulgated thereunder, or the federal clean air act.

12.7. The notice of intent required by subdivision 7.1.d. shall be received by the director not later than the date sixty (60) calendar days after the effective date of this rule and shall contain the following information:

12.7.a. The names, unit identification numbers (if any) and location, by address and county, of the sources, processes, or process equipment that have been shutdown for which emission reduction credit registration is intended;

12.7.b. The month and year in which the sources identified in subdivision 12.7.a were shutdown; and

12.7.c. For each pollutant for which emission reduction credit registry will be sought, an estimate of the maximum amount of emissions reductions, in tons, which are associated with each source, process, or process equipment shutdown.

#### **§45-28-13. Registration of use, trading or retirement of emission reduction credits.**

13.1. A person applying to use, trade or retire emission reduction credits under the provisions of this rule shall provide prior notice to the director.

13.2. The notice to use emission reduction credits shall utilize a form provided by the director and include all of the following information:

13.2.a. The name and location, by address and county, of the source, process, or process equipment at which the emission reduction credits are proposed to be used.

13.2.b. The name, address, and telephone number of the responsible official providing notice of the proposed use or trading of emission reduction credits.

13.2.c. The number of emission reduction credits to be used at each source, process or process equipment unit in tons per year or tons per ozone season and the maximum short-term emission rate that will occur during the emission reduction credit use period based upon the underlying applicable requirement or otherwise provided in this rule.

13.2.d. A description of the source, process, or process equipment at which the emission reduction credits are proposed to be used.

13.2.e. A specific identification of the proposed use.

13.2.f. A copy of the notice or notices of emission reduction credit generation and, if applicable, emission reduction credit transfer/trade corresponding to the emission reduction credits which are proposed to be used.

13.2.g. An identification of all applicable requirements being complied with through the use of emission reduction credits and the emission monitoring and quantification protocols used to quantify emissions and to determine compliance with all applicable requirements.

13.2.h. The effective dates of use of the emission reduction credits, and calculations demonstrating compliance through the use of emission reduction credits.

13.2.i. The air quality analysis required under subsection 4.1. This analysis must utilize the short-term emission rate(s) provided under subdivision 13.2.c.

13.2.j. If the new or increased emissions or emission overages at the sources using emission reduction credits entails or includes emissions of a hazardous air pollutant at such sources, such hazardous air pollutant must be identified and quantified.

13.2.k. A copy of an affidavit of publication for a legal ad published in a newspaper of general circulation in the area where the credits will be used notifying the public of the intent to use emission reduction credits, and including a summary of the information in subdivisions 13.2.a., 13.2.b., 13.2.c., 13.2.h., and 13.2.j.

13.2.l. Any other information required on the form provided by the director which the director has found reasonably necessary to determine if the proposed use of emission reduction credits complies with the Code and applicable state and federal rules.

13.3. The notice to trade or retire emission reduction credits shall include all of the following information:

13.3.a. The name and mailing address of the company which is proposing to trade or retire the emission reduction credits.

13.3.b. The name, address, and telephone number of the responsible official providing notice of the proposed trade or retirement of emission reduction credits.

13.3.c. The name and mailing address of the company which is proposing to receive the emission reduction credits (for trading only).

13.3.d. The name, address, and telephone number of the contact person for the company which is proposing to receive the emission reduction credits (for trading only).

13.3.e. An identification of the registry series number corresponding to the emission reduction credits which are proposed to be traded or retired.

13.3.f. The number of emission reduction credits by pollutant, in tons per year or tons per ozone season, which are proposed to be traded or retired.

13.4. Each of the notices required by subsections 13.2 and 13.3 shall be accompanied by a certification, by the responsible official, that the information contained in the notice is true, accurate, and complete. Where notice to use emission reduction credits is being provided pursuant to subsection 13.2, a certification that the source, process, or process equipment shall be operated in compliance with all applicable requirements and the conditions and requirements for the use of emission reduction credits under this rule shall also be included, provided that certification does not have to assert that the use of emission reduction credits is consistent with attainment area maintenance plans or nonattainment area reasonable further progress requirements or attainment demonstrations.

13.5. The notices and certifications required by subsections 13.2, 13.3, and 13.4 shall be submitted to the director by certified mail or, if authorized by the director, electronically for a determination of completeness. Within sixty (60) days of receipt of the notice and certification, the director shall make a determination, and provide a written response to the person submitting the notice and certification, as to the completeness of the submittal. A determination of completeness or incompleteness made by the director shall be considered a final agency decision subject to review by the air quality board pursuant to the Code and W.Va. Code §§22B-1-1 et seq. A determination of completeness does not constitute an approval by the director. If the notice is determined to be complete, the director shall, within five (5) business days, enter the information required by section 14 into the emission trading registry. The information in the notice and the certification shall be available to the public immediately upon entry in the emission trading registry, except for information that is determined to be confidential under W.Va. Code §22-5-10 and 45CSR31. If the notice is determined by the director to be incomplete, the proposed use or trade of emission reduction credits shall not occur. A notice of incompleteness shall not preclude or prejudice a person from submitting a corrected or revised notice and certification.

13.6. The director shall not issue a notice of completeness for a proposed use of emission reduction credits until he or she determines that the air quality protection and maintenance provisions of subsection 4.1 are satisfied based upon the information contained in the notice required by subsection 13.2 and/or the director's independent analyses of air quality impacts and attainment and maintenance plan requirements for the areas affected by the emission reduction credits use. The director shall send a written response to the person who submitted the notice of use and certification determined to be inconsistent with the provisions of subsection 4.1 explaining why the determination was made. A determination of inconsistency with the provisions of subsection 4.1 by the director shall not preclude or prejudice a person applying to use emission reduction credits from submitting a revised notice and certification to address the inconsistencies identified by the director.



13.7. The methods used, operational changes made and maximum short-term emission rates established to accommodate the use of emission reduction credits for which a complete notice is submitted to the director pursuant to subsection 13.2 shall become legally enforceable operating requirements upon the effective date of the notice of completeness issued by the director, or the beginning date of the emission reduction credit use period specified in a notice determined to be complete by the director. The conditions and requirements for the use of emission reduction credits shall continue to be legally enforceable operating requirements throughout the emission reduction credit use period, and shall be incorporated into a permit to construct/modify or an operating permit as required by the Code, rules promulgated thereunder, or the federal clean air act.

13.8. A person who uses emission reduction credits under this rule shall include the price paid for the emission reduction credits in the notice required by subsection 13.2 or by separate notice to the director within seven (7) business days of the starting date of the use period.

13.9. A person who has registered the use of emission reduction credits with the director shall be allowed a period of time, not to exceed sixty (60) days, commencing with the end of the use period specified in the notice of use to amend the notice of use and submit a notice and certification under section 12 to register any unused emission reduction credits in excess of the quantity needed for the uses specified in the original notice of use.

13.10. If a facility proposing to use emission reduction credits is located within one hundred (100) kilometers of any Class I area, the notice provided to the director under this subsection for emission reduction credit use shall be provided to the federal land manager for such Class I area at the time that it is submitted to the director.

#### **§45-28-14. Emission trading registry; registration fees.**

14.1. The director shall establish and maintain a publicly available emission trading registry for all of the following purposes :

14.1.a. Registering emission reductions to generate emission reduction credits.

14.1.b. Recording and tracking the use and trading of emission reduction credits.

14.1.c. Registering emission reductions and emission reduction credits contributed to the state for retirement or discounted as an air quality benefit pursuant to section 11 and subsection 15.3 .

14.2. The emission trading registry shall contain the information required by subsections 12.3, 13.2, and 13.3 and the effective date and the life of the emission reduction credits that have been or will be generated.

14.3. The emission trading registry shall be continually updated by the director.

14.4. The director shall make program activity information publicly available through continuous updates to the emission trading registry.

14.5. The responsible official who certified the generation, use, or trade of emission reduction credits shall have five (5) business days after the day of posting on the emission trading registry to notify the director of any data entry errors by the director and necessary corrections to the information posted on the emission trading registry. The director shall promptly correct any data entry errors on the emission trading registry.

14.6. Any person seeking registration of emission reduction credits in the registry shall pay to the director a registration fee in accordance with this subsection within thirty (30) days of notification by the director of registration completeness as provided under subsection 12.5. Emission reduction credits shall not be listed in the registry by the director until payment of such fee is received by the director. A fee of two dollars (\$2.00) per ton of emission reductions credits registered shall be paid for emission reductions credits registered between the effective date of this rule and the end of the first full state fiscal year following the effect date of this rule. Beginning on July 1 of the subsequent state fiscal year and on July 1 of each year thereafter, the director shall establish a registration fee for each pollutant, not to exceed six dollars (\$6.00) per ton registered, to cover, to the extent possible, the projected cost for establishing and administering the emission trading program. Fees shall not be refunded for emission reductions credits withdrawn from the registry.

14.7. The director may invalidate, revise or remove emission reduction credits from the registry as provided in this rule or to conform to other federal or state rules under the Code and the federal clean air act requiring such action.

#### **§45-28-15. Enforcement.**

15.1. Notwithstanding another person's liability, negligence, or false representation, a person who owns or operates a source, process, or process equipment and who participates in the generation, use, or trading of emission reduction credits under this rule shall be solely responsible to assure that any affected source, process, or process equipment under his or her ownership or control is in compliance with all applicable requirements.

15.2. A person who, without being notified by the director, discovers and provides a written notice of insufficient emissions reductions to the director stating that the overall emission reductions achieved by the emission reduction credits generated and registered, used, or traded by the person are not real, surplus, enforceable, permanent, and quantifiable may be provided a reconciliation period of not more than thirty (30) days, if all of the following conditions are met and the director determines that the person has acted in good faith:

15.2.a. The circumstances causing the emission reductions not to be real, surplus, enforceable, permanent, or quantifiable have not occurred before.

15.2.b. The notice of insufficient reductions is provided to the director within thirty (30) days of the discovery that the emission reductions are not real, surplus, enforceable, permanent, or quantifiable.

15.2.c. The notice of insufficient reductions shall include all of the following information:

15.2.c.1. A detailed description of how, and the date when, the insufficient reductions were discovered.

15.2.c.2. An explanation of the cause of the insufficient reductions.

15.2.c.3. A statement of the necessary corrective actions taken or to be taken and the time when the actions were completed or a schedule describing when the actions will be taken and completed.

15.2.c.4. A revised notice and certification of emission reduction credit generation.

15.2.c.5. Certification by a responsible official that, to the best of the responsible official's knowledge, the information in the notice of insufficient reductions is true, accurate, and complete.

15.2.d. Upon submitting the notice of insufficient reductions, the person submitting the notice shall do one of the following, as applicable:

15.2.d.1. If emission reduction credits were or are being used or traded, then the person submitting the notice shall, within thirty (30) days, either implement and register emission reductions or obtain emission reduction credits sufficient to compensate for the number of emission reduction credits that were not real, surplus, enforceable, permanent, and quantifiable. Reconciliation of emission reduction credits shall be on the same basis, either tons per year or tons per ozone season, as credits found not to be real, surplus, enforceable, permanent, and quantifiable.

15.2.d.2. If emission reductions have been registered but the associated emission reduction credits have not been used or traded, then the person submitting the notice shall, concurrent with the submittal of the notice of insufficient reductions, submit a revised notice of emission reduction credit generation or written request for the director to withdraw the emission reduction credits from the emission trading registry.

15.3. If the director finds, without being provided a notice pursuant to subsection 15.2, that a person has registered emission reductions for the generation of emission reduction credits that are not real, surplus, enforceable, permanent, and quantifiable and the emission reduction credits have been or are being used or traded, then the person who generated and registered the insufficient emission reductions shall generate, or obtain, and donate emission reduction credits to the director in an amount equal to treble the number of emission reductions or emission reduction credits that were not real, surplus, enforceable, permanent, and quantifiable. If the director finds, after having been provided notice under subsection 15.2, that a person has registered emission reductions for the generation of emission reduction credits that are not real, surplus, enforceable, permanent, and quantifiable and the emission reduction credits have been or are being used or traded, the person who generated and registered the insufficient emission reductions may be required to generate, or obtain, and donate emission reduction credits to the director in an amount up to treble the number of emission reductions or emission reduction credits that were not real, surplus, enforceable, permanent, and quantifiable. Reconciliation of emission reduction credits shall be on the same basis, either tons per year or tons per ozone season, as credits found not to be real, surplus, enforceable, permanent, and quantifiable.

Emission reduction credits donated to the director under this subsection shall be retired to assure realization of an air quality benefit and maintenance and attainment of national ambient air quality standards. A donation of emission reduction credits under this subsection shall not be considered to be a civil or criminal penalty. In addition to providing a donation under this rule, a person may be subject to civil and criminal enforcement actions, penalties, and imprisonment as provided under the Code.

15.4. Upon reconciliation of the emission reduction credits pursuant to subsection 15.2., the credits shall be considered real, surplus, enforceable, permanent and quantifiable.

15.5 The granting of a reconciliation period by the director under subsection 15.2 may be considered as a mitigating factor in the imposition or assessment of penalties by the director in any enforcement action, including the determination whether to require the generator to donate additional credits under subsection 15.3.

15.6. Emission reduction credits must be held prior to being used or traded. A person who fails to hold sufficient emission reduction credits to maintain compliance with the applicable requirement or requirements identified in the notice of emission reduction credit use shall be in violation of this rule.

15.7. If the director determines that a person has violated the provisions of the Code or this rule, then the director may take appropriate enforcement action as provided under the Code and this rule. In an enforcement proceeding, a person who generates and registers emission reductions shall have the burden of proof that the emission reductions generated and registered are real, surplus, enforceable, permanent, and quantifiable. A person who uses emission reduction credits shall have the burden of proof of due diligence with respect to verification of the validity and accuracy of the emission reduction credits used to comply with applicable emission requirements and the provisions of this rule.

#### **§45-28-16. Program evaluations and individual audits.**

16.1. The director shall conduct, or cause to be conducted, an evaluation of the emission trading program established under the provisions of this rule. The evaluation shall be conducted every three (3) years, or more frequently if deemed necessary by the director, to make all of the following emission trading program assessments:

16.1.a. Whether the program is consistent with the maintenance of national ambient air quality standards and has resulted in emission reductions consistent with reasonable further progress towards attainment and maintenance of national ambient air quality standards.

16.1.b. Whether requirements for monitoring, recordkeeping, reporting, and enforcement have resulted in a sufficiently high level of compliance.

16.1.c. Whether the program has caused any localized adverse effects to the public health, safety, welfare or to the environment, including any disproportionate air quality impacts. This assessment shall include an analysis of the effects of emission trading on the emissions and impacts of toxic or hazardous air pollutant emissions.

16.1.d. Whether the program is achieving reductions across a spectrum of sources, including area and mobile sources.

16.1.e. Whether provisions for conducting audits of emission reduction credit transactions have resulted in a sufficient number of audits being conducted across a spectrum of sources.

16.2. The director shall prepare a report on the evaluation of the program. The director shall seek public input on the findings contained in the evaluation report and shall provide for the public notice of the findings, a public comment period on the findings, and an opportunity for a public hearing on the findings contained in the report.

16.3. If, after an evaluation of the program, the director determines that it is necessary to make program modifications, the director, within six (6) months of completion of the evaluation, shall, where appropriate, prepare a draft program revision for submittal to the administrator of the United States Environmental Protection Agency and propose any necessary rules or rule revisions to the West Virginia Legislature within twelve (12) months of completion of the evaluation.

16.4. The director may conduct audits of individual transactions that take place under this rule to determine compliance with all applicable requirements. The audits may include any of the following:

16.4.a. A review of the protocols used to certify and provide notice of emission reduction credit generation.

16.4.b. A compliance assessment of the sources, processes, or process equipment which have generated, registered, used, or traded emission reduction credits.

16.4.c. A review of the methods, procedures, determinations, and calculations used to monitor, record, quantify, and certify emissions, emission reductions, and the generation and use of emission reduction credits.

16.5. If, after an audit of a source, process, process equipment, or the use or trading of emission reduction credits under this rule, the director determines that all applicable requirements have not been complied with, then the director may, pursuant to reasonable notice, take appropriate action as provided under the Code and this rule.

#### **§45-28-17. Interstate trading.**

17.1. Nothing in this rule shall be construed to prohibit or restrict interstate trading of volatile organic compounds emission reduction credits or criteria pollutant emission reduction credits, except ozone, in a manner consistent with the Code, rules promulgated under the Code, and any interstate, regional, or national air pollution control strategy implemented pursuant to, or to meet the requirements of, the federal clean air act.

17.2. Emission reduction credits which were generated in a state other than West Virginia, but which are proposed to be used for the purpose of this rule in the state of West Virginia, shall be used in a manner consistent with this rule.

17.3. The director shall enter into a memorandum of understanding with another state which, at a minimum, addresses the following areas prior to allowing the use in the state of West Virginia of emission reduction credits under this rule which were generated in the other state:

17.3.a. The emission reduction credit generation system.

17.3.b. The sharing of required notices and a compatible tracking system.

17.3.c. Appropriate geographic restrictions.

17.3.d. The eligibility of emission reduction credits for use.

17.3.e. Acceptable emission reduction credit generation and use activities.

17.3.f. Record retention requirements.

17.3.g. Consistent treatment of emission monitoring and quantification protocols for purposes of emission reduction credit generation and use.

17.3.h. Consistency in the determination of the baseline from which emission reduction credits are generated.

17.3.i. Temporal requirements and definitions.

17.4. The interstate memorandum of understanding required by subsection 17.3 shall require each participating state to enforce emission limitations under their respective jurisdictions, and shall contain a procedure or procedures for incorporating emission shifts caused by trading into each state's attainment demonstrations, maintenance plans, and reasonable further progress plans, as applicable.

17.5. The director shall assure that the emissions trading rules and implementation procedures of another state are, to the extent possible, equivalent to this rule and its implementation procedures in entering any memorandum of understanding. The memorandum of understanding must assure that the more restrictive provision is applied by each state in determining the validity of emission reduction credit generation and eligibility for emission reduction credit use.