

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

Form #3

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2001 JUL 27 P 3:36

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: WV DEP - Division 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: 9

TITLE OF RULE BEING AMENDED: "Ambient Air Quality Standards for Carbon Monoxide
and Ozone"

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Authorized Signature

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 27, 2001

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

John A. Benedict, Deputy Director
7012 MacCorkle Avenue, SE
Charleston, WV 25304

Cindy Lawson, Administrative Secretary
10 McJunkin Road
Nitro, WV 25143-2506

Phone: (304) 926-3647
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Fax: (304) 759-0526

jbenedict@mail.dep.state.wv.us

clawson@mail.dep.state.wv.us

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

See "f" above

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: 45CSR9 - "Ambient Air Quality Standards for Carbon Monoxide and Ozone"

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

B. SUMMARY OF RULE:

The purpose of this rule is to establish ambient air quality standards for carbon monoxide and ozone, equivalent to those national primary and secondary ambient air quality standards established by the U.S. EPA.

National primary ambient air quality standards define levels of air quality which the Administrator of the U.S. EPA judges are necessary, with an adequate margin of safety, to protect the public health. National secondary ambient air quality standards define levels of air quality which the Administrator of the U.S. EPA judges necessary to protect the public welfare from any known or anticipated adverse effects of a pollutant. Such standards are subject to revision, and additional primary and secondary standards may be promulgated as the Administrator of the U.S. EPA deems necessary to protect the public health and welfare.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

In accordance with sections 108 and 109 of the Clean Air Act (Act), U.S. EPA reviewed the air quality criteria and national ambient air quality standards (NAAQS) for ozone (O₃) and particulate matter (PM). Based on these reviews, the U.S. EPA revised the standards for both classes of pollutants in 1997. Significant controversy and legal challenges ensued, resulting in a fairly complex chain of actions involving all three branches of the federal government: executive, legislative and judicial.

Ozone and related pollutants have long been recognized, in both clinical and epidemiological research, to affect public health. The ozone standard would provide protection for children and other at-risk populations against a wide range of O₃-induced health effects, including decreased lung function (primarily in children active outdoors), increased respiratory symptoms (particularly in highly sensitive individuals), hospital admissions and emergency room visits for respiratory causes (among children and adults with pre-existing respiratory disease such as asthma), inflammation of the lung, and possible long-term damage to the lungs.

As explained above, U.S. EPA revised the NAAQS for particulate matter (PM) and for ozone (O₃) (July 18, 1997 *Federal Register*) thereby necessitating revisions to the corresponding state counterpart rules. The 1999 Legislature, by the passage of House Bill No. 2533, authorized the promulgation of the rule adopting the revised federal standards discussed above. This rule was filed by the Secretary (now Secretary) June 1, 1999, and was made effective August 30, 1999. However, as a result of a federal court ruling on May 14, 1999, the federal standard for ozone was remanded to U.S. EPA. (See American Trucking Associations, Inc., et al. v. United States Environmental Protection Agency, Case Nos. 97-1440 and 97-1441, United States Court of Appeals, District of Columbia Circuit, May 14, 1999.)

To be consistent with this ruling, the Secretary (now Secretary) proposed revisions to the state rule which would suspend the ozone standard until further direction was received from either the U.S. EPA or the U.S. Supreme Court of Appeals. The 2000 Legislature, by the passage of House Bill No. 4223, authorized the promulgation of an agency rule which removed the contested 8-hour standard while reserving a section for a subsequent standard. This rule was filed by the Secretary (now Secretary) May 19, 2000, and was made effective June 1, 2000. Subsequently, U.S. EPA responded to the Circuit Court of Appeals ruling, in part, by reinstating the previous 1-hour ozone standard through a final rule, "Rescinding Findings That the 1-Hour Ozone Standard No Longer Applies in Certain Areas" (65 FR 140, beginning at 45182) effective on October 18, 2000.

Upon appeal, the U.S. Supreme Court ruled on specific issues related to the 8-hour ozone standards (See Whitman v. American Trucking Associations, Inc., et al., Case Nos. 99-1257 and 99-1426, U.S. Supreme Court, February 27, 2001). The cases were characterized by the Court as "unusually complex". The ruling validated U.S. EPA's authority to set the revised standards but held that "the implementation policy [is] unlawful" and "the EPA's interpretation of that Part [Part D of Title I] is unreasonable". Therefore, although the 8-hour ozone standard has not been invalidated, the U.S. Supreme Court has essentially ruled that it cannot be implemented under U.S. EPA's present interpretation. Consequently, the Secretary proposes to adopt the 1-hour ozone standard pursuant to U.S. EPA's October 18, 2000 Rule and will defer adoption of the more stringent 8-hour standard until the implementation issue has been resolved by U.S. EPA and finally adjudicated.

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

The proposed rule amendments are being made to conform to the federal counterpart rule, U.S. EPA's October 18, 2000 Rule (1-hour Ozone Standard reinstatement). Therefore, no determination of stringency is required. As discussed above, another federal counterpart also exists, U.S. EPA's July 18, 1997 Rule (8-hour Ozone Standard), which has been subject to prolonged litigation. Because the 1-hour standard is the only one that can be legally

implemented at present, it is the appropriate counterpart against which any comparison should be made for the purpose of a stringency finding.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3(c,) the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

At its May 29, 2001 meeting, the Environmental Protection Advisory Council reviewed and discussed this rule. Their comments are contained in the attached minutes.

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR9 - "Ambient Air Quality Standards for Carbon Monoxide and Ozone"

Type of Rule: Legislative Interpretive Procedural

Agency: Office of Air Quality

Address: 7012 MacCorkle Avenue, SE

Charleston, WV 25304-2943

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of Above Estimates:

The actual revisions to this rule will have no additional economic impact because they impose no additional requirements beyond the current federal requirements.

3. Objectives of These Rules:

This rule revises the ambient air quality standards for ozone to conform to those promulgated by the U.S. EPA under the federal Clean Air Act, as amended. Promulgation of this rule by the Legislature is necessary for the State to fulfill its responsibilities under the Clean Air Act.

Rule Title: 45CSR9 - "Ambient Air Quality Standards for Carbon Monoxide and Ozone"

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

See section 2.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

No impact above that resulting from the currently applicable federal standards.

C. Economic Impact on Citizens/Public at Large.

No impact above that resulting from the currently applicable federal standards.

Date: _____

Signature of Agency Head or Authorized Representative:

FILED

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

2001 JUN 27 P 3:36
OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 9
AMBIENT AIR QUALITY STANDARDS FOR
CARBON MONOXIDE AND OZONE

§45-9-1. General.

1.1. Scope. -- The purpose of this rule is to establish ambient air quality standards for carbon monoxide and ozone, equivalent to those national primary and secondary ambient air quality standards established by the U.S. EPA.

National primary ambient air quality standards define levels of air quality which the Administrator of the U.S. EPA judges are necessary, with an adequate margin of safety, to protect the public health. National secondary ambient air quality standards define levels of air quality which the administrator of the U.S. EPA judges necessary to protect the public welfare from any known or anticipated adverse effects of a pollutant. Such standards are subject to revision, and additional primary and secondary standards may be promulgated as the Administrator of the U.S. EPA deems necessary to protect the public health and welfare.

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

1.3. Filing Date. -- ~~May 19, 2000~~.

1.4. Effective Date. -- ~~June 1, 2000~~.

1.5. Former Rules. -- This legislative rule amends 45CSR9 - "~~Rules Pertaining to Ambient Air Quality Standards for Carbon Monoxide and Ozone~~" which was filed on ~~June 1, 1999~~ May 19, 2000 and became effective on ~~August 30, 1999~~ June 1, 2000.

§45-9-2. Anti-Degradation Policy.

2.1. In the best interests of the State of West Virginia, it is the objective of the ~~Director~~ Secretary to obtain and maintain the cleanest air possible, consistent with the best available technology.

2.2. Where the present ambient air is of better quality than the established standards, the ~~Director~~ Secretary will develop long-range plans to protect the difference between the present quality and the established standards. The plans will be based upon the best available forecasts of probable land and air uses in such areas of high air quality.

2.3. The air quality of these areas will not be lowered unless it has been clearly demonstrated to the ~~Director~~ Secretary that such a change is justifiable as a result of necessary economic or social development and will not result in "statutory air pollution". This will require that any industrial, public, or private project or development which could constitute a new source of air pollutants, within an area of such high air quality, provide the best practicable control available under existing technology as part of the initial project.

§45-9-3. Definitions.

3.1. "Air Pollutants" means solids, liquids, or gases which, if discharged into the air, may result in a statutory air pollution.

3.2. "Air Pollution", 'statutory air pollution', shall have the meaning ascribed to it in W. Va. Code §22-5-2.

~~3.3. "Ozone" means the triatomic oxygen molecule (O₃), a very reactive form of oxygen.~~

3.4. "Ambient Air Quality Standards" means the numerical expression of a specified concentration level for a particular air pollutant in the ambient air and the time averaging interval over which that concentration level is measured.

3.4. "Ozone" means the triatomic oxygen molecule (O₃), a very reactive form of oxygen.

3.5. "Secretary" means the secretary of the department of environmental protection or such other person to whom the secretary has delegated authority or duties pursuant to W. Va. Code §§22-1-6 or 22-1-8.

§45-9-4. Ambient Air Quality Standards.

4.1. The following ambient air pollutant concentrations shall not be exceeded:

4.1.a. Carbon Monoxide

4.1.a.1. Maximum eight (8) hour concentration, ten (10) milligrams per cubic meter (9 ppm) - not to be exceeded more than once per year.

4.1.a.2. Maximum one (1) hour concentration, forty (40) milligrams per cubic meter (35 ppm) - not to be exceeded more than once per year.

4.1.b. Ozone

4.1.b.1. ~~Reserved~~ The level of the one (1) hour primary and secondary ambient air quality standards for ozone is 0.12 parts per million (ppm) (235 micrograms per cubic meter [$\mu\text{g}/\text{m}^3$]).

4.1.b.2. The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million (ppm) (235 micrograms per cubic meter [$\mu\text{g}/\text{m}^3$]) is equal to or

less than one (1), as determined by Appendix H to 40 CFR Part 50.

§45-9-5. Methods of Measurement.

5.1. Carbon Monoxide concentrations shall be measured in the ambient air by:

5.1.a. a reference method based on Appendix C of 40 CFR Part 50 and designated in accordance with 40 CFR Part 53; or

5.1.b. an equivalent method designated in accordance with 40 CFR Part 53.

5.2. Ozone concentrations shall be measured in the ambient air by: a reference method based on Appendix D to 40 CFR Part 50 and designated in accordance with 40 CFR Part 53.

~~5.2.a. [Reserved]~~

ORIGINAL

BEFORE THE WEST VIRGINIA DIVISION OF
ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

In the matter of:

PUBLIC HEARING ON PROPOSED LEGISLATIVE RULE

45 CSR 9 "AMBIENT AIR QUALITY STANDARDS FOR CARBON
MONOXIDE AND OZONE".

Transcript of proceedings had at a public hearing in the above-styled matter taken by Missy L. Young, Certified Court Reporter and Commissioner in and for the State of West Virginia, at the West Virginia Division of Environmental Protection, Office of Air Quality, Conference Room, 7012 MacCorkle Avenue, S.E., Charleston, West Virginia, commencing at 6:02 p.m., on the 12th day of July, 2001, pursuant to notice.



1 P R O C E E D I N G S

2 MS. CHANDLER: The purpose of this
3 hearing is to accept comments on 45CSR9 -"Ambient Air
4 Quality Standards for Carbon Monoxide and Ozone".

5 The purpose of this rule is to establish ambient
6 air quality standards for carbon monoxide and ozone,
7 equivalent to those national primary and secondary ambient
8 air quality standards established by the U.S.
9 Environmental Protection Agency.

10 National primary ambient air quality standards
11 define levels of air quality which the Administrator of
12 the U.S. EPA judges are necessary, with an adequate margin
13 of safety, to protect the public health. National
14 secondary ambient air quality standards define levels of
15 air quality which the Administrator of the U.S. EPA judges
16 necessary to protect the public welfare from any known or
17 anticipated adverse effect of a pollutant. Such standards
18 are subject to revision, and additional primary and
19 secondary standards may be promulgated as the
20 Administrator or the U.S. EPA deems necessary to protect
21 the public health and welfare.

22 In 1997, U.S. EPA revised the National Air
23 Quality Standards for ozone from a 1-hour standard of .12
24 ppm to an 8-hour standard of .08 ppm. The 1999

1 Legislature, authorized the promulgation of a rule
2 adopting the revised federal standard. This rule was made
3 effective August 30, 1999. However, as a result of a
4 federal court ruling on May 14, 1999, the federal standard
5 for ozone was remanded to U.S. EPA.

6 The 2000 Legislature authorized the promulgation
7 of an agency rule which removed the contested 8-hour
8 standard while reserving a section for a subsequent
9 standard. Subsequently, U.S. EPA reinstated the previous
10 1-hour ozone standard through a final rule on October 18,
11 2000.

12 On February 27, 2001, the U.S. Supreme Court
13 ruled on specific issues related to the 8-hour ozone
14 standard. The ruling validated U.S. EPA's authority to
15 set the revised standards but held that "the
16 implementation policy is unlawful". Consequently, the
17 Secretary proposes to adopt the 1-hour ozone standard
18 pursuant to U.S. EPA's October 18, 2000 rule and will
19 defer adoption of the more stringent 8-hour standard until
20 the implementation issue has been resolved by U.S. EPA and
21 finally adjudicated.

22 Upon authorization and promulgation of revisions
23 to 45CSR9, the rule will be submitted to the U.S. EPA for
24 its approval as part of the State Implementation Plan

1 pursuant to the federal Clean Air Act.

2 The floor is now open for public comment.

3 Please identify yourself and affiliation, if any, prior to
4 making comments.

5 There being nothing further, this public hearing
6 for 45CSR9 is concluded.


7 (WHEREUPON, the public hearing
8 was concluded.)

BEFORE THE WEST VIRGINIA DIVISION OF
ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, the undersigned, Missy L. Young, a
Certified Court Reporter and Commissioner within and for
the State of West Virginia, duly commissioned and
qualified, do hereby certify that the foregoing is, to the
best of my skill and ability, a true and accurate
transcript of all the proceedings had in the
aforementioned matter.

Given under my hand and official seal this
18th day of July, 2001.



Certified Court Reporter
Commissioner for the State of West Virginia

My commission expires April 15, 2008.



Department of Environmental Protection
West Virginia

Public Hearing on Rules:
45 CSR1, 45CSR9, 45CSR9, 45CSR15,
45 CSR16, 45CSR18, 45CSR25, 45CSR26,
45 CSR33, 45CSR34
DAQ, 7012 MacCorkle Ave. SE, Charleston
July 12, 2001 6P.M.

Sign-In

NAME	ADDRESS	ORGANIZATION	PHONE/FAX	E-MAIL	Comment	
					YES	NO
Tim Malen	301 Virginia St Charleston WV	AEP	304-348-4763 304-348-4715	epm@vong aep.com		✓
Kim Brown Poland	P.O. Box 1791 Charleston WV	WVMA	304/347-8348	KBPO@rambw.com		✓
DAVID M FLANNERY	PO Box 553 Charleston WV	WV Chamber	304/340-1017 304 340-1136	dflannery@jacksondale.com		✓
Karen Watson	2117	DAQ	926-3743			
Jim Maser	7012 MacCorkle Ave	DAQ	926 3731			✓
Russ Lorince	7 Greenbrier St.	Allegheny Energy	345-4694	lorince@alleghenyenergy.com		✓



WEST VIRGINIA MANUFACTURERS ASSOCIATION

2001 Quarrier Street, Charleston, WV 25311
Telephone: (304) 342-2123
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wvma@wvma.com

July 12, 2001

John A. Benedict, Deputy Director
Division of Air Quality, DEP
7012 MacCorkle Avenue, SE
Charleston, WV 25304-2943

Re: Proposed Amendments to 45 CSR 8, 9, 15, 16, 25, 33 and
34 and Proposed Regulation 45 CSR 18.

Dear Deputy Director Benedict:

Please accept these comments by the WVMA on behalf of its several member companies which are directly affected by the above-referenced air regulations being amended or proposed. The WVMA offers these comments with the intention of ensuring that the subject air regulations are as clear as possible and, where such regulations incorporate provisions of federal regulations, that the most recent versions of such provisions are incorporated. Each regulation will be addressed in turn. Comments on proposed 45 CSR 1 amendments are being submitted separately.

The WVMA fully supports the update of Regulation 8, 45 CSR 8 "Ambient Air Quality Standards for Sulfur Oxides and Particulate Matter," and other above-referenced regulations to reflect the agency's new departmental designation. The WVMA also endorses the DAQ's decision not to adopt any changes to the PM10 standards at this time. The U.S. EPA is in the process of reconsidering its 1997 revisions to the PM standards following the recent American Trucking Association decision by the U.S. Supreme Court. The lower court has vacated the new particulate standards pending EPA's reconsideration of them, consistent with the Court's opinion, and we agree that West Virginia should not make any changes to the older PM10 standard at this time.

Regulation 9, 45 CSR 9 "Ambient Air Quality Standards for Carbon Monoxide and Ozone," is proposed for amendment to readopt the "old" one-hour ozone standard that EPA has

Board of Directors

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DuPont
Eagle Manufacturing Co.
Elkem Metals Company
Flexsys
FMC Corporation

GE Plastics
Halltown Paperboard Company
Inco Alloys International, Inc.
Kanawha Manufacturing Co.
Kingsford Manufacturing
Koppers Industries, Inc.
Marble King, Inc.

Mylan Pharmaceuticals, Inc.
NKG Spark Plug, Inc.
One Valley Bank
OSB Operations - Georgia-Pacific
PPG Industries
Quebecor Printing
Rhône-Poulenc Ag Company

Toyota
U.S. Silica Company
Union Carbide Corporation
W.M. Cramer Lumber Co.
Weirton Steel Corporation

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“reinstated” following Court action which remanded the “new” 8-hour ozone standard to EPA for reconsideration. Although the U.S. Supreme Court upheld EPA’s rulemaking powers as to this standard, the court challenge remains as to the reasonableness of the selected standard, and the Supreme Court rejected and remanded to EPA its implementation approach to the new standard. Accordingly, we agree with DAQ’s approach in reinstating the prior 1-hour ozone standard until the issues are resolved on the Federal level.

Regulation 15, **45 CSR 15 “Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 61,”** specifically incorporates “reference methods, performance specifications and other test methods” of 40 CFR Part 61 in section 4.1, but fails to specifically incorporate the accompanying federal definitions. The most obvious lacking definition is that for sources subject to the rule. The general requirement of 45 CSR 15, contained in Section 2.1, is a prohibition against constructing, modifying or operating any “National Emission Standards for Hazardous Air Pollutants (NESHAP) source” which results in a violation of the rule. There is no definition either in the state rule or Code of Federal Regulations for “National Emission Standards for Hazardous Air Pollutants (NESHAP) source.” This phrase is apparently meant to include sources which are subject to NESHAPs, but as written, includes sources of the standards, rather than the emissions. We therefore recommend that “National Emission Standards for Hazardous Air Pollutants (NESHAP) source” be replaced with “hazardous air pollutant source” since “hazardous air pollutant” is defined in section 1.1. We also recommend that the lack of definitions be addressed on a broader scale by adding a provision similar to that of 45 CSR 18 Section 2.1 to read:

Definitions of all terms used, but not defined in this subsection shall have the meaning given to them in 40 CFR Part 61.02. Terms not defined therein shall have the meaning given to them in the federal Clean Air Act.

This provision would provide definitions of terms included in the incorporated reference methods, performance specifications and other test methods.

Section 2 of **45 CSR 16 “Standards of Performance for New Stationary Sources Pursuant to 40 CFR 60”** like its counterpart provision in Regulation 15, identifies sources subject to the rule as “New Source Performance Standard source” without defining such sources. Likewise, Section 4.1 specifically includes reference methods, performance specifications and other test methods of the incorporated Federal regulations, but fails to specifically incorporate accompanying definitions. We therefore recommend that a provision similar to that of 45 CSR 18 Section 2.1 be added, to read:

John A. Benedict, Deputy Director
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Definitions of all terms used, but not defined in this subsection shall have the meaning given to them in 40 CFR Part 60. Terms not defined therein shall have the meaning given to them in the federal Clean Air Act.

This provision would provide definitions of terms included in the incorporated reference methods, performance specifications and other test methods.

Further, the date up to which federal regulations are incorporated should be extended to account for changes to the incorporated federal regulations which have occurred since June 1, 2001. Proposed Sections 1.5 and 4.1 of Regulation 16 incorporate that version of 40 CFR Part 60 which was effective July 1, 2000 and as amended by the Federal Register through June 1, 2001. On June 11, 2001, certain provisions of 40 CFR Part 60, dealing with the revised definition of "boiler operating day" and a requirement for substitution of missing data, were withdrawn. *See* 66 Fed. Reg. 31177 (June 11, 2001). We recommend that this Federal Register notice be included in the incorporated rule by changing Sections 1.5 and 4.4 to read:

... this rule incorporates by reference 40 CFR Parts 60 and 65 to the extent referenced in 40 CFR Part 60, effective July 1, 2000, as amended by the Federal Register through June 11, 2001.

(Emphasis added).

With respect to the newly proposed 45 CSR 18 "To Prevent and Control Emissions from Commercial and Industrial Solid Waste Incineration units," the definition for that waste subject to the rule, "commercial and industrial waste" should be clarified. Whether material qualifies as "commercial and industrial waste" depends upon (1) whether it is "solid waste" and (2) the manner in which it is incinerated (i.e., in an enclosed device using a controlled flame that is a distinct operating unit of the facility). Although the definition of "solid waste" contained in 40 CFR 60.2265 is incorporated by Section 2.1 of Regulation 18, for the sake of clarity, we recommend that the federal definition be restated in Section 2, for ease of reference by regulated sources.

WVMA would also like to suggest two administrative changes to Regulation 18. First, Section 2.1 contains some circular and superfluous language which should be eliminated. This Section provides that terms not defined in Regulation 18 shall have the meaning given to them in certain sections of the CFR, and where not defined in the CFR, shall have the meaning given to them by the Clean Air Act, certain other sections of the CFR or "this rule." The phrase "or this rule" should be deleted since one only looks to these other sources if "this rule" does not define the term. Second, a typographical error in Section 6.2 wherein the word "shall" appears twice should be eliminated.

John A. Benedict, Deputy Director
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The cut-off date for incorporation of Federal Registers should also be extended in **45 CSR 25 "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities."** Section 1.5.a. of Regulation 25 incorporates those versions of Code of Federal Regulations provisions, including 40 CFR 264, contained in Table 25-A which were in effect as of July 1, 2000. On July 3, 2001, EPA took a direct final action which amended the applicability of Part 264. *See* 66 Fed. Reg. 35087 (July 3, 2001). We therefore recommend that Section 1.5.a. be amended to read "...that version which was in effect as of July 1, 2000, as amended by the Federal Register through July 3, 2001."

Two proposed rules which will amend 40 CFR Parts 264 and 40 CFR Parts 264, 265, 266, and 270, respectively were also published in the Federal Register on July 3, 2001. *See* 66 Fed. Reg. 35124 and 35126 (July 3, 2001).

Likewise, the cut-off date for incorporation of Federal Registers should be extended in **45 CSR 33 "Acid Rain Provisions and Permits."** Sections 1.5 and 4.1 of Regulation 33 incorporate those versions of certain provisions of the Code of Federal Regulations, including 40 CFR Part 75, which were effective July 1, 2000 and as amended by the Federal Register through June 1, 2001. On June 13, 2001, the EPA issued a Federal Register notice correcting the minimum recording and reporting requirements and the determination of monitor data availability for standard missing data procedures. *See* 66 Fed. Reg. 31842 (June 13, 2001). We recommend that this Federal Register notice be included in the incorporated rule by changing Sections 1.5 and 4.4 to read:

... this rule incorporates by reference... effective July 1, 2000, as amended by the Federal Register through **June 13, 2001.**

(Emphasis added).

Finally, **45 CSR 34 "Emission Standards for Hazardous Air Pollutants for Source Categories Pursuant to 40 CFR Part 63"** should be amended to incorporate three Federal Register changes made to 40 CFR Part 62 since June 1, 2001. Sections 1.5 and 4.1 of Regulation 34 incorporate those versions of 40 CFR Part 63 and Part 65, to the extent referenced in Part 63, which were effective on July 1, 2000 as amended by the Federal Register through June 1, 2001. Since then, Part 63 has undergone several regulatory changes:

- On May 14, the Notice of Intent to Comply provisions of 40 CFR Part 63 which had been vacated by the District of Columbia Circuit Court of Appeals in Chemical Manufacturers Ass'n v. EPA, 217 F.2d 861 (D.C.Cir. 2000) were officially removed from the CFR. *See* 66 Fed. Reg. 24270).

John A. Benedict, Deputy Director

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- On June 29, 2001, the EPA issued technical corrections to the NESHAP for Oil and Natural Gas Production Facilities and the NESHAP for Natural Gas Transmission and Storage Facilities which remove certain inconsistencies within the rule. *See* 66 Fed. Reg. 34548 (June 29, 2001).
- In addition, on July 3, 2001, the EPA issued a direct final rule amending certain subsections of Part 63 to improve implementation of emissions standards. *See* 66 Fed. Reg. 35087 (July 3, 2001).

These changes should be included in Regulation 34. We therefore recommend that this Federal Register notice be included in the incorporated rule by changing Sections 1.5 and 4.1 to read:

... this rule incorporates by reference 40 CFR Parts 63 and 65, to the extent referenced in 40 CFR Part 63, effective July 1, 2000, as amended by the Federal Register through July 3, 2001.

(Emphasis added). Two proposed rules which will amend 40 CFR Part 63 were also published in the Federal Register on July 3, 2001. *See* 66 Fed. Reg. 35124 and 35126 (July 3, 2001).

WVMA offers the same comment with respect to Regulation 34 as it offered above in its discussion of Regulations 15 and 16: that the universe of sources subject to the rule should be clarified and basic federal definitions accompanying incorporated federal provisions should specifically be included in order for the scope of the rules to be apparent on their face.

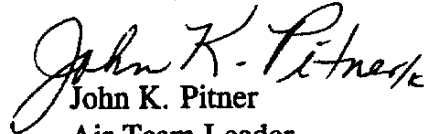
Finally, WVMA would like to offer the following suggestion with respect to the last "Inconsistency" section appearing in several of the above-referenced rules. This section provides that the Secretary is to make a determination as to which rule governs in the case of inconsistency of the subject rule with another rule of the Department of Environmental Protection, but that such determination should be based upon the application of the more stringent provision, term, condition, method or rule. We believe the better approach would be to reword this subsection to state that where an inconsistency exists, the more stringent provision, term, condition, method, or rule applies, except where the Secretary may determine otherwise on a case-by-case basis appropriate to the type and size of the regulated unit and its location. Such a change would give the Secretary discretion to apply the more appropriate standard, which is not necessarily the more stringent standard, in cases where an inconsistency arises, but good reasons exist not to apply the most stringent term.

The WVMA commends the Division of Air Quality on its annual efforts to update the subject regulations to reflect changes in counterpart federal regulations and to immediately

John A. Benedict, Deputy Director
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reflect recent organizational changes within the Department of Environmental Protection. We appreciate the opportunity to comment on these rules and trust that our suggestions will be helpful in the process of finalizing these rules.

Sincerely,



John K. Pitner
Air Team Leader
Environmental, Safety & Health Committee

cc: Karen S. Price, President, WVMA
Air Team Members
Kim Brown Poland, Esquire, Robinson & McElwee PLLC
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Mr. John Benedict
Deputy Director
Division of Air Quality
West Virginia Department of Environmental Protection
7012 MacCorkle Avenue S.E.
Charleston, West Virginia 25304

Re: Proposed Regulatory Revisions.

Dear Mr. Benedict:

The following comments are offered on behalf of the West Virginia Chamber of Commerce in response to the proposed changes to the air quality regulatory program. These comments address the modifications to 45 CSR 1, 8, 9, 15, 16, 18, 25, 33, and 34. Separate, more detailed comments are being filed concerning 45 CSR 26.

1. 45 CSR 1 - "NO_x Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides." DAQ has proposed modification to the final compliance date from May 1, 2004 to May 31, 2004. This rule modification is dictated by the order of the United States Court of Appeals for the District of Columbia Circuit. This deadline creates an immediate question of how and when the NO_x SIP call ozone season budget allowances for West Virginia should be implemented since the NO_x SIP call seeks to have West Virginia demonstrate how it will meet an allocation that is applicable to a time period beginning on May 1 and ending September 30 of each year. The Chamber, however, supports the May 31, 2004 deadline as consistent with the Court ruling. This would result in a correct application of the Court opinion and this date is appropriate to allow sufficient time to install the control equipment that is necessary to comply with the significant emission reduction requirements of the regulation.

2. 45 CSR 8 - "Ambient Air Quality Standards for Sulfur Oxides and Particulate Matter." The modifications to this rule are designed to correct the reference to the PM 10 reference method. Since the new federal standard for PM 2.5 was remanded and the standard for PM 10 was vacated by the U.S. Court of Appeals for the District of Columbia Circuit, the West Virginia rule has been modified accordingly. The Chamber supports these modifications.

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3. 45 CSR 9 - "Ambient Air Quality Standards for Carbon Monoxide and Ozone." The modifications to this rule are designed to make the proposed revisions to the state rule for ozone consistent with the U.S. Court of Appeals for the District of Columbia Circuit ruling that remanded the 8-hour ozone standard. The Secretary proposes to adopt the 1-hour ozone standard and will defer adoption of the more stringent 8-hour ozone standard until implementation issues have been resolved by U.S. EPA and finally adjudicated. The Chamber supports these modifications.

4. 45 CSR 15 - "Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 61." This proposed rule codifies procedures and emission standards for certain stationary sources that emit (or have the potential to emit) one or more of the eight substances listed as hazardous air pollutants in section 61.01(a) of 40 CFR Part 61 (asbestos, benzene, beryllium, coke oven emissions, inorganic arsenic, mercury, radionuclides, and vinyl chloride). This revised rule incorporates by reference additional provisions relating to the Consolidated Federal Air Rule; Synthetic Organic Chemical Manufacturing Industry, and Amendments for Testing and Monitoring Provisions. The Chamber supports these modifications.

5. 45 CSR 16 - "Standards of Performance for New Stationary Sources Pursuant to 40 CFR Part 60." This proposed rule adopts by reference the recently updated standards of performance for new stationary sources promulgated by U.S. EPA. The Chamber supports these modifications.

6. 45 CSR 18 - "To Prevent and Control Emissions From Commercial and Industrial Solid Waste Incineration Units." This new proposed rule and series incorporates the federal counterparts (40 CFR Part 60 Subparts CCCC and specified portions of DDDD) which established standards of performance for new stationary sources and guidelines for existing sources for commercial and industrial solid waste incineration units. The Chamber notes that the incorporation by reference is combined with additional regulatory provisions. The Chamber is only supportive of those air regulatory programs that are no more stringent than the federal program.


7. 45 CSR 25 - "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage or Disposal Facilities." The proposed revisions to this rule will update it by incorporating the federal counterpart regulation effective through May 14, 2001, which includes a federal regulation vacating the Notice of Intent to Comply provision for hazardous waste combustors. In addition, the proposed rule changes are required to maintain consistency with the current 45 CSR 20. The Chamber supports these modifications.

8. 45 CSR 33 - "Acid Rain Provisions and Permits." The proposed revisions to this rule are intended to update it by incorporating all pertinent revisions and additions promulgated by U.S. EPA under 40 CFR Part 72 and related parts. The Chamber supports these modifications.

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9. 45 CSR 34 - "Emission Standards for Hazardous Air Pollutants for Source Categories Pursuant to 40 CFR Part 63." The proposed revisions to this rule are intended to codify general procedures and emission standards for certain stationary sources that emit (or have the potential to emit) one or more of the substances listed as hazardous air pollutants in section 112(b) of the CAA. This rule incorporates by reference 40 CFR Part 63, EPA hazardous air pollutant standards. The Chamber supports these modifications.

Very truly yours.



David M. Flannery, Chairman
West Virginia Chamber Environmental Committee

cc: Stephen G. Roberts

From: "David White" <dwhitenj@hotmail.com>
To: <jbenedict@mail.dep.state.wv.us>
Date: Thu, Jul 12, 2001 4:07 PM
Subject: Proposed Rulemaking

Hi Guys. Just me again sending another copy of the comments on the proposed rules. I wasn't sure if the other message had gone through. Reply or call at (609) 239-4343 if you have trouble opening the attachment. Thanks. Dave White

Get your FREE download of MSN Explorer at <http://explorer.msn.com>

CC: <jchandler@mail.dep.state.wv.us>

David W. White
129 West Federal Street
Burlington, New Jersey 08016

July 12, 2001

Mr. John Benedict
Deputy Director
West Virginia Division of Air Quality
7012 MacCorkle Avenue, South East
Charleston, West Virginia 25304-3727

Re: Proposed Legislative Rules 45 CSR 1,8,9,15,16,18,25,26,33 and 34

Dear Mr. Benedict:

Please find below comments submitted in regard to the proposed rulemaking for the above referenced legislative rules.

In regard to modifications to 45 CSR 1, NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides, I would suggest as a minor note that Department and Secretary be capitalized throughout for consistency. The strikethrough version posted at the DAQ website does not capitalize these at various sections, 1.1.a, 2.4, 2.21, 2.47, 2.78, 2.81, 2.92, etc.

In regard to 45 CSR 8, Ambient Air Quality Standards for Sulfur Oxides and Particulate Matter, and 45 CSR 9, Ambient Air Quality Standards for Carbon Monoxide and Ozone, I would refer initially to the Air Pollution Control Act which provides that, "It shall be unlawful to cause a statutory air pollution, ..." §22-5-3 WV Code. Statutory air pollution is defined as "... the discharge into the air by the act of man of substances (liquid, solid, gaseous, organic or inorganic) in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property." §22-5-1(6) WV Code.

This standard provided for in the Air Pollution Control Act can and will often be more strict than the level of protection intended by the United States Environmental Protection Agency in its promulgation of National Ambient Air Quality Standards. For instance, ozone levels well below ambient standards have long been recognized to cause adverse health consequences to sensitive populations. Persons with chronic lung illnesses, the elderly and the very young can experience adverse health effects at levels below the National Ambient Air Quality Standard.

Allowing or permitting the emission of volatile organic chemicals and nitrogen oxides in a locality, manner and amount that would result in ozone concentrations causing adverse health effects to any member of the community would run afoul of the statutory provisions cited above, while still potentially meeting the standards referenced in 45 CSR 9. In light of this statutory obligation I would encourage the DAQ to not only adopt lower ambient standards, but also to enforce the statutory requirements and not simply defer to the USEPA promulgated standard.

The unique nature of West Virginia's topography, its populated river valleys and steep hillsides combined with the extensive and varied amounts of toxic emissions to which West Virginians are exposed requires specific measures to ensure adequate protection of human health. The national standards are not designed to meet all of these conditions.

In regard to 45 CSR 15 Emission Standards for Hazardous Air Pollutants I would again refer to the DAQ's specific responsibility under the WV Code. The variety of chemical exposures and their long term and synergistic effects on West Virginians have yet to be determined in any meaningful way specific to uniquely West Virginian features. Yet despite the broad statutory protections afforded in the WV Code, the DAQ continues to permit and allow increases in emissions of hazardous air pollutants, even when existing statutory standards are not being met.

The foul odors regularly experienced in many parts of the Kanawha Valley clearly violate the statutory prohibition on the interference with the enjoyment of life or property. And as a past Director of the Air Pollution Control Commission would point out, its not what you can smell that's going to get you. Yet permits are still being issued to allow increased toxic emissions to the air which may pose specific health hazards to various populations.

Quoting from a May 4, 2001 letter from Mr. Ed Andrews, Permit Engineer in the DAQ, in reference to a proposed permit increasing allowable acrylonitrile emissions at a facility in South Charleston, "Without some type of enforceable significant impact standard or acceptable ambient air quality concentration levels to use as a baseline, it is very difficult to determine if the toxic air emissions from a source pose a [sic] unacceptable risk to the public." This remarkable statement merely confirms that the DAQ in many instances is not able to assess whether a proposed permit will pose an unreasonable human health risk, or violate the Code, but will issue such permit anyway.

Adoption of federal standards provides some means of evaluation but should in no way replace or eliminate the independent statutory requirements imposed upon the DAQ. Unfortunately, that abrogation of a statutory duty occurs each time the DAQ permits an increase of emissions in a locality and manner as to exacerbate an existing statutory air pollution.

In regard to 45 CSR 16, Standards of Performance for New Stationary Sources Pursuant to 40 CFR Part 60, the adoption of these standards should not limit the DAQ and prevent

its enforcement of statutory requirements. It is after all the Code which provides the authority for adoption, implementation and enforcement of these regulations.

In regard to 45 CSR 18, To Prevent and Control Emissions from Commercial and Industrial Solid Waste Incineration Units, I would recommend that the potential health impacts from this proposed regulation be evaluated. Without any toxicological or health professionals on staff reviewing the effects and implications of the proposed emission standards in light of the unique features encountered in West Virginia, these emission standards in the proposed regulation may in fact be met while causing or contributing to a statutory air pollution. Simple deference to federal standards does not ensure West Virginians the protection they are afforded under state law.

In regard to 45 CSR 25, To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities, the appropriateness of analysis of uniquely West Virginia factors is acknowledged. Specifically, §4.13 allows for a case-by-case analysis of emissions to determine risk to human health and the environment by considering such factors as topography, population distributions, population activities and modes and intensities and duration of exposure. Yet without any toxicological or human health resources available, the engineering staff will generally rely on federal data which may or may not be specific to West Virginia or meet the West Virginia Code's specific standards.

In regard to 45 CSR 26, NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electrical Generating Units, several comments upon this rather lengthy proposed regulation. First, the extended phase in period for implementation of this regulation appears unnecessarily long. Extensive research by personnel of the DAQ Planning Section has demonstrated that NOx impacts on ground level pollutant concentrations will be primarily limited to areas within 250 miles of a source and have little impacts outside that distance. As such the NOx emissions from West Virginia power plants will have the most adverse effects on West Virginians, despite the height of their stacks. To protect West Virginians from continued adverse effects from pollutants even below the national thresholds, implementation of NOx reductions should be phased in much sooner.

Also in terms of enforcement of violations, §54.4.c.1 provides that, "For purposes of determining the number of days of violation, if a NOx Budget unit has excess emissions for an ozone season, each day in the ozone season (153 days) constitutes a day in violation unless the owners and operators of the unit demonstrate that a lesser number of days should be considered;" Does this provision mean that exceeding a NOx Budget would constitute 153 separate violations, each punishable by up to \$25,000 in fines? Would each of these 153 violations have to be resolved in accordance with USEPA Timely and Appropriate Enforcement Guidelines, or whatever requirements would be applicable at the time? Would failure to satisfy an EPA penalty matrix for all 153 violations make West Virginia liable to EPA under existing or future grant commitments? And what information is relevant in demonstrating that a lesser number of days should be considered?

In regard to 45 CSR 33, Acid Rain Provisions and Permits, no comments.

In regard to 45 CSR 34 Emission Standards for Hazardous Air Pollutants for Source Categories Pursuant to 40 CFR Part 63, please refer to my previous discussion of the uniquely West Virginian concerns and statutory obligations imposed upon the DAQ by the West Virginia Code.

While I do recognize that the USEPA will be an invaluable resource in developing air quality data and information, it remains the statutory obligation of the DAQ to achieve and maintain such levels of air quality that will protect the health and welfare West Virginians. As political climates in Washington wax and wane with each new administration, the people of West Virginia should be assured that the DAQ will provide protections required under law, specifically the law of West Virginia.

Thank you very much for the opportunity to provide these comments.

Sincerely,

David White

45CSR9

AMBIENT AIR QUALITY STANDARDS FOR CARBON MONOXIDE AND OZONE

RESPONSE TO COMMENTS

On June 6, 2001 the Division of Air Quality (DAQ) commenced the public comment period and subsequently held a public hearing on July 12, 2001 to accept oral comments on the proposed rule, 45CSR9. Written comments were accepted through 6:00 PM on Thursday, July 12, 2001. No person verbally commented at the public hearing concerning proposed rule 45CSR9. Three commenters submitted written comments which the DAQ addresses below.

I. COMMENTER: West Virginia Manufacturer's Association (WVMA)

COMMENT A: *The commenter supports the proposed revisions to the rule.*

RESPONSE A: No response required.

II. COMMENTER: West Virginia Chamber of Commerce

COMMENT A: *The commenter supports the proposed revisions to the rule.*

RESPONSE A: No response required.

III. COMMENTER: David White

COMMENT A: *The commenter states that the standards set forth in the state statute at W. Va. Code §22-5-3 will often be more strict than the National Ambient Air Quality Standards (NAAQS) and points out the unique nature of West Virginia's topography, its populated river valleys and steep hillsides. The commenter encourages DAQ to not only adopt lower ambient standards, but also to enforce the statutory requirements.*

RESPONSE A: The NAAQS are established by the U.S. EPA pursuant to the federal Clean Air Act and are required to protect human health, the environment and welfare. The DAQ considers the NAAQS to be the health and welfare-based criteria which are currently supported by the scientific community. Should the State determine, however, that the NAAQS are not protective of health and welfare in West Virginia, the Secretary may make a specific determination under W. Va. Code §22-1-3a justifying a more stringent standard. The Secretary does not believe that such a determination is warranted in this case. Furthermore, if the NAAQS are found to be insufficient to protect health or welfare in a given situation, the DAQ may utilize the authority in W. Va. Code §22-5-3.