

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #7 ☐

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FILED

2005 JAN 19 P 4:12

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: WV Department of Environmental Protection - Air Quality TITLE NUMBER: 45

CITE AUTHORITY: W.Va. Code §22-5-4

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 45CSR1

TITLE OF RULE BEING AMENDED: NOx Budget Trading Program as a Means of Control and
Reduction of Nitrogen Oxides from Non-Electric Generating Units

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME
EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER
FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE
AS FOLLOWS:

Phase II of the federal NOx SIP Call was promulgated by EPA on April 21, 2004 at 69 FR 21604. Because EPA did not provide model rule language until Fall of 2004, it was not possible for the DAQ to file 45CSR1 as a conventional legislative rule for the 2005 session. Affected states must submit a revision to their State Implementation Plan (SIP) by April 1, 2005. Therefore, an emergency rule is necessary to meet the federal obligation.

Use additional sheets if necessary



EMERGENCY RULE QUESTIONNAIRE

DATE: January 19, 2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV Dept. of Environmental Protection - Div. of Air Quality

601 57th Street, S.E., Charleston, WV 25304

Phone: 926 0499 ext. 1237

EMERGENCY RULE TITLE: "Control and Reduction of Nitrogen Oxides from Non-Electric Generating Units as a Means to Mitigate Transport of Ozone Precursors"

1. Date of filing January 19, 2005
2. Statutory authority for promulgating emergency rule:
The Cabinet Secretary has statutory authority under WV Code §22-5-4
3. Date of filing of proposed legislative rule: After Feb. 22, 2005 and before Apr. 19, 2005
4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? Both: the emergency rule adopts new language and also amends current legislative rule 45CSR1.
5. Has the same or similar emergency rule previously been filed and expired?
A substantively different version of 45CSR1 was filed as an emergency rule on September 15, 2000 to meet the federal deadlines for implementing Phase I of the NOx SIP Call.
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.
None

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

Phase II of the NOx SIP call was promulgated by EPA on April 21, 2004 at 69 FR 21604. Because EPA did not provide model rule language until Fall of 2004, it was not possible for the DAQ to file 45CSR1 as a conventional legislative rule for the 2005 session. Affected states must submit a revision to their State Implementation Plan (SIP) by April 1, 2005. Therefore, an emergency rule is necessary to meet the federal obligations.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

If the state fails to meet SIP obligations in a timely manner, it becomes subject to sanctions under the Clean Air Act, including the withholding of federal highway funds.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: 45CSR1 - "Control and Reduction of Nitrogen Oxides from Non-Electric Generating Units as a Means to Mitigate Transport of Ozone Precursors"

A. AUTHORITY: W.Va. Code §22-5-4

B. SUMMARY OF RULE:

This rule partially fulfills the State's obligations in response to U.S. EPA's final rule, *Findings of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone* (27 Oct 1998, herein referred to as the *NO_x SIP Call*). Essentially, the federal rule requires that large emitters of Nitrogen Oxides (NO_x) significantly reduce emissions and constrains them to set budgets, starting in 2004 and maintaining them thereafter. Flexibility is built in through market-based "cap and trade" provisions which allow sources to buy/sell NO_x emission allowances from/to other program participants. For example, a source which has emitted NO_x in excess of its NO_x allowance allocation may purchase NO_x allowances under the federal NO_x Budget Trading Program

On April 30, 2002, DAQ submitted a Phase I NO_x SIP revision which was fully approved by EPA on May 1, 2002. EPA promulgated West Virginia's approved NO_x SIP revision in a direct-final rulemaking in the Federal Register on May 10, 2002.

Although EPA approved 45CSR1 as a part of West Virginia's Phase I NO_x SIP revision, EPA promulgated Phase II of the NO_x SIP Call on April 21, 2004. Phase II of the NO_x SIP Call contains revisions to NO_x Budget Trading Program which correct technical language errors and improves consistency with the Acid Rain Program. Phase II also requires an 82% reduction of ozone season NO_x emissions from internal combustion engines based upon 1995 ozone season emissions adjusted for growth to 2007. Affected states must submit Phase II NO_x SIP revisions to EPA by April 1, 2005. In order to satisfy the established federal NO_x SIP Call Phase II SIP revision timeline, the State must adopt this rule as an emergency rule.

D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:

A federal counterpart to this proposed rule exists. To the extent practicable

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Thursday, December 2, 2004
601 57th Street, SE, Charleston, WV
West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

Larry Harris
Jackie Hallinan
Rick Roberts
Lisa Dooley
Bill Raney

DEP:

Stephanie Timmermeyer, Cabinet Secretary
Randy Huffman, Assistant Cabinet Secretary
Joe Dawley, General Counsel
Ken Ellison, Director - Division of Land Restoration
Allyn Turner, Director – Division of Water and Waste Management
Bill Brannon, Division of Water and Waste Management
Mike Zeto, Office of Environmental Enforcement
Joe Parker, Acting Director, DEP Division of Mining and Reclamation
Charlie Sturey, DEP Division of Mining and Reclamation
Cindy Maynard, DEP Office of Environmental Advocate

Oil and Gas Fees

Summary: Revise W.Va. Code §22-6-6 to increase well work permit fees by \$200 (new fee will be \$650) and increase deep well permit fees by \$450 (new fee will be \$900). These fees were last revised in 1983. Create a new section establishing a "permit to operate" with a fee of \$5 per well per year. In total, these initiatives are projected to increase OOG's revenues by \$650,000.

Uniform Environmental Covenant Act

Summary: The uniform environmental covenant act will streamline and normalize how land use covenants required under the Voluntary Remediation and Redevelopment Act are recorded and maintained by county clerks. This act will complement the VRRRA by ensuring that land use covenants are enforceable and adhered to by property owners.

UST Insurance Fund

Summary: Legislation is necessary to target revenues for the UST Insurance Fund. The fund may require up to \$14 million dollars to address outstanding claims. The DEP is working with an interim finance committee to identify potential sources of revenue.

Greenhouse Gas

Current Activities

Small Mouth Bass (SMB) Collected April, 2004 from 7 Sites

SITES	DATA – Percent Intersex	LMB
North Fork	25% male	
Smoke Hole	69% male	
Petersburg Levee	62% male	
Welton Park	100% male	33% male
Old Fields Bridge	75% male	50% male
Blues Beach	90% male	
Cacapon River	70% male	

- SMB collected July, 2004 from 8 sites.
- Fish collected November, 2004 focusing on Large Mouth Bass as more data on these nationally (2 downstream sites) Blues Beach and Milleasons Mill.
- July and November 2004 histopathology data not yet complete.
- Blood analyses on 42 fish samples will be started once histopatholgy completed.

The Corps of Engineers are doing similar exploratory work in the Kanawha River (50 Black Bass), In

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR1 - Reduction of Nitrogen Oxides from Non-Electric Generating Units as a Means to Mitigate Transport of Ozone Precursors

Type of Rule: X Legislative Interpretive Procedural

Agency: Division of Air Quality

Address: 601 57th Street SE

Charleston, WV 25304

Phone Number: 926-0499 ext. 1237

Email: tmowrer@wvdep.org

Rule Title: 45CSR1 - Reduction of Nitrogen Oxides from Non-Electric Generating Units as a Means to Mitigate Transport of Ozone Precursors

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

Costs attributed to Personal Services arise from rule implementation, compliance plan review and enforcement. A 5% FTE Technical Analyst position @ \$50K/year plus 33% benefits is estimated for rule implementation and compliance plan review in fiscal years 2005 and 2006. Additional enforcement costs are minimal, and may be considered included in existing Title V enforcement cost projections.

In 2007 and thereafter, there will be a potential for an approximate \$19,800 decrease in Title V fees collected due to the ozone season reduction of 903 tons of NO_x emissions, times a projected Title V fee rate of \$21.92 per ton.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: January 14,

FILED

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

2005 JAN 19 P 4: 12

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 1
~~NO_x BUDGET TRADING PROGRAM AS A MEANS OF CONTROL AND~~
REDUCTION OF NITROGEN OXIDES FROM NON-ELECTRIC GENERATING UNITS
AS A MEANS TO MITIGATE TRANSPORT OF OZONE PRECURSORS

§45-1-1. General.

1.1. Scope. -- This rule establishes:

1.1.a. General provisions and the definitions

required by sections 10 through 14 for certifying the designation of a NO_x authorized account representative for a NO_x Budget source or a group of identified NO_x Budget sources who is authorized to represent the owners and operators of such source or sources and of the NO_x Budget units at such source or sources with regard to matters under the NO_x Budget Trading Program.

2.2. "Account number" means the identification number given by the Administrator to each NO_x Allowance Tracking System account.

2.3. "Acid Rain emissions limitation" means, as defined in 40 CFR §72.2, a limitation on emissions of sulfur dioxide or nitrogen oxides under the Acid Rain Program under title IV of the CAA.

2.4. "Administrator" means the Administrator of the United States Environmental Protection Agency or the Administrator's duly authorized representative.

2.5. "Allocate or allocation" means the determination by the Secretary or the Administrator of the number of NO_x allowances to be initially credited to a NO_x Budget unit or an allocation set-aside.

provided in subdivision 4.2.a, section 5 or sections 80 through 88, for a unit that is not a NO_x Budget unit under subsection 4.1 on the date of commencement of operation, the date the unit becomes a NO_x Budget unit under subsection 4.1 shall be the unit's date of commencement of operation.

2.14. "Common stack" means a single flue through which emissions from two or more units are exhausted.

2.15. "Compliance account" means a NO_x Allowance Tracking System account, established by the Administrator for a NO_x Budget unit under sections 50 through 57, in which the NO_x allowance allocations for the unit are initially recorded and in which are held NO_x allowances available for use by the unit for an ozone season for the purpose of meeting the unit's NO_x Budget emissions limitation.

2.16. "Compliance certification" means a submission to the Secretary or the Administrator, as appropriate, that is required under sections 30 and 31 to report a NO_x Budget source's or a NO_x Budget unit's compliance or noncompliance with sections 30 and 31 and that is signed by the NO_x authorized account representative in accordance with sections 10 through

2.21. "Emissions" means air pollutants exhausted from a unit or source into the atmosphere, as measured, recorded and reported to the Secretary or Administrator by the NO_x authorized account representative and as determined by the Administrator in accordance with sections 70 through 76.

2.22. Reserved.

2.23. ~~"Energy Information Administration" means the Energy Information Administration of the United States Department of Energy.~~ Reserved.

2.24. "Excess emissions" means any tonnage of nitrogen oxides emitted by a NO_x Budget unit during an ozone season that exceeds the NO_x Budget emissions limitation for the unit.

2.25. "Fossil fuel" means natural gas, petroleum, coal or any form of solid, liquid or gaseous fuel derived from such material.

2.26. "Fossil fuel-fired" means, with regard to a unit:

2.26.a. For units that commenced operation before January 1,

1995.

2.33. "Life-of-the-unit, firm power contractual arrangement" means a unit participation power sales agreement under which a utility or industrial customer reserves or is entitled to receive, a specified amount or percentage of nameplate capacity and associated energy from any specified unit and pays its proportional amount of such unit's total costs, pursuant to a contract:

2.33.a. For the life of the unit;

2.33.b. For a cumulative term of no less than 30 years, including contracts that permit an election for early termination; or

2.33.c. For a period equal to or greater than 25 years or 70 percent of the economic useful life of the unit determined as of the time the unit is built, with option rights to purchase or release some portion of the nameplate capacity and associated energy generated by the unit at the end of the period.

2.34. "Long dry kiln" means a kiln 14 feet or larger in diameter, 400 feet or greater in length, which employs no preheating of the feed. The inlet feed to the kiln is dry.

denied or withdrawn and shall include, but not be limited to, any holding company, utility system or plant manager of such a unit or source.

~~2.64.~~ 2.65. "Opt-in" means to be elected to become a NO_x Budget unit under the NO_x Budget Trading Program through a final, effective NO_x Budget opt-in permit under sections 80 through 88.

• ~~2.65. Reserved.~~

2.66. "Overdraft account" means the NO_x Allowance Tracking System account, established by the Administrator under sections 50 through 57 for each NO_x Budget source where there are two or more NO_x Budget units.

2.67. "Owner" means any of the following persons:

2.67.a. Any holder of any portion of the legal or equitable title in a NO_x Budget unit or in a unit for which an application for a NO_x Budget opt-in permit under section 83 is

2.75. "Potential electrical output capacity" means 33 percent of a unit's maximum design heat input.

2.76. "Precalciner kiln" means a kiln where the feed to the kiln system is preheated in cyclone chambers and utilize a second burner to calcine material in a separate vessel attached to the preheater prior to the final fusion in a kiln which forms clinker.

2.77. "Preheater kiln" means a kiln where the feed to the kiln system is preheated in cyclone chambers prior to the final fusion in a kiln which forms clinker.

2.78. "Receive or receipt of" means, when referring to the Secretary or the Administrator, to come into possession of a document, information or correspondence (whether sent in writing or by authorized electronic transmission), as indicated in an official correspondence log or by a notation made on the document, information or correspondence, by the Secretary or the Administrator in the regular course of business.

2.79. "Recordation, record or recorded" means, with regard to NO_x allowances, the movement of NO_x allowances by the Administrator from one NO_x Allowance Tracking System account to another, for purposes of allocation, transfer or deduction.

replaced is included in calculating the consecutive time period.

2.89. Reserved.

2.90. "Submit or serve" means to send or transmit a document, information or correspondence to the person specified:

2.90.a. In person;

2.90.b. By United States Postal Service;
or

2.90.c. By other means of dispatch or transmission and delivery. Compliance with any "submission," "service" or "mailing" deadline shall be determined by the date of dispatch, transmission or mailing and not the date of receipt.

2.91. "Title V operating permit" means a permit issued under 45CSR30.

2.92. "Title V operating permit regulations" means the regulations that the Secretary has issued and the Administrator has approved as meeting the requirements of 45CSR30

4.1.a.1. Reserved.

4.1.a.2. Reserved.

4.1.a.3. Reserved.

4.1.b. Non-Electric Generating Units.

4.1.b.1. For units that commenced operation before January 1, 1997, a unit that has a maximum design heat input greater than 250 mmBtu/hr and that did not serve during 1995 or 1996 a generator producing electricity for sale under a firm contract to the electric grid.

4.1.b.2. For units that commenced operation on or after January 1, 1997 and before January 1, 1999, a unit that has a maximum design heat input greater than 250 mmBtu/hr and that did not serve during 1997 or 1998 a generator producing electricity for sale under a firm contract to the electric grid.

4.1.b.3. For units that commence operation on or after January 1, 1999, a unit with a maximum design heat input greater than 250 mmBtu

time provided by the Secretary) before the later of May 31, 2004 or the date on which the unit is to first resume operation; and

5.3.e.2. A unit exempt under this section and located at a source that is required or but for this exemption would be required, to have a non-title V permit shall not resume operation unless the NO_x authorized account representative of the source submits a complete NO_x Budget permit application under section 22 for the unit not less than 18 months (or such lesser time provided by the Secretary) before the later of May 31, 2004 or the date on which the unit is to first resume operation;

5.3.f. Loss of exemption. -- On the earlier of the following dates, a unit exempt under subdivision 5.2.a shall lose its exemption:

5.3.f.1. The date on which the NO_x authorized account representative submits a NO_x Budget permit application under paragraphs 5.3.e.1 and 5.3.e.2; or

5.3.f.2. The date on which the NO_x authorized account representative is required under paragraphs 5.3.e.1 and 5.3.e.2 to submit a NO_x Budget permit application; or

6.3. Nitrogen oxides requirements.

6.3.a. The owners and operators of each NO_x Budget source and each NO_x Budget unit at the source shall hold NO_x allowances available for compliance deductions under section 54, as of the NO_x allowance transfer deadline, in the unit's compliance account and the source's overdraft account in an amount not less than the total NO_x emissions for the ozone season from the unit, as determined in accordance with sections 70 through 76, plus any amount necessary to account for actual heat input under subdivision 42.5.a for the ozone season or to account for excess emission for a prior ozone season under subsection 54.4, or to account for the withdrawal from the NO_x Budget Trading Program, or a change in regulatory status of a NO_x Budget opt-in unit under section 86 or section 87.

6.3.b. Each ton of nitrogen oxides emitted in excess of the NO_x Budget emissions limitation shall constitute a separate violation of this rule, the CAA and W.Va. Code §22-5-1 et seq.

6.3.c. A NO_x Budget unit shall be subject to the requirements under subdivision 6.3.a starting on the later of May 31, 2004 or the date on which the unit commences operation.

