# WEST VIRGINIA

# SECRETARY OF STATE

**Joe Manchin, III**

# ADMINISTRATIVE LAW DIVISION

FORM #5

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

## NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

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

CITE AUTHORITY: W.Va. Code §22-5-1 et seq.; 45CSR10

RULE TYPE: PROCEDURAL _____ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE _____
CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

_____

AMENDMENT TO AN EXISTING RULE: YES _____, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

_____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 10A

TITLE OF RULE BEING PROPOSED: Testing, Monitoring, Recordkeeping And Reporting Requirements Under 45CSR10

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS March 15, 2001

Karen G. Watson, Counsel
Authorized Signature

$11.40

Office of Air Quality
7012 MacCorkle Avenue, Southeast
Charleston, West Virginia 25304-2943
(304) 926-3637
(304) 926-3637

# West Virginia Division of Environmental Protection

Bob Wise
Governor

Randy Huffman
Acting Director

February 13, 2001



Ms. Judy Cooper, Director
Administrative Law Division
Secretary of State
Building 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0770

Re: 45CSR10A–Office of Air Quality

Dear Ms. Cooper:

We recently discovered several errors in 45CSR10A, one of the interpretive rules we filed with your office on February 2, 2001. The first involves an error in the language of section 6.1.c, which creates an inconsistency between this and other provisions in the rule dealing with the same subject, i.e., sections 5.1.a and 7.1.a. The agency intended to follow the same approach in section 6.1.c as it did in sections 5.1.a and 7.1.a, but its choice of words inadvertently resulted in a different meaning.

The second error involves the word "In" in section 6.3.c, which should be "If." The third involves a clause that was placed at the end of section 6.5 instead of at the end of section 6.5.a, where it should have been included. The fourth is a Word Perfect formatting error in Appendix A of the rule, which caused certain information to not be displayed in the form. We have made the necessary corrections to the rule, including Appendix A, and are refiling the rule with your office, with a new effective date. Also, we are enclosing a disk containing the revised version of the rule.

We apologize for any inconvenience we may have caused your office and appreciate your cooperation and assistance.

Sincerely,

Karen G. Watson

Karen G. Watson
Counsel

Enclosure - rule filing (45CSR10A) and disk

Executive Office
#10 McJunkin Road
Nitro, WV 25143-2506
Telephone No: (304)759-0515
Fax No: (304)759-0526

# West Virginia Bureau of Environment

Bob Wise
Governor

Randy Huffman
Acting Commissioner

February 1, 2001

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

RE: 45CSR10A - "Testing, Monitoring, Recordkeeping and Reporting Requirements Under 45CSR10"

Dear Ms. Cooper:

This letter will serve as my approval to file the above-referenced Interpretive Rule with your Office as "Notice of Agency Adoption of an Interpretive Rule."

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

Sincerely yours,

Randy Huffman
Acting Commissioner

RH:cc

cc: Karen Watson
Carrie Chambers

**BUREAU OF ENVIRONMENT**
**DIVISION OF ENVIRONMENTAL PROTECTION**

**BRIEFING DOCUMENT**

**RULE TITLE:** 45CSR10A - "Testing, Monitoring, Recordkeeping, and Reporting Requirements"

**A. AUTHORITY:** W.Va. Code §§22-5-1 et seq.and WV 45CSR10

**B. SUMMARY OF RULE:**

45CSR10A "Testing, Monitoring, Recordkeeping, and Reporting Requirements" provides guidance on OAQ's testing, monitoring, recordkeeping and reporting requirements for the owner/operators of fuel burning units, manufacturing process sources, and combustion sources subject to 45CSR10.

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:**

45CSR10 "To Prevent and Control Air Pollution from the Emission of Sulfur Oxides" is a legislative rule which establishes weight emission standards for fuel burning units and other standards for manufacturing process sources and combustion sources operated in West Virginia. The legislative rule authorizes the Director to require sources to demonstrate compliance with these standards by testing and monitoring their emissions, keeping records of such testing and monitoring and submitting the results to the Director. 45CSR10 provides the Director will specify the exact manner and frequency of testing, monitoring, recordkeeping and reporting. It is through the adoption of this interpretive rule that the Director will prescribe the specific requirements for testing, monitoring, recordkeeping and reporting which are applicable to a source, depending upon its size and nature. The proposed interpretive rule is the result of a thorough review in a stakeholder process that was inclusive of the Office of Air Quality, representatives of the regulated community, concerned citizens and the environmental community.

**APPENDIX B**

## FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR10A - "Testing, Monitoring, Recordkeeping, and Reporting Requirements"

Type of Rule: _____ Legislative ____X____ Interpretive _____ Procedural

Agency: Office of Air Quality

Address: 7012 MacCorkle Avenue, SE

Charleston, WV 25304

| 1. Effect of Proposed Rule | Annual | | Fiscal Year | | |
|---|---|---|---|---|---|
| Estimated Total Cost | Increase | Decrease | Current | Next | There-after |
| | $ -0- | $ -0- | $ -0- | $ -0- | $ -0- |
| Personal Services | -0- | -0- | -0- | -0- | -0- |
| Current Expense | -0- | -0- | -0- | -0- | -0- |
| Repairs and Alterations | -0- | -0- | -0- | -0- | -0- |
| Equipment | -0- | -0- | -0- | -0- | -0- |
| Other | -0- | -0- | -0- | -0- | -0- |

2. Explanation of above estimates: The adoption of 45CSR10A will have minimal effect on the costs to the Office of Air Quality and implementation will be absorbed into the existing work environment. Costs are covered under previous budget estimates.

3. Objectives of these rules: The objective of this rule is to provide guidance and clarification on OAQ's testing, monitoring, recordkeeping and reporting requirements for sources covered by 45CSR10 "To Prevent and Control Air Pollution from the Emissions of Sulfur Oxides," which is part of the West Virginia State Implementation Plan approved by the USEPA for attainment and maintenance of attainment of the National Ambient Air Quality Standards for sulfur oxides.

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.

1. The rule proposed herein may have some minimal effect on the costs to covered sources due to additional testing, monitoring, recordkeeping and reporting requirements. It is possible that several manufacturing and combustion sources may have to install continuous emission monitoring systems (CEMS); however, the rule allows alternative monitoring methods for good cause, making any cost estimates uncertain at this time.

2. In some cases there may be reduced costs to sources due to additional flexibility provided by the revisions.

C. Economic Impact on Citizens/Public at Large.

The proposed rule will have no economic impact on citizens or the public at large.

Date: 11/17/2000

Signature of Agency Head or Authorized Representative

Carrie J. Chambers

# TITLE 45
# INTERPRETIVE RULE
# DIVISION OF ENVIRONMENTAL PROTECTION
# OFFICE OF AIR QUALITY

## SERIES 10A
## TESTING, MONITORING, RECORDKEEPING AND REPORTING REQUIREMENTS UNDER 45CSR10

### §45-10A-1. General.

1.1. Scope. -- Series 10A provides guidance and clarification for complying with the testing, monitoring, recordkeeping and reporting requirements of 45CSR10 "To Prevent and Control Air Pollution from the Emission of Sulfur Oxides." This rule is an interpretive rule, not a legislative rule, as those terms are defined under W. Va. Code §29A-1-2.

1.2. Authority.-- W. Va. Code §§22-5-1 et seq. and WV 45CSR10.

1.3. Filing Date. -- February 13, 2001.

1.4. Effective Date. -- March 15, 2001.

### §45-10A-2. Definitions.

2.1. "ASTM approved" means test methods and procedures approved and published by the American Society for Testing and Materials.

2.2. "Combustion Source" means a source(s) subject to the standards set forth in section 5 of 45CSR10.

2.3. "Continuous Emission Monitoring System" or "CEMS" means all equipment required for the determination of gas concentration or emission rate, installed, calibrated, operated and maintained as specified in 40 CFR Part 75, or 40 CFR Part 60, Appendix B, Performance Specification 2 or Performance Specification 7 and 40 CFR Part 60, Appendix F.

2.4. "Excursion" means: (1) measured emissions exceeding the applicable standards set forth in sections 3, 4, and 5 of 45CSR10; or (2) operating parameters outside the range set forth in an approved monitoring plan, which may or may not result in measured emissions exceeding the applicable standards set forth in sections 3, 4, and 5 of 45CSR10.

2.5. "Factor", in $lbSO_2/mmBTU$, means the number, indicated in 45CSR10, subsection 3.1, 3.2, or 3.3, as appropriate, to be multiplied by the TDHI to calculate the maximum amount of sulfur dioxide permitted to be discharged to the atmosphere from all stacks located at one plant, expressed in units of pounds per hour.

2.6. "Fuel Quality Analysis" means the sulfur content and the BTU content.

2.7. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in WV CSR §45-10-2 or W. Va. Code § 22-5-1 et seq.

### §45-10A-3. Applicability.

3.1. This rule applies to any fuel burning unit(s), manufacturing process source(s) or combustion source(s) subject to 45CSR10, except as follows:

3.1.a. fuel burning unit(s) with a design heat input of less than 10 million BTU's per hour;

3.1.b. fuel burning unit(s) which combust natural gas, wood or distillate oil, alone or in combination; or

3.1.c. manufacturing process source operation(s) which have the potential to emit less than 500 pounds per year of sulfur oxides.

**§45-10A-4. Fuel Burning Unit(s)--Registration of Allowable Emission Rates for Individual Stacks.**

4.1. In accordance with subdivision 3.4.a. of 45CSR10, the owner or operator of each fuel burning unit(s) shall register an allowable emission rate for each individual stack, in pounds per hour, determined as provided in Appendix B, except where:

4.1.a. The owner or operator of a fuel burning unit utilizes CEMS or daily ASTM method sampling and analysis to demonstrate compliance with the plant-wide emission limit and the provisions of subdivision 3.4.a. of 45CSR10; or

4.1.b. The Director has approved a petition for an alternative individual stack allowable emission rate, filed by the owner or operator in accordance with subdivision 3.4.b of 45CSR10.

**§45-10A-5. Testing Requirements.**

5.1. Fuel Burning Unit(s)

5.1.a. The owner or operator shall conduct or have conducted, weight emission tests to determine the compliance of each fuel burning unit with the weight emission standards set forth in section 3 of 45CSR10 at a frequency established in the following table. Weight emission tests shall be conducted in accordance with 40CFR Part 60, Appendix A, Method 6 or other equivalent EPA testing method approved by the Director. If weight emission testing is required, the initial weight emission test shall be conducted within a time period starting twelve (12) months prior to, and ending twelve (12) months after, the effective date of this rule for existing units and within one hundred eighty (180) days of start-up for new unit(s).

| % of Factor | Testing Frequency |
|---|---|
| ≤50% of Factor | No stack testing required |
| between 50% and 90% of Factor | Once/5 years |
| ≥90% of Factor | Once/ year |

5.1.b. The owner or operator of a fuel burning unit(s), with a DHI greater than or equal to 10 million BTU's per hour (mmBTU/hr) but less than 100 mmBTU/hr, may petition the Director for an alternative to weight emission testing.

5.1.c. The owner or operator of a fuel burning unit may petition for alternatives to the testing requirements of subsection 5.1 for units that are infrequently used or for infrequently used fuels.

5.2. Manufacturing Process Source(s)

5.2.a. The owner or operator shall conduct or have conducted, compliance tests to determine the compliance of each manufacturing process source with the emission standards set forth in section 4 of 45CSR10. Compliance tests shall be conducted in accordance with 40CFR Part 60, Appendix A, Method 6 or other equivalent

EPA testing method approved by the Director. The initial compliance test shall be conducted within a time period starting twelve (12) months prior to and ending twelve (12) months after the effective date of this rule for existing units and within one hundred eighty (180) days of start-up for new unit(s). The results of the initial test shall be a consideration in establishing a compliance testing frequency. Compliance tests shall be conducted at a frequency established in the approved monitoring plan.

5.2.b. Manufacturing process source(s) utilizing a flare as a control device shall be exempt from the compliance testing requirements of subdivision 5.2.a.

5.2.c. The owner or operator of a manufacturing process source(s) may for good cause petition the Director for an alternative to compliance testing, which may include, but not be limited to, process gas sampling for percent sulfur by weight. To determine the emission rate of sulfur dioxide the manufacturing process source(s) shall assume 100% conversion to sulfur dioxide of all unrecovered sulfur compounds.

5.3. Combustion Source(s)

5.3.a. The owner or operator shall conduct or have conducted, compliance tests to determine the compliance of each combustion source with the standards set forth in section 5 of 45CSR10. Compliance tests shall be conducted in accordance with 40 CFR Part 60, Appendix A, Method 15 or other equivalent EPA testing method approved by the Director. The initial compliance test shall be conducted within a time period starting twelve (12) months prior to and ending twelve (12) months after the effective date of this rule for existing units and within one hundred eighty (180) days of start-up for new unit(s). The results of the initial test shall be a consideration in establishing a compliance testing frequency. Compliance tests shall be conducted at a frequency established in the approved monitoring plan.

5.4. The owner or operator of a fuel burning unit(s), manufacturing process unit(s), or combustion unit(s) employing CEMS to meet the requirements of section 6 shall be exempt from the testing requirements of subsections 5.1, 5.2 and 5.3.

5.5. The Director reserves the right to require testing pursuant to subsection 8.1 of 45CSR10.

**§45-10A-6. Monitoring Plan Requirements.**

6.1. Fuel Burning Unit(s)

6.1.a. The owner or operator of a fuel burning unit(s) shall submit, to the Director for approval, a monitoring plan for each fuel burning unit(s) that describes the method the owner or operator will use to monitor compliance with the weight emission standard set forth in section 3 of 45CSR10. The owner or operator of a fuel burning unit(s) may use CEMS, which shall be deemed to satisfy all of the requirements of an approved monitoring plan, or a monitoring plan as specified in subsection 6.4, in accordance with the provisions of this section.

6.1.b. The owner or operator of a type 'a' fuel burning unit(s) shall use a CEMS to satisfy the requirements of an approved monitoring plan.

6.1.b.1. CEMS conforming to the specifications of 40 CFR Part 75 shall use unbiased, unsubstituted data to demonstrate compliance with the provisions of 45CSR10.

6.1.c. The owner or operator of a type 'b' or type 'c' fuel burning unit(s) which

burns fuel with a sulfur content that equates to 90% or greater of the factor shall:

6.1.c.1. Use a CEMS to satisfy the requirements of an approved monitoring plan; or

6.1.c.2. Conduct daily "as burned" fuel analysis in accordance with applicable ASTM procedures and test methods.

6.1.c.3. CEMS, if required, shall be installed, operational and certified within twelve (12) months of the date of monitoring plan approval or within twelve (12) months of triggering the 90% threshold, whichever is later.

6.1.d. CEMS shall be used to satisfy the requirements of an approved monitoring plan if any other rule, permit or order requires the use of CEMS for the fuel burning unit(s). If not yet installed, the CEMS shall be installed by the date required in the other rule, permit or order.

6.2. Manufacturing Process Source(s)

6.2.a. The owner or operator of a manufacturing process source(s) shall submit, to the Director for approval, a monitoring plan for each manufacturing process source(s) that describes the method the owner or operator will use to monitor compliance with the mass emission standard set forth in section 4 of 45CSR10. The owner or operator of a manufacturing process source(s) may use CEMS, which shall be deemed to satisfy all of the requirements of an approved monitoring plan, or a monitoring plan as specified in subsection 6.4, in accordance with the provisions of this section.

6.2.b. The owner or operator of a manufacturing process source(s) with a potential to emit 100 tons per year (tpy) of sulfur dioxide and with the potential to emit sulfur dioxide at a rate greater than or equal to 90% of the applicable emission standard shall use CEMS to satisfy the requirements of an approved monitoring plan.

6.2.b.1. The owner or operator of a manufacturing process source(s) may for good cause petition the Director for an alternative to CEMS.

6.2.b.2. CEMS, if required, shall be installed, operational and certified within twelve (12) months of the date of monitoring plan approval, within twelve (12) months of the receipt of denial of a petition under paragraph 6.2.b.1 or within twelve (12) months of triggering the 100 tpy and 90% thresholds in subdivision 6.2.b, whichever is later.

6.2.c. CEMS shall be used to satisfy the requirements of an approved monitoring plan if any other rule, permit or order requires the use of CEMS for the manufacturing process source(s). If not yet installed, the CEMS shall be installed by the date required in the other rule, permit or order.

6.3. Combustion Source(s)

6.3.a. The owner or operator of a combustion source(s) shall submit, to the Director for approval, a monitoring plan for each combustion source(s) that describes the method the owner or operator will use to monitor compliance with the standard set forth in section 5 of 45CSR10. The owner or operator of a combustion source(s) may use CEMS, which shall be deemed to satisfy all of the requirements of an approved monitoring plan, or a monitoring plan as specified in subsection 6.4, in accordance with the provisions of this section.

6.3.b. The owner or operator of a combustion source(s) which has a refinery

process gas stream or any other process gas stream that contains an average hydrogen sulfide concentration greater than or equal to 45 grains per 100 cubic feet shall use CEMS to satisfy the requirements of an approved monitoring plan.

6.3.b.1. The owner or operator of a combustion source(s) may for good cause petition the Director for an alternative to CEMS.

6.3.b.2. CEMS, if required, shall be installed, operational and certified within twelve (12) months of the date of monitoring plan approval, within twelve (12) months of the receipt of denial of a petition under paragraph 6.3.b.1 or within twelve (12) months of triggering the 45 grains per 100 cubic feet threshold in subdivision 6.3.b, whichever is later.

6.3.c. CEMS shall be used to satisfy the requirements of an approved monitoring plan if any other rule, permit or order requires the use of CEMS for the combustion source(s). If not yet installed, the CEMS shall be installed by the date required in the other rule, permit or order.

6.4. An approved monitoring plan shall contain, at a minimum, the following items:

6.4.a. a list of parameters to be monitored;

6.4.b. the monitoring method and frequency for each parameter to be monitored;

6.4.c. the compliance range for each parameter to be monitored;

6.4.d. an explanation of how the parameters to be monitored were chosen, and how they are indicative of compliance;

6.4.e. an explanation of how the compliance ranges were established;

6.4.f. a schedule for installation and operation of any additional monitoring equipment installed for purposes of complying with this rule;

6.4.g. a response plan to be implemented during excursions; and

6.4.h. a proposed compliance testing schedule for manufacturing process source(s) and combustion source(s), as applicable.

6.5. Monitoring plans, pursuant to subdivisions 6.1.a, 6.2.a, and 6.3.a, shall be submitted to the Director for approval no later than February 28, 2001, as specified in paragraph 8.2.c.2 of 45CSR10.

6.5.a. Approval or denial of such plans shall be issued no later than August 31, 2001, or 6 months after submittal, whichever is later, as specified in paragraph 8.2.c.2 of 45CSR10, provided that the owner or operator may presume approval of a monitoring plan if the Director has neither approved nor denied the plan by the date specified in this subdivision.

6.5.b. Monitoring plans shall become effective upon approval.

6.6. In addition to other actions taken by the Director, the Director may require the monitoring plan to be revised when the Director has reason to believe that the ranges established for operating parameters in the monitoring plan are no longer indicative of compliance or when the Director has reason to believe that excursions are excessive.

6.7. Notwithstanding any other provisions of this rule, the Director reserves

the right to require the installation of CEMS pursuant to subdivision 8.2.a. of 45CSR10, in any case where the Director deems it necessary to determine compliance with the standards in 45CSR10.

**§45-10A-7. Recordkeeping and Reporting Requirements.**

7.1. Recordkeeping

7.1a. Fuel burning units - The owner or operator of a fuel burning unit(s) shall maintain records of the operating schedule and the quality and quantity of fuel burned in each unit. Such records shall include, but not be limited to, the date and time of start-up and shutdown, the quantity of fuel consumed on a daily basis, and a periodic fuel quality analysis as set forth in the following table:

| Fuel quality | Frequency of Analysis |
|---|---|
| ≥90% of Factor | Daily |
| < 90% of Factor | per shipment |

7.1.a.1. The owner or operator shall provide in the monitoring plan a quality control and quality assurance program for the fuel analysis. If a certified independent lab is used to provide the fuel analysis, the quality control and assurance program is deemed to be satisfactory.

7.1.b. Combustion source(s) - The owner or operator of a combustion source(s) shall maintain records of the operating schedule and the quantity and quality of fuel consumed in each unit. Such records shall include, but not be limited to, the date and time of start-up and shutdown, the quantity of fuel consumed on a daily basis, and a periodic fuel quality analysis. The frequency of periodic fuel quality analysis shall be established in an approved monitoring plan.

7.1.c. The owner or operator of a fuel burning unit or combustion source which utilizes CEMS shall be exempt from the provisions of subdivision 7.1.a. or 7.1.b, respectively.

7.1.d. For fuel burning units, manufacturing process sources, and combustion sources, records of all required monitoring data as established in an approved monitoring plan and support information shall be maintained on-site for a period of at least five (5) years from the date of monitoring, sampling, measurement or reporting. Support information includes all calibration and maintenance records and all strip chart recordings for continuous monitoring instrumentation, and copies of all required reports.

7.2. Exception Reporting

7.2.a. CEMS - Each owner or operator employing CEMS for an approved monitoring plan, shall submit a "CEMS Summary Report" and/or a "CEMS Excursion and Monitoring System Performance Report" to the Director quarterly; the Director may, on a case-by-case basis, require more frequent reporting if the Director deems it necessary to accurately assess the compliance status of the source. All reports shall be postmarked by the thirtieth (30th) day following the end of each calendar quarter. The CEMS Summary Report shall contain the information and be in the format shown in Appendix A unless otherwise specified by the Director.

7.2.a.1. Submittal of 40 CFR Part 75 data in electronic data reporting (EDR) format to the Director shall be deemed to satisfy the requirements of subdivision 7.2.a.

7.2.a.2. If the total duration of excursions for the reporting period is less than four percent (4%) of the total source operating time for the reporting period and the total monitoring method downtime for the reporting period is less than five percent (5%) of the total source operating time for the reporting period, only the CEMS Summary Report shall be submitted; the CEMS Excursion and Monitoring System Performance report shall be maintained on-site and shall be submitted to the Director upon request.

7.2.a.3. If the total duration of excursions for the reporting period is four percent (4%) or greater of the total operating time for the reporting period or the total monitoring method downtime for the reporting period is five percent (5%) or greater of the total operating time for the reporting period, the CEMS Summary Report and the CEMS Excursion and Monitoring System Performance Report shall both be submitted to the Director.

7.2.a.4. The CEMS Excursion and Monitoring System Performance Report shall be in a format approved by the Director and shall include the following information:

7.2.a.4.A. The magnitude of each excursion, and the date and time, including starting and ending times, of each excursion;

7.2.a.4.B. Specific identification of each excursion that occurs during start-ups, shutdowns, and malfunctions of the facility;

7.2.a.4.C. The nature and cause of any malfunction (if known), and the corrective action taken and preventative measures adopted;

7.2.a.4.D. The date and time identifying each period during which quality-controlled monitoring data was unavailable, except for zero and span checks, and the reason for data unavailability and the nature of the repairs or adjustments to the monitoring system; and

7.2.a.4.E. When no excursions have occurred or there were no periods of quality-controlled data unavailability, and no monitoring systems were inoperative, repaired, or adjusted, such information shall be stated in the report.

7.2.b. Non-CEMS Based Monitoring - Each owner or operator employing monitoring pursuant to subsection 6.4 shall submit a "Monitoring Summary Report" and an "Excursion and Monitoring Plan Performance Report" to the Director on a quarterly basis; the Director may, on a case-by-case basis, require more frequent reporting if the Director deems it necessary to accurately assess the compliance status of the fuel burning unit(s). All reports shall be postmarked by the thirtieth (30th) day following the end of each calendar quarter. The Monitoring Summary Report shall contain the information and be in a format approved by the Director.

7.2.b.1. If the total number of excursions for the reporting period is less than four percent (4%) of the total number of readings for the reporting period and the number of readings missing for the reporting period is less than five percent (5%) of the total number of readings agreed upon in the monitoring plan for the reporting period, the Monitoring Summary Report shall be submitted to the Director; the Excursion and Monitoring Plan Performance Report shall be maintained on-site and shall be submitted to the Director upon request.

7.2.b.2. If the number of excursions for the reporting period is four percent (4%) or greater of the total number of readings for the reporting period or the number

of readings missing for the reporting period is five percent (5%) or greater of the total number of readings agreed upon in the monitoring plan for the reporting period, the Monitoring Summary Report and the Excursion and Monitoring Plan Performance Report shall both be submitted to the Director.

7.2.b.3. The Excursion and Monitoring Plan Performance Report shall be in the format specified in an approved monitoring plan and shall include, but not be limited to, the following information:

7.2.b.3.A. The magnitude of each excursion, and the date and time, including starting and ending times, of each excursion;

7.2.b.3.B. Specific identification of each excursion that occurs during start-ups, shutdowns, and malfunctions of the facility;

7.2.b.3.C. The nature and cause of any excursion (if known), and the corrective action taken and preventative measures adopted (if any);

7.2.b.3.D. The date and time identifying each period during when data is unavailable, and the reason for data unavailability and the corrective action taken; and

7.2.b.3.E. When no excursions have occurred or there were no periods of data unavailability, such information shall be stated in the report.

# Appendix A - CEMS Summary Report

Pollutant $SO_2$

Company _____

_____

Emission Limitation

| Regulation | Limit | Units | Period |
|---|---|---|---|
| 45 CSR 10 | | | |

Total Source Operating Time _____ minutes

Reporting Period: Calendar Quarter _____ to _____

Monitor Manufacturer: _____

Model Number: _____

Date of Last Certification or Audit: _____

Process Unit(s) Description: _____

_____

_____

## Emissions Data Summary

1. Duration of excess emissions in reporting period due to:

a. Startup/Shutdown _____ hours

b. Malfunctions due to Control Equipment Problems _____ hours

c. Malfunctions due to Process Problems _____ hours

d. Other Known Causes _____ hours

e. Unknown Causes _____ hours

2. Total Duration _____ hours

3. Percent Excess Emissions _____ %

% Excess Emissions = 100 * (Total Duration / Total source Operating Time)

## CEMS Performance Summary

1. CEMS Downtime in reporting period due to:

a. Monitor Equipment Malfunction _____ hours

b. Other Equipment Malfunction _____ hours

c. Quality Assurance Calibration _____ hours

d. Other Known Causes _____ hours

e. Unknown Causes _____ hours

2. Total CEMS Downtime _____ hours

3. Percent CEMS Downtime _____ %

% Downtime = 100 8 (Total COMS Downtime / Total Source Operating Time)

Please Note:

1. Separate Summary Reports are required for each process in the system when it has separate monitoring equipment.
2. Total source operating time means the total time which the affected source is operating, including all periods of start-up, shut-down, malfunction, or CEMS downtime as those times are defined under the rule.
3. All times for $SO_2$ emissions are to be reported in hours.
4. On a separate page describe any changes since the last reporting period to the CEMS process or controls.
5. Other reports may be necessary to meet requirements.

# Appendix B - Registration

| Table 1 - Sum of Design Heat Inputs for Similar Units | | | | | |
|---|---|---|---|---|---|
| **Type 'a'** | | **Type 'b'** | | **Type 'c'** | |
| **(A) Unit ID** | **(B) DHI (mmBTU)** | **(C) Unit ID** | **(D) DHI (mmBTU)** | **(E) Unit ID** | **(F) DHI (mmBTU)** |
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| Sum of DHI for all Type 'a' units | | Sum of DHI for all Type 'b' units | | Sum of DHI for all Type 'c' units | |

| Table 2 - Weight Emission Limits for Similar Units | | | |
|---|---|---|---|
| **(A)** | **(B) Total Design Heat Input (mmBTU)** | **(C) Factor from 45CSR10, Section 3 (lb/mmBTU)** | **(D) Weight Emission Rate (lb/hr)[1,2] [B * C = D]** |
| Sum of DHI for all Type 'a' units | | | |
| Sum of DHI for all Type 'b' units | | | |
| Sum of DHI for all Type 'c' units | | | |

| Table 3 - Registration of Standard Individual Stack Emission Rates | | | | | |
|---|---|---|---|---|---|
| (A) Stack ID | (B) Identify each unit venting thru stack | (C) Sum of DHI for all units vent-ing thru stack (mmBTU) | (D) Sum of DHI for all Similar Units (Table 2, Column B) (mmBTU) | (E) Wt. Emission Rate for all Similar Units (Table 2, Column D) (mmBTU) | (F) Stack Emission Rate (lb/hr) [(C/D) *E = F] |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| Sum of Standard Stack Allowable Emission Rates (lb/hr) | | | | | |

The owner or operator may register individual stack allowable emission rates, differing from those calculated above, as provided for in 45CSR10, Subsection 3.4.

| Table 4 - Registration of Alternative Stack Emisson Rates | | |
|---|---|---|
| (A) Stack ID | (B) Identify each unit venting thru stack | (C) Alternative Stack Emission Rate (lb/hr) |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| Sum of Alternative Stack Emission Rates (lb/hr)[1] | | |

[1] The sum of the Alternative stack emission rates for similar units shall not exceed the weight emission rates for similar units in Table 2, Column D.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029



DEC 28 2000

Mr. Edward L. Kropp, Chief
Office of Air Quality
7012 MacCorkle Ave, SE
Charleston, West Virginia 25304-2943

Dear Mr. Kropp:

Enclosed please find the Environmental Protection Agency comments regarding Interpretive Rules 45CSR2A and 45CSR10A which address "Testing, Monitoring, Recordkeeping, and Reporting Requirements." We appreciate the opportunity to comment on these interpretive rules. If you have any questions, please contact me at 215-814-2654 or Ruth Knapp of my staff at 215-814-2191.

Sincerely,

/s/Judith M. Katz,
Director Air Protection Division

Comments on Interpretative Rule 45CSR2A

1. Definition 2.3 should be revised to address the following issues. First, the language that states "including those exempted during start-up, shutdown and malfunction" should be modified to read "including all periods of startup, shutdown and malfunction" if the intent is to define all instances where control equipment or operational parameters are outside the range set forth in the monitoring plan. The second part of the definition regarding excursion states, excursion "also means measured emissions exceeding the applicable standards set forth in section 3 and 4 of 45CSR2" and its use later in the rule is a bit confusing. Another term such as "exceedances" or "excess emissions" should be defined and used to refer to instances where mass emission limits or opacity limits are being exceeded.

2. Section 6.2.a.1 indicates that a source may not need to use continuous opacity monitoring system (COMS) if the source is "able to comply with applicable particulate matter and opacity standards without utilization of particulate matter control equipment." This section should contain additional criteria to indicate how compliance, for this exception, will be determined. An example of such criteria might be, the source must show compliance with the applicable opacity standard on three different days using Method 9 and must perform 1 stack test to show compliance with applicable mass emission standards.

Comments on Interpretative Rule 45CSR10A

1. Section 5.1.a refers to section 3 of 45CSR10 which establishes limits of emissions in pounds of $SO_2$ per unit of design heat input (DHI). The section contains a table of testing frequency based upon the percent of allowable sulfur content. Since sulfur content is never set as allowable, West Virginia should provide a method for deriving one unit from the other. It would be preferable to have the table based upon allowable pounds per DHI.

2. Section 6.1.c refers to fuel with a sulfur content greater than or equal to 90% of the allowable sulfur content. As noted above, there is no "allowable sulfur content." There is only a calculated sulfur content based upon calculations.

3. Section 6.3.b.2 refers to triggering the 45 grains per cubic foot threshold. This threshold should actually be 45 grains per 100 cubic feet.

American Electric Power
1 Riverside Plaza

| Post-it® Fax Note 7671 | Date | # of pages ▶ 3 |
|---|---|---|
| To T. Mower | From G. Wooten | |
| Co./Dept. OAQ | Co. AEP | |
| Phone # 304-926-3638 | Phone # 614-223-1262 | |
| Fax # 304-926-3637 | Fax # | |

AEP
AMERICAN ELECTRIC POWER

January 2, 2001

Mr. Edward L. Kropp, Chief
Office of Air Quality
West Virginia Division of Environmental Protection
7012 MacCorkle Avenue SE
Charleston, West Virginia 25304-2943

**RE: Comments on 45 CSR 2A and 45 CSR 10A Interpretive Rules**

Dear Chief Kropp:

The operating companies of the American Electric Power System, including Ohio Power Company, Appalachian Power Company, and Central Operating Company, (collectively referred to as "AEP") offer the following comments on the proposed interpretive rules establishing testing, monitoring, recordkeeping and reporting requirements under legislative rules 45 CSR 2 and 45 CSR 10. AEP also adopts and incorporates by reference the comments submitted on behalf of the West Virginia Chamber of Commerce and the West Virginia Manufacturers Association, of which the AEP companies are members.

AEP was a faithful participant in the Office of Air Quality ("OAQ") convened 45 CSR 2A and 10A stakeholder workgroup. During these meetings, numerous recommendations and suggestions were presented to the OAQ for consideration in development of the proposed interpretive rules. AEP extends its compliments to the OAQ staff for the long hours and hard work committed to this effort. AEP is supportive of the stakeholder process as a forum available for various parties to listen, learn, and draft state air rule. However, AEP does believe that OAQ has in some cases overstepped the bounds in the development of this interpretive rule. For example, the interpretive rule not only was used to clarify the legislative rule, but it was also used to expand the authority of the OAQ by eliminating monitoring and testing options for some sources and establishing new stack by stack emission limits for others. While AEP does not support efforts to increase the stringency of the legislative rule through an interpretive rule, AEP does support the development of interpretive rules for the purpose of clarifying or simplifying legislative rules.

## 45 CSR 2A:

**§45-2A-5.1.a:** One issue that AEP consistently pointed out during the stakeholder processes (both for the legislative and interpretive rulemakings) and one that AEP still feels is appropriate to comment on is what appears to be an apparent melding of the terms "testing" and "monitoring." In this particular section, the paragraph starts out by stating the requirement to conduct tests for the purpose of determining compliance. However, later in the paragraph, sources are directed to include a schedule for conducting tests in their monitoring plans. As a result "testing" and "monitoring" requirements are being blended. We believe the agency should make an effort to clarify that while sources are generally required to perform periodic testing to demonstrate compliance, monitoring is a separate requirement, and should be performed on a more frequent basis. AEP suggests that OAQ define the two terms ("testing" and "monitoring") in the definitions section of the interpretive rule. When rules such as 45 CSR 2 and 45 CSR 10

were originally drafted, there was not an intention of requiring sources to continuously demonstrate compliance. However, with the melding of the requirements to periodically demonstrate (test) compliance and continuously monitor, sources are effectively being required to demonstrate compliance continuously. The standard was simply not set with this type of requirement in mind.

**§45-2A-5.2.a:** For convenience, AEP suggests OAQ consider placing a table (similar to the table in §45-10A-5.1.a) in this section that describes the testing cycle. This could be as simple as incorporating the tables from Appendix A into this section.

**§45-2A-6.2.a:** One issue that AEP consistently addressed during the interpretive rulemaking stakeholder process and still feels is appropriate to comment on is the OAQ's decision to force sources with a design heat input greater than 250 mmBTU/hr to use COMS as the approved monitoring plan method. §45-2-3.2 and §45-2-8.2.a of the legislative rule clearly give fuel burning sources the choice of using Method 9 or COMS not only as the method for determining compliance, but also for monitoring emissions. AEP believes that in requiring specific sources to use a "continuous" method of "monitoring" compliance, the OAQ is effectively increasing the stringency of this standard. One issue that makes the proposed language particularly troublesome is the apparent melding of the terms "testing" and "monitoring" (see comment for §45-2A-5.1.a). By requiring the use of COMs, combined with the blending of "testing" and "monitoring" terms, the OAQ is effectively creating a requirement for larger fuel burning sources to continuously demonstrate compliance. AEP believes that a more appropriate requirement would be to use COMS as an indicator of compliance and that the approved USEPA approved Test Method 9 be used for periodic demonstrations of compliance. AEP further believes that when the 10% standard was originally established, compliance with that standard was clearly intended to be determined using a test method (Method 9) that is performed periodically, not continuously.

**§45-2A-6.3.a.7.A:** AEP suggests OAQ reconsider the number of Method 9 readings that must be taken each hour during an excursion period under a non-COMs based monitoring plan. A properly completed 6-minute USEPA Method 9 test is sufficient to determine whether or not a source is back in compliance with the standard. Conducting 3 additional tests will provide little, if any, additional value. It would seem more appropriate to only require 1 properly conducted Method 9 test each hour. The 1 test-per-hour policy could potentially have a positive impact on the environment by freeing up an employee to troubleshoot the cause of the exceedance and correct any problems discovered.

**§45-2A-7.2.a:** Consistent with a similar requirement under §45-2-7.2.b.3.E, AEP believes that even when a mass emissions test has not been completed during a particular quarter, the source should still submit a report to the OAQ stating that no mass emission tests were conducted during that period.

## 45 CSR 10A:

**§45-10A-5.1.a:** The table presented in this section may complicate the determination of testing requirements. While the idea of a table is excellent, AEP believes that the introduction of a new term, "Allowable Sulfur Content" only complicates the determination. Furthermore, the table introduces a new standard or parameter that must be determined during test procedures. AEP suggests that OAQ consider revising the table so that the standard for determining testing frequency be consistent with the standard (pounds per hour) cited in §45-10-3. An alternative would be to use the lb/mmBtu emission rate listed in §45-10-3.

**§45-10A-6.1.a:** Consistent with discussions during the stakeholder process, AEP suggests that OAQ clarify that CEMS data used to monitor compliance with SO2 limits under 45 CSR 10 be unbiased (no bias adjustment factor) and unsubstituted. While OAQ supported this method of determining CEMS based emissions, it appears that insertion of language describing the data as unbiased and unsubstituted was overlooked.

**§45-10A-6.1.b:** Another issue that AEP consistently commented on during the interpretive rulemaking stakeholder process and still feels is appropriate to address is OAQ's decision to require type "a" sources to use CEMS as the approved monitoring plan method. §45-10-8.2.c of the legislative rule clearly gives fuel burning sources the choice of using Method 6, CEMS or fuel sampling and analysis, as the method for demonstrating compliance. AEP believes that by requiring specific sources to use a continuous method of "monitoring" compliance that the OAQ is effectively increasing the stringency of the standard for select sources. One issue that makes this position by OAQ particularly troublesome is again the apparent melding of the terms "testing" and "monitoring". By forcing the use of CEMs, combined with the blending of "testing" and "monitoring" terms, the OAQ is effectively creating a requirement for electric generating sources to continuously demonstrate or test for compliance. AEP believes that when the $SO_2$ standards in 45 CSR 10 were originally established, compliance with those standards was clearly intended to be determined using a test method (Method 6) that is performed periodically, not continuously.

**§45-10A-7.2:** During the stakeholder process, a document was circulated by the OAQ (Entitled Appendix B: Monitoring Program Data Formats for WVDEP Office of Air Quality) that provided information on the format of data to be recorded and submitted under 45 CSR 10. It was clear in the Appendix B document that acid rain sources using 40 CFR 75 monitoring could use the 40 CFR 75 EDR reports to meet the reporting requirements of the OAQ. Late in the stakeholder process, Appendix B was eliminated due to the fact that time was running short and the individuals involved in the stakeholder process were not "computer experts". It was recognized that some of the recordkeeping and reporting requirements would have to be worked out during the monitoring plan development phase. While, the stakeholder group really had no choice but to drop this Appendix, it seems now to have presented some potential problems. The 40 CFR 75 monitoring, recordkeeping and reporting requirements are the most stringent and complete set of $SO_2$ monitoring, recordkeeping and reporting requirements being used today. It seems overly burdensome to require acid rain sources to implement additional recordkeeping and reporting requirements beyond those required in 40 CFR 75. Because AEP believes that this was simply overlooked, we ask that OAQ further clarify the rule by inserting language into 45 CSR 10A stating that submittal of the 40 CFR 75 EDR reports to the OAQ be deemed sufficient for meeting the requirements of recordkeeping and reporting under 40 CSR 10A.

In closing, AEP would like to thank the OAQ for the opportunity to have been a participant in the interpretive rulemaking process. We look forward to working with you on future similar projects. If you have any questions concerning our comments, please call me at (614) 223-1262.

Sincerely,

Gregory J. Wooten

Gregory J. Wooten
Air Quality Services
Environmental Services Department

cc: M.R. Robida - Environmental Services
F. E. Blake - Environmental Services
J. C. Lytle – Environmental Services

PPG Industries, Inc.
Post Office Box 191 New Martinsville, West Virginia 26155 USA Telephone: (304) 455-2200



December 21, 2000



**W. Scott Pleskonko**
Director, Environmental, Health & Safety
Natrium Plant
Chemicals Group

Edward L. Kropp, Chief
Office of Air Quality
West Virginia Division of Environmental Protection
7012 MacCorkle Avenue S.E.
Charleston, WV 25304-2943

RE: Comments to Proposed Interpretive Rules 45 CSR 2A and 45 CSR 10A

Dear Mr. Kropp:

PPG Industries, Inc. ("PPG") is hereby submitting comments to the interpretive rules recently proposed by the West Virginia Division of Environmental Protection ("DEP") regarding emission monitoring and testing. As an initial matter, PPG notes that proposed 45 CSR 2A and 45 CSR 10A are being promulgated as interpretive rules by the DEP and not as legislative rules. Accordingly, the proposed rules should not create new obligations or increase the stringency of existing legislative rules. PPG believes that interpretive rules 2A and 10A must provide sufficient flexibility so as not to definitively establish rights or obligations.

1. §45-2A-4. Registration of Allowable Emission Rates for Individual Stacks

This section provides the owner or operator with a choice between conducting simultaneous weight emission tests of all similar fuel burning units at a source or registering an allowable emission rate for each individual stack at the source.

First, an interpretive rule should not require the registration of an allowable emission limit for each stack. Such a requirement effectively increases the stringency of the underlying particulate matter limit established in 45 CSR 2 (which allows for a plant-wide limit). As discussed above, an interpretive rule cannot create new obligations or increase the stringency of existing legislative rules.

Second, the option of conducting stack testing on all stacks in order to demonstrate compliance with the applicable particulate matter limit in 45 CSR 2 appears reasonable provided the testing requirements are reasonable. PPG is concerned with the availability and allocation of resources (i.e., stack testing consultants and/or equipment) to conduct such testing "simultaneously" as indicated in the interpretive rule. PPG requests that the DEP allow for such stack testing over a reasonable period of time such that testing of all stacks at a source can be accomplished in a reasonable manner.

2. §45-2A-6 Visible Emission Monitoring Plan Requirements

First, PPG notes that the timeframe for submitting a monitoring plan is not included in the interpretive rule. Legislative rule 2 requires submission of a monitoring plan within 6 months of its effective date of August 31, 2000 (i.e., by February 28, 2001). PPG requests that the DEP confirm the date for submitting monitoring plans and consider clarifying the due date in interpretive rule 2A.

Second, subsection 6.2 generally requires a continuous opacity monitoring system ("COMS") for certain larger fuel burning units. PPG initially notes that legislative rule 2 does not mandate COMS but allows for alternative monitoring (e.g., periodic Method 9 observations or parametric monitoring). The DEP should not restrict a facility's options via an interpretive rule. Instead, DEP should consider emission sources on an individual basis in assessing whether a COMS will be required.

However, PPG does note that section 6.2.b provides for an exemption from the COMS requirements under certain conditions. PPG believes that the inclusion of this provision may provide sufficient flexibility to address situations on a case-by-case basis provided the DEP is reasonable in assessing individual situations. Accordingly, PPG supports the DEP's recognition of the ability to exempt sources from the COMS requirement. PPG intends to further explore alternate monitoring for opacity, particularly in light of the impact of the recognized error in COMS data.

3. §45-10A-4 Fuel Burning Units(s)—Registration of Allowable Emission Rates for Individual Stacks

As discussed with respect to interpretive rule 2A above, a requirement to register allowable emission rates for individual stacks cannot be imposed via interpretive rulemaking.

We appreciate the opportunity to submit these comments and trust that the DEP will give them serious consideration.

Sincerely,

W. Scott Pleskonko
Director, Environmental, Health & Safety

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*OF INDEPENDENT LAW FIRMS*


January 2, 2001

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## *TELECOPY COVER SHEET*

TO: EDWARD L. KROPP 926-3637

C/M# 90286 / 7539

FROM: KATHY G. BECKETT

TOTAL # OF PGS. INCLUDING COVER SHEET: 7

PLEASE CONTACT Susie Crouch at (304) 340-1013 IF ANY PROBLEMS OCCUR IN RECEIVING THIS FAX.



PLEASE DELIVER THIS FAX IMMEDIATELY UPON RECEIPT.

January 2, 2001

Via Facsimile

Edward L. Kropp, Esquire
Deputy Director and Chief of the Office of Air Quality
West Virginia Division of Environmental Protection
7012 MacCorkle Avenue S.E.
Charleston, West Virginia 25304

Re: Interpretive Rules 2A and 10A

Dear Chief Kropp:

The enclosed comments are filed on behalf of the West Virginia Chamber of Commerce and the West Virginia Manufacturers Association in response to the Office of Air Quality's filing of interpretive rules 45 CSR 2A and 45 CSR 10A.

The filing of these two interpretive rules brings to closure issues that were left remaining after last year's efforts to update and streamline 45 CSR 2 and 45 CSR 10. The Chamber and WVMA applauds the Office of Air Quality for its willingness to address the remaining issues and appreciates the numerous open discussions that were held with all stakeholders concerning the text of these interpretive rules.

1. Interpretive Rule Format. The Chamber and WVMA question the agency's use of the interpretive rule format to address substantive regulatory revisions. The organizations do, however, support the use of interpretive rules to establish clarification and guidance for the underlying legislative rule and statutory law. An interpretive rule is defined as a rule that will provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it. In some provisions of these interpretive rules, the agency is providing more than simply guidance. It is changing the underlying rule applicability. A case in point is the agency's requirement that continuous monitors be required of certain classes of facilities, where the underlying legislative rules clearly provide a range of monitoring options. A second case is the agency's requirement that sources register individual stack emission limits. This represents a departure from historical implementation of 45 CSR 2 and 45 CSR 10 and contradicts the overall cap on emissions that is provided under 45 CSR 2.

The types of changes that are suggested within 45 CSR 2A and 45 CSR 10A are of general application and future effect with enforcement implications which warrant the more thorough rulemaking process of a legislative rule.

For your information, the following statutory definitions for "interpretive rule" and "legislative rule" are provided. The Chamber and WVMA urge the agency not to exceed the statutory scope for interpretive rules.

W. Va. Code §29A-1-2(c) sets forth the definition of "interpretive rule" as

Every rule adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established conditions for the exercise of discretionary power as herein provided. However, an interpretive rule is admissible for the purpose of showing that the prior conduct of a person was based on good faith reliance on such rule. The admission of such rule in no way affects any legislative or judicial determination regarding the prospective effect of such rule. Where any provision of this code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions.

W. Va. Code §29A-1-2(c) sets forth the definition of "legislative rule" as

Every rule proposed or promulgated by any agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of the law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the legislature. Except where otherwise specifically provided in this code, legislative rule does not include (a) findings or determinations of fact made or reported by an agency, including any such findings and determinations as are required to be made by any agency as a condition precedent to proposal of a rule to the legislature; (B) declaratory rulings issued by an agency pursuant to the provisions of section one [§29A-4-1], article four of this chapter; (C) orders, as defined in subdivision (e) of this section; or (D) executive orders or proclamations by the governor issued solely in the exercise of executive power, including executive orders issued in the event of a public disaster or emergency.

2. Registration of Individual Stacks.

**45 CSR 2A and 45 CSR 10A.** The Office of Air Quality itself admits that the historical application of the requirement to register individual stacks has been confusing. Those who have had experience with 45 CSR 2 and 45 CSR 10 recall that the context within which stacks were required to assign specific weight rates involved instances where modeling was required to demonstrate air quality impacts. The agency is now proposing that all regulated source stacks be registered for specific emission rates. Such a registration requirement is in direct conflict with the provisions of 45 CSR 2 and 10 which provide for a plantwide cap for the weight emission standards. By requiring registration of individual stacks, the interpretive rule is improperly limiting the underlying statutory rule language. A move from a plant wide limit to a stack-by-stack limit effectively increases the stringency of these standards. This increase in stringency is being imposed when there is no evidence that there are problems meeting the current PM or SO2 NAAQS.

The agency explained its interest in emphasizing the registration as a need to prepare facilities for implementation of the Title V program.

The industry representatives, working with the agency, proposed that a more reasonable application of the requirements to register individual stacks under both 45 CSR 2A and 45 CSR 10A as follows:

> The owner or operator of each Title V fuel burning unit(s) shall register the allowable emission rate for each individual stack. The emission rate, in pounds per hour, shall be determined as provided in Appendix E. Registration of design heat input shall not become an enforceable limit. Registration of an allowable emission rate shall be reviewed by the Director and if approved as part of a compliance schedule and/or permit limit shall become enforceable. Individual stack emission limits shall be representative of varied operating conditions and are not required to represent a single operating scenario of plantwide emissions.

This proposal was rejected based upon additional concerns of the agency concerning enforcement of 45 CSR 2 and 45 CSR 10. Industry continues to question how registration of individual stacks creates an enforcement tool the agency does not already possess. In light of the fact that the agency's proposal directly contradicts the plantwide limits for particulates and raises a serious concern about enforcement, we object to the requirement to register each stack under 45 CSR 2A and 45 CSR 10A.

3. Testing Requirements.

**45 CSR 2A.** The weight emission testing requirements under 45 CSR 2A, §5.2 reference Appendix A for establishing the frequency of testing. Appendix A refers to cycles which are defined in the definitions section. To reduce confusion, it is suggested that the definitions for each cycle be included in Appendix A or in the text of §5.2. In 45 CSR 10A §5.1.a the definitions for frequency are included in the discussion. Sources

working with both 10A and 2A may have a clearer understanding of these frequency requirements if they were handled in a similar fashion.

**45 CSR 10A.** *Manufacturing Process Source(s).* The agency has included a provision under 45 CSR 10A, §5.2.b that provides that process sources utilizing a flare as a control device shall be exempt from compliance testing requirements. This provision was included in the interpretive rule in acknowledgment of the fact that testing of flares is inappropriate. The Chamber and WVMA endorse the agency's inclusion of this provision.

The agency has also included a provision under 45 CSR 10A, §5.2.c that allows for the petitioning of the Director by a source for an alternative to compliance testing. The Chamber and WVMA support the agency's inclusion of this provision which will allow for the regulated community to adequately demonstrate compliance via methods other than those specifically identified in 45 CSR 10A, §5.2.a.

*Stack Testing Requirement Relative to CEMs Application.* The agency has included in 45 CSR 10A, §5.4 an exemption from testing requirements for those fuel burning units, manufacturing process units, or combustion units that employ CEMs. The Chamber and WVMA applaud the agency's inclusion of this provision in light of the amount of data the CEMs will provide.

4. Monitoring Plan Requirements. When we initially discussed the agency developing a policy to assist in the implementation of 45 CSR 2 and 45 CSR 10 it was to establish the details as to what needs to be incorporated into the monitoring plans and related recordkeeping requirements. This section is an important part of what is needed to assure the regulated community is providing appropriate information.

**45 CSR 2A.** The Chamber and WVMA agree with the agency's position that operation of COMs is an adequate monitoring plan. Also of importance is the provision that allows those sources that are able to comply with the applicable particulate matter and opacity standards without utilization of particulate matter control equipment not to file a plan.

The Chamber and WVMA are also supportive of the 45 CSR 2A,§6.2.b which allows an exemption from the installation of COMs if the Director determines that COMs would not provide an accurate determination of emissions or that the installation of a COMs may be waived due to physical source limitations or to extreme economic reasons. This provision is similar to one in the Commonwealth of Pennsylvania. The Chamber and WVMA know of members who will be petitioning the Director to approve such exemptions we hope that the agency will give those petitions appropriate consideration.

Finally, the Chamber and WVMA find inclusion of non-COMs based monitoring plans as entirely consistent with 45 CSR 2. Not all sources should be required to install COMs, and Method 9 readings can readily and economically provide compliance data.

**45 CSR 10A.** *Fuel Burning Units.* The Chamber and WVMA agree with the recognition by the agency that the operation of CEMs is an adequate monitoring plan. Also of importance is the provision that those sources that burn fuel with a sulfur content equal to or greater than 90% of the allowable sulfur content are able to use CEMs or "as burned" fuel analysis. It is entirely appropriate for the agency to accept either type of monitoring.

*Manufacturing Process Source(s).* The Chamber and WVMA support the recognition by the agency that operation of CEMs is an adequate monitoring plan. Also of importance is the provision that establishes a threshold for those sources that may or may not need to operate CEMs. We are very supportive of the provision that allows for the ability to petition for an alternative to CEMs as set forth in 45 CSR 10A, §6.2.1.b. There will be sources filing such petitions and we look forward to working with the agency on approval of such as appropriate.

*Combustion Sources.* The Chamber and WVMA support the recognition by the agency that operation of CEMs is an adequate monitoring plan. Also of importance is the provision that establishes a threshold for those sources that may or may not need to operate CEMs.

5. Recordkeeping and Reporting Requirements.

**45 CSR 2A.** The Chamber and WVMA support 45 CSR 2A, §7.1.a.1 which establishes appropriate recordkeeping requirements for the burning of pipeline quality gas. We are also supportive of the agency's inclusion of provisions that address alternative fuels and combinations of fuels burned.

Generally, the provisions of 45 CSR 2A, §7.2 appropriately set forth the details of what the agency needs with respect to exception reports. The percentages for the excursions relative to total operating time appear to be inconsistent with those recognized in 45 CSR 10A, § 7.2. It is proposed that these requirements be made consistent with those of 45 CSR 10A.

**45 CSR 10A.** The Chamber and WVMA support the exemption from the recordkeeping provisions of 45 CSR 10A §7.1.a and §7.1.b provided such sources operate CEMs. We also support the schedule for the frequency of analysis of fuel quality based upon percentage of the compliance limit within which the facility operates. These are reasonable and appropriate standards.

With respect to 45 CSR 10A, §7.2 exception reporting a few clarifications need to be made. It was originally discussed that those reports generated pursuant to 40 CFR Part 75 would be sufficient for this section therefore avoiding the generation and filing of

additional reports to the state. Inclusion of language that recognizes this issue is essential.

In conclusion, the Chamber and WVMA appreciate the agency's work. We believe that the rules should be issued as legislative rules, but in the interim would support immediate application of these guidelines, with the revisions suggested above.

Additional comments have been filed by active industry participants of the stakeholder process. We commend the agency's careful consideration of those comments which address plant-specific concerns that are more generally addressed herein.

If you have any questions concerning these comments, please feel free to contact either Kathy Beckett (304) 340-1019 or John Pitner (304) 665-3485.

Very truly yours,

Kathy G. Beckett
WV Chamber of Commerce

John K. Pitner
John K. Pitner – Air Team Leader
WV Manufacturers Association

cc: Earl Billingsley
Laura Crowder
Karen Watson, Esquire

bc: Stephen G. Roberts
Karen Price

# 45CSR10A

## TESTING, MONITORING, RECORDKEEPING AND REPORTING REQUIREMENTS UNDER 45CSR10

## RESPONSE TO COMMENTS

### I. Commenter: U. S. Environmental Protection Agency (EPA)

**Comment A:** *"Section 5.1.a refers to section 3 of 45CSR10 which establishes limits of emissions in pounds of SO2 per unit of design heat input (DHI). The section contains a table of testing frequency based upon the percent of allowable sulfur content. Since sulfur content is never set as allowable, West Virginia should provide a method for deriving one unit from the other. It would be preferable to have the table based upon allowable pounds per DHI."*

**Response A:** OAQ concurs with the commenter and has deleted the definition of "allowable sulfur content" in subsection 2.2. OAQ has inserted a new definition of the term "factor", in lb $SO_2$/mmBTU, as follows: "means the number, indicated in 45CSR10, subsection 3.1, 3.2, or 3.3, as applicable, to be multiplied by the TDHI to calculate the amount, measured in pounds per hour, of sulfur dioxide permitted to be discharged to the atmosphere from all stacks located at one plant."

OAQ also changed the relevant language in subdivisions 5.1.a and 7.1.a of the rule.

**Comment B:** *"Section 6.1.c refers to fuel with a sulfur content greater than or equal to 90% of the allowable sulfur content. As noted above, there is no "allowable sulfur content." There is only a calculated sulfur content based upon calculations."*

**Response B:** OAQ has changed "allowable sulfur content" to "factor"in subsection 6.1.c.

**Comment C:** *"Section 6.3.b.2 refers to triggering the 45 grains per cubic foot threshold. This threshold should actually be 45 grains per 100 cubic feet."*

**Response C:** The OAQ concurs and the correction has been made.

**Comment D:** The commenter suggested the term "excursion" in the definitions is confusing and suggested that OAQ revise the definition.

**Response D:** Although the comment was made in the context of 45CSR2A, OAQ believes it applies equally to this interpretive rule. The term "excursion" will be revised with some minor clarifications.

## II. Commenter: American Electric Power (AEP)

**Comment A:** ***§45-10A-5.1.a:*** *The table presented in this section may complicate the determination of testing requirements. While the idea of a table is excellent, AEP believes that the introduction of a new term, "allowable sulfur content" only complicates the determination. Furthermore, the table introduces a new standard or parameter that must be determined during test procedures. AEP suggests that OAQ consider revising the table so that the standard for determining testing frequency be consistent with the standard (pounds per hour) cited in §45-10-3. An alternative would be to use the lb/mmBtu emission rate listed in §45-10-3.*

**Response A:** See Response to EPA Comments A and B.

**Comment B:** ***§45-10A-6.1.a:*** *Consistent with discussions during the stakeholder process, AEP suggests that OAQ clarify that CEMS data used to monitor compliance with SO2 limits under 45 CSR 10 be unbiased (no bias adjustment factor) and unsubstituted. While OAQ supported this method of determining CEMS based emissions, it appears that insertion of language describing the data as unbiased and unsubstituted was overlooked.*

**Response B:** The commenter is in error; the language was not overlooked and is contained in subsection 2.2, the definition of "Continuous emission monitoring system" or "CEMS." However, upon review of the language the OAQ believes it is more appropriate to include the language in section 6, and has inserted 6.1.b.1, which states:

> CEMS conforming to the specifications of 40 CFR Part 75 shall use unbiased, unsubstituted data to demonstrate compliance with the provisions of 45CSR10.

**Comment C:** ***§45-10A-6.1.b:*** *Another issue that AEP consistently commented on during the interpretive rulemaking stakeholder process and still feels is appropriate to address is OAQ's decision to require type "a" sources to use CEMS as the approved monitoring plan method. §45-10-8.2.c of the legislative rule clearly gives fuel burning sources the choice of using Method 6, CEMS or fuel sampling and analysis, as the method for demonstrating compliance. AEP believes that by requiring specific sources to use a continuous method of "monitoring" compliance that the OAQ is effectively increasing the stringency of the standard for select sources. One issue that makes this position by OAQ particularly troublesome is again the apparent melding of the terms "testing" and "monitoring". By forcing the use of CEMs, combined with the blending of "testing" and "monitoring" terms, the OAQ is effectively creating a requirement for electric generating sources to continuously demonstrate or test for compliance. AEP believes that when the $SO_2$ standards in 45 CSR 10 were*

*originally established, compliance with those standards was clearly intended to be determined using a test method (Method 6) that is performed periodically, not continuously.*

**Response C:** The commenter states that 45CSR10, the underlying legislative rule, in subdivision 8.2.c clearly gives fuel burning sources the choice of using Method 6, CEMS or fuel sampling and analysis, as the method for demonstrating compliance with the standard, and implies that this choice is completely up to the source to make, without any direction or input from the regulatory agency. This is not what the rule says. The commenter fails to consider other pertinent language in subdivision 8.2.a which clearly gives the Director the authority to require a source to use CEMS as the method of demonstrating compliance. Subdivision 8.2.a states:

> At the request of the Director the owner and/or operator shall install such stack gas monitoring devices as the Director deems necessary to determine compliance with the provisions of this rule. The data from such devices shall be readily available at the source location or such other reasonable location the Director may specify. At the request of the Director, or his or her duly authorized representative, such data shall be made available for inspection or copying. Failure to promptly supply such data shall constitute a violation of this rule. (Emphasis added)

The authority to require CEMS is by no means a new regulatory requirement. The above-quoted language, authorizing the Director to require CEMS has been in 45CSR10 since 1972.[1] The Director by the adoption of this interpretive rule is simple providing guidance for the first time as to when and under what circumstances he or she will require CEMS to be used, an exercise of the authority clearly given him by law.

The commenter's second point is that by requiring some sources to use a continuous method of monitoring, such as CEMS, the OAQ is effectively increasing the stringency of the standard. The OAQ disagrees that the interpretive rule in any way alters the underlying standard. The standards for fuel burning units established in 45CSR§10-3 are either a pound per hour or a pound per million Btu emission rate, averaged over a twenty-four hour period. Regardless of the type of monitoring used to determine compliance with the standards, be it periodic reference method testing, fuel sampling, CEMS or some other method, the underlying standard and the obligation to comply remain the same.

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[1]The Director's general authority to prescribe a specific monitoring device is found under W.Va. Code §22-5-4(a)(15).

The scope of the compliance obligation with requirements under the federal Clean Air Act (CAA) was one of the key points discussed by EPA in its final rulemaking involving the Any Credible Evidence (ACE) concept. (See 62 Federal Register 8323-8326, February 24, 1997). One of industry's main contentions regarding EPA's proposed ACE rule was that the effect of the rule, allowing data and evidence in addition to reference test methods to be considered in an enforcement action, was to increase the stringency of the standard. EPA responded by explaining that the issue of what type of data is used to determine compliance is distinct from the issue of the source's underlying obligation to comply. The obligation to comply with the agency's standards is continuing in nature, i.e., sources are required to comply all of the time (consistent with averaging times) except for periods specifically exempted in the standards, such as start-up, shutdown or malfunctions. In the final promulgation of the ACE rule, EPA cited ample legal authority under the CAA, regulations and case law for the proposition that sources are required to comply continuously, and the Director believes the same legal principles apply in this case since 45CSR10 is part of the State Implementation Plan (SIP) required under the CAA.

The scope of the compliance obligation is further elucidated in OAQ's Title V compliance certification requirement under 45CSR30. In the compliance certification form required to be signed by sources annually, sources are required to certify "continuous compliance" with the permit, whether the monitoring methods specified in the permit generate data on an intermittent basis, such as periodic Method 6 readings, or on a continuous basis, such as CEMS.[2]

The fact that the compliance obligation is continuous in nature does not, however, preclude the agency from adopting enforcement discretion policies for evaluating the results of various test methods. Such enforcement policies, though, are separate and distinct from the issue of whether CEMS are warranted and are therefore outside the scope of this rulemaking.

The commenter states that the terms "testing" and "monitoring" have been melded in the rule, and that this melding of terms somehow results in a requirement that sources demonstrate compliance with the standards on a continuous basis. While it is true that the two terms do sometimes overlap, this usage of terms does not result in any requirement to monitor continuously, as the commenter suggests. Rather, any requirement in the rule to monitor emissions continuously is not a result of semantics but a considered determination that the continuous monitoring

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[2]The compliance certification form explains in a footnote that a source may claim continuous compliance based upon the results of intermittent compliance determination methods, provided that the results are representative and no reasonably available information contradicts that assumption (the ACE concept).

method is the most appropriate method for measuring compliance, considering the nature of the source and other factors.

It may be helpful to consider the standard dictionary definitions of the terms "testing" and "monitoring":

> "Monitoring", according to The American Heritage Dictionary, means "to scrutinize or check systematically with a view to collecting certain specified categories of data."
>
> "Testing", according to The American Heritage Dictionary, means "to determine the presence or properties of a substance."

It is readily apparent from the above definitions that the real distinction between the terms has to do with frequency. The two terms are not mutually exclusive. Both terms involve the measurement and collection of data; however, "testing" can consist of a one-time measurement, whereas "monitoring" involves the measurement of data over some period of time or in some systematic fashion.

Thus, the reality is that the two terms do blend into one another, depending upon the context. This blending of terms is not unique to the interpretive rules. The underlying legislative rules, 45CSR2 and 45CSR10, (which were the product of an extensive stakeholder process), use the terms "testing" and "monitoring" in the same manner as under these interpretive rules. Perhaps with the passage of the 2000 revisions to the legislative rules, these terms are receiving more scrutiny, since for the first time sources are required to develop and execute monitoring plans and sources must now conduct periodic testing, thus raising the issue of where "testing" ends and "monitoring" begins.

Regardless of what term we use to describe the method of measuring data, however, the real question is what is the most appropriate method, considering the nature of the particular source. This turns on many different issues, all of which were thoroughly discussed in the stakeholder process, and includes reliability and representativeness of the method, physical constraints, and economic feasibility, to name but a few. (See below for more detailed discussion).

The OAQ believes there is no inherent problem in the way the terms are used in the legislative and interpretive rules. What is important is that there be no confusion as to the exact methods of measurement required by the Director, whether characterized as "monitoring" or "testing". The rules must clearly inform the regulated public as to their obligation to collect information related to the demonstration of compliance with the standards.

The commenter's last point was that when the $SO_2$ standards in 45CSR10 were

originally established, compliance with those standards was intended to be determined using a test method (Method 6) that is performed periodically, not continuously, implying that the agency is now and forever bound to only that type of testing requirement.

The commenter's premise that Method 6 was the method required in the original rule is incorrect. 45CSR10, as written in 1972, amended in 1978, and again amended in 1994, did not specify a particular test method; rather it stated that "such tests shall be conducted in a manner as the Chief may specify". Furthermore, 45CSR10, subdivision 8.2.a, quoted above, which has been in the rule since 1972, clearly contemplates that monitoring devices may be required by the Director to "determine compliance". Subdivision 8.2.b of 45CSR10, added to the rule in 1978, goes on to state:

> Prior to the installation of calibrated stack gas monitoring devices, sulfur dioxide emission rates shall be calculated on an equivalent fuel sulfur content basis.

Subsection 2.6 of 45CSR10 defines "equivalent fuel sulfur content" as:

> that quantity of sulfur dioxide in pounds per million British Thermal Units (BTU's) which correspond to a given percent sulfur in fuel being burned and is calculated on the basis of one hundred percent (100%) conversion of the sulfur to sulfur dioxide and assuming that no sulfur or sulfur dioxide recovery or control measures are employed.

Contrary to the commenter's contention, the above-quoted language clearly contemplates that compliance can be determined by methods other than using a stack test (Method 6). Neither Method 6, nor any other test method, is mentioned in the earlier versions of 45CSR10, whereas monitoring and fuel sampling and analysis are clearly contemplated.

CEMS are in fact well-established monitoring methods which accurately measure emissions. They have been the required monitoring method in some air programs for 30 years. In 1971, EPA first required steam generating units with a design heat input of 250 mmBTU/hr or greater to use CEMS as part of the new source performance standards (NSPS). See 40 CFR Part 60, Subpart D. Over the years, EPA has continued to require more and more source categories to use CEMS (see below for more detail). Indeed, testing and monitoring methods are updated frequently by EPA with improvements in the accuracy of the methods. One of the paramount reasons for the OAQ's major regulatory revision effort initiated in 1998 was to include updated test methods in all of its rules, especially the SIP rules. In fact, Method 6 itself, originally a wet chemistry test method, has been updated a number of times and currently the majority of sources use Method 6C,

an instrumental test method. Method 6C itself uses an $SO_2$ monitor, or an emission monitoring system to measure emissions. There simply is no valid reason to believe that sources, especially those greater than the 250 mmBTU/hr threshold, should not be required to use modern technology for measuring their emissions.

Before providing all the reasons supporting the CEMS requirement in the interpretive rule, let us examine exactly what the rule says. The rule says that all type 'a' fuel burning units (electric generating units) must use CEMS, and type 'b' or type 'c' fuel burning units (industrial, commercial, institutional boilers) with a design heat input of 250 mmBTU/hr or greater and that burn fuel with an equivalent sulfur content that allows them to emit at 90% or more of their limit, must use CEMS or conduct daily as-burned fuel analysis.

There are many reasons supporting the requirement that certain sources use CEMS to demonstrate compliance with the standard. The first is that sources meeting the 250 mmBTU/hr threshold have a significant potential to adversely affect the environment, thus warranting the use of the most reliable means of measuring those emissions. It is commonly accepted that CEMS create an unbiased, continuous and permanent record of emissions on a real-time basis.

Second, the 250 mmBTU/hr threshold is a common regulatory threshold for requiring CEMS to be used as the monitoring method. The federal NSPS and Acid Rain programs both require sources of this size to use CEMS, and in fact approximately sixteen (16) sources in West Virginia currently have CEMS required by one program or the other.

Third, CEMS are both economically and technologically feasible. EPA has been required to verify this point in a myriad of rulemakings under NSPS, including industrial, institutional, commercial and utility steam boilers firing other than "clean" fuels. As stated above, EPA first required CEMS for utility steam generators in 1971 for units with a DHI of 250 mmBTU/hr or greater. Over the last 30 years, EPA has gradually required smaller steam boilers to use CEMS, resulting in boilers as small as 30 mmBTU/hr now being required to use CEMS under NSPS.

Additionally, one of the strongest justifications for the CEMS requirement in this interpretive rule is that all of the fuel burning sources required to use CEMS by this rule, i.e, type 'a' fuel burning units, have CEMS in place due to either NSPS or Acid Rain requirements. Other sources have the option of installing CEMS, conducting daily "as burned" fuel analyses, or lowering the sulfur content of their fuel to stay below 90% of the regulatory limit. Therefore, there will be little economic impact to the regulated community as a result of this requirement. Balancing the relatively small economic impact against the substantial benefits to

be obtained by having sources using the most reliable methods of measuring emissions clearly justifies the Director in adopting this requirement.

**Comment D:** *§45-10A-7.2: During the stakeholder process, a document was circulated by the OAQ (Entitled Appendix B: Monitoring Program Data Formats for WVDEP Office of Air Quality) that provided information on the format of data to be recorded and submitted under 45CSR10. It was clear in the Appendix B document that acid rain sources using 40 CFR 75 monitoring could use the 40 CFR 75 EDR reports to meet the reporting requirements of the OAQ. Late in the stakeholder process, Appendix B was eliminated due to the fact that time was running short and the individuals involved in the stakeholder process were not "computer experts". It was recognized that some of the recordkeeping and reporting requirements would have to be worked out during the monitoring plan development phase. While, the stakeholder group really had no choice but to drop this Appendix, it seems now to have presented some potential problems. The 40 CFR 75 monitoring, recordkeeping and reporting requirements are the most stringent and complete set of $SO_2$ monitoring, recordkeeping and reporting requirements being used today. It seems overly burdensome to require acid rain sources to implement additional recordkeeping and reporting requirements beyond those required in 40 CFR 75. Because AEP believes that this was simply overlooked, we ask that OAQ further clarify the rule by inserting language into 45 CSR 10A stating that submittal of the 40 CFR 75 EDR reports to the OAQ be deemed sufficient for meeting the requirements of recordkeeping and reporting under 40CSR10A.*

**Response D:** The OAQ agrees with the commenter's contention that this point was overlooked and has inserted paragraph 7.2.a.1. which states:

> Submittal of 40 CFR Part 75 data in electronic data reporting (EDR) format to the Director shall be deemed to satisfy the requirements of subdivision 7.2.a.

**Comment E:** AEP commented generally that in some cases the interpretive rule expanded the authority of the agency and did more than merely clarify the legislative rule.

**Response E:** See Response to Chamber's and WVMA's Comment A below.

## III. Commenter: PPG Industries, Inc. (PPG)

**Comment A:** *§45-10A-4 Fuel Burning Unit(s) - Registration of Allowable Emission Rates for Individual Stacks*

*As discussed with respect to interpretive rule 2A above, a requirement to register allowable emission rates for individual stacks cannot be imposed via interpretive*

*rulemaking.*

*An interpretive rule should not require the registration of an allowable emission limit for each stack. Such a requirement effectively increases the stringency of the underlying particulate matter limit established in 45CSR10 (which allows for a plant-wide limit). An interpretive rule cannot create new obligations or increase the stringency of existing legislative rules.*

**Response A:** The commenter's contention that the interpretive rule creates a new standard is unsupportable. §45-10A-3.4. "Allowable Emission Rates for Individual Stacks" states:

> "3.4.a. Unless otherwise approved by the Director, the maximum allowable emission rate for an individual stack shall not exceed by more than twenty-five percent (25%) the emission rate determined by prorating the total allowable emission rate specified in subsections 3.1, 3.2, or 3.3, on the basis of individual unit heat input at design capacity for all fuel burning units discharging through that stack.
>
> > 3.4.a.1. Subject to the provisions of this section, allowable emission rates for individual stacks shall be determined by the owner and/or operator and registered with the Director at the request of and on forms provided by the Director. Such rates shall be subject to review and approval by the Director." (Emphasis added)

The plant-wide limit in subdivision 3.4.a allows sources with multiple stacks the flexibility to operate individual units under different operating scenarios provided the sum of the emissions from all similar units does not exceed the plant-wide limit. The interpretive rule does not change this limit; it merely makes the limit enforceable by specifying how a source must demonstrate compliance. The rule provides sources with the option of demonstrating compliance in a number of ways: (1) CEMS; (2) daily ASTM method sampling and analysis; or (3) registration of individual stack emission rates and periodic testing to verify compliance with the individual limits.

45CSR10 has a twenty-four (24) hour averaging time for the standard and sources must be able to demonstrate compliance with the plant-wide limit over the averaging period. Any method for determining compliance must produce data relevant to the averaging period. The OAQ believes that the options provided in the rule give sources sufficient operational flexibility.

The OAQ believes an interpretive rule is an appropriate vehicle for requiring

sources to register their preference for CEMS, daily sampling and analysis, or registration and periodic testing.

**Comment B:** PPG commented generally that several portions of the proposed interpretive rule created new obligations or increased the stringency of the legislative rule.

**Response B:** See Response to Chamber's and WVMA's Comment A below.

**Comment C:** The commenter noted in the context of 45CSR2A that the time frame for submitting a monitoring plan is not included in the rule.

**Response C:** The initial time frame, as well as other implementation measures, have been incorporated into the interpretive rule in subsection 6.5. Also, language regarding the timing of the installation of CEMS for manufacturing and combustion sources when required by another authority has been added in subdivisions 6.2.c and 6.3.c, consistent with the proposed rule language in subdivision 6.1.d for fuel-burning units.

## IV. Commenter: West Virginia Chamber of Commerce (Chamber) and West Virginia Manufacturers Association (WVMA)

**Comment A:** *Interpretive Rule Format. The Chamber and WVMA question the agency's use of the interpretive rule format to address substantive regulatory revisions. The organizations do, however, support the use of interpretive rules to establish clarification and guidance for the underlying legislative rule and statutory law. An interpretive rule is defined as a rule that will provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it. In some provisions of these interpretive rules, the agency is providing more than simply guidance. It is changing the underlying rule applicability. A case in point is the agency's requirement that continuous monitors be required of certain classes of facilities, where the underlying legislative rules clearly provide a range of monitoring options. A second case is the agency's requirement that sources register individual stack emission limits. This represents a departure from historical implementation of 45CSR2 and 45CSR10.*

*The types of changes that are suggested within 45CSR10A are of general application and future effect with enforcement implications which warrant the more thorough rulemaking process of a legislative rule.*

**Response A:** The two examples cited by the commenter have been thoroughly discussed in other sections of this response. It is abundantly clear that the interpretive rule does not in any way change the underlying rule or statute nor does it expand the

agency's jurisdiction in an impermissible manner. Rather, it interprets and implements the statute and 45CSR10 by explaining how the Director intends to make the discretionary judgments permitted him by law.

The OAQ is somewhat disappointed that the commenter questions the use of an interpretive rule as the mechanism for specifying what type of monitoring is acceptable and when individual stack registration is required. During the development of the underlying legislative rule, the stakeholders envisioned using an interpretive rule as the mechanism for the detailed implementation of the rule with regard to testing, monitoring, recordkeeping and reporting issues. Indeed, the legislative rule, although quite prescriptive with respect to the standards themselves, leaves the details of testing, monitoring, recordkeeping and reporting largely to the Director's discretion. It is inevitable in such a case that additional guidance is necessary explaining how the agency intends to make various discretionary judgments. The alternative to establishing this guidance is that all decisions are made strictly on a case-by-case basis, with no "bright lines" or guiding principles. This is not only unduly resource intensive for the agency; it encourages decision making which has the potential to treat sources in a dissimilar fashion, although similar in nature.

When an agency desires to provide information and guidance to the public upon the law enforced by it, an interpretive rule is the mechanism set forth in the West Virginia Administrative Procedures Act. W.Va. Code §29A-1-2(c). An interpretive rule applies generally and with future effect (like any other rule), and is a means to provide details regarding the implementation of the law. It is also an appropriate way to establish the conditions for the exercise of discretionary power provided in the underlying law. The definition of "interpretive rule" states in pertinent part:

> . . .Where any provision of this code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions. W.Va. Code §29A-1-2(c).

The two examples given by the commenter concern portions of the legislative rule which commit a determination of fact and judgment to the sole discretion of the Director, thus making them perfect candidates for interpretive rulemaking. The first concerns section 8.2.a of 45CSR10, which commits the determination of whether to require CEMS to the Director's sole discretion. The second concerns section 3.4.a.1 of 45CSR10, which states that the Director may require a source to

register individual stacks. Both of these provisions, CEMS and individual stack registration, are examples of discretionary authority provided by law.

Except for being approved by the Legislature, the process for adopting an interpretive rule is virtually the same as for a legislative rule. The rule is proposed for public comment and the agency is required to consider all comments and provide a written response to those comments. In this case, there was additional public participation in the development of the proposed rule through an extensive stakeholder process, inclusive of all interest groups. As a result of this process, OAQ has considered a variety of different testing and monitoring options and has written a rule which affords a significant amount of flexibility both to the Director and to the sources, as is evidenced by several exceptions and exemptions contained in the interpretive rule.

Clearly, state law authorizes an agency to use an interpretive rule as OAQ has done in this case. The benefits of an agency providing guidance to the public through the interpretive rulemaking process cannot be overstated. In this instance, the rule provides reasonable assurance to everyone that they will know the relevant and important factors considered by the Director when he or she makes a decision regarding testing and monitoring requirements.

**Comment B:** *Registration of Individual Stacks.*

*45CSR2A and 45CSR10A. The Office of Air Quality itself admits that the historical application of the requirement to register individual stacks has been confusing. Those who have had experience with 45CSR2 and 45CSR10 recall that the context within which stacks were required to assign specific weight rates involved instances where modeling was required to demonstrate air quality impacts. The agency is now proposing that all regulated source stacks be registered for specific emission rates. Such a registration requirement is in direct conflict with the provisions of 45CSR2 and 10 which provide for a plant-wide cap for the weight emission standards. By requiring registration of individual stacks, the interpretive rule is improperly limiting the underlying statutory rule language. A move from a plant wide limit to a stack-by-stack limit effectively increases the stringency of these standards. This increase in stringency is being imposed when there is no evidence that there are problems meeting the current PM or SO2 NAAQS.*

*The agency explained its interest in emphasizing the registration as a need to prepare facilities for implementation of the Title V program.*

*The industry representatives, working with the agency, proposed that a more reasonable application of the requirements to register individual stacks under both 45CSR2A and 45CSR10A as follows:*

*The owner or operator of each Title V fuel burning unit(s) shall register the allowable emission rate for each individual stack. The emission rate, in pounds per hour, shall be determined as provided in Appendix E. Registration of design heat input shall not become an enforceable limit. Registration of an allowable emission rate shall be reviewed by the Director and if approved as part of a compliance schedule and/or permit limit shall become enforceable. Individual stack emission limits shall be representative of varied operating conditions and are not required to represent a single operating scenario of plant-wide emissions.*

*This proposal was rejected based upon additional concerns of the agency concerning enforcement of 45CSR2 and 45CSR10. Industry continues to question how registration of individual stacks creates an enforcement tool the agency does not already possess. In light of the fact that the agency's proposal directly contradicts the plant-wide limits for particulates and raises a serious concern about enforcement, we object to the requirement to register each stack under 45CSR2A and 45CSR10A.*

**Response B:** See Response to PPG Comment A.

Additionally, OAQ disagrees with the commenter that the registration requirement was used in the past primarily in instances where modeling was required to demonstrate air quality impacts. The few times individual stack registration was required in the past occurred when the agency was concerned that the plant-wide limit was not being met at facilities with multiple stacks or could not be practically demonstrated to be met.

With the advent of the regulatory revision effort in 1998, 45CSR10 was carefully scrutinized from the standpoint of compliance demonstrations, among other things. As the commenter correctly suggested, OAQ's sensitivity to the issue of compliance demonstrations has been heightened by the Title V operating permit program, as has the entire public's. It is important that there be a credible means of demonstrating compliance with all the standards in the legislative rule, including the plant-wide weight emission standards in 45CSR10.

The commenter states that industry proposed language on the registration option during the stakeholder discussions and that the OAQ rejected that proposal. However, the language presented during these discussions contained two sentences in addition to the language quoted by the commenter. These two additional sentences read: "Total registered emissions from individual units may exceed the plant-wide limits of 45CSR2 (or 10). Total actual emissions may not exceed specified limits of 45CSR2 (or 10)."

It was these two sentences that were the reason the OAQ could not accept industry's proposal. The first sentence states that the registered emissions can exceed the plant-wide limit, which completely undercuts the registration process as a means of ensuring compliance with the plant-wide limit. The whole purpose of registering is to provide some operating flexibility while establishing a credible standard by which to measure the compliance of the source while operating. Furthermore, the second sentence is not needed because it merely states the expectation of the rule.

The concepts in the remaining part of industry's proposal (quoted in the Comment above) are not objectionable to the OAQ and are similar to the concepts and language in the interpretive rule. The reference to Title V sources is agreeable, but unnecessary, since all the sources covered by this rule are in fact Title V sources. The next point regarding design heat input is a point upon which industry and OAQ agree--design heat input has never been considered a limit. The only limit is the SO2 emission rate which is calculated as a product of the design heat input or actual heat input, as appropriate, and the applicable regulatory factor stated in 45CSR10. It is unnecessary to make this statement in the rule. The last concept involves multiple operating scenarios and whether a source is allowed to register more than one scenario. OAQ believes the language in subdivision 3.4.a of 45CSR10 would permit a source to register more than one operating scenario, provided that each operating scenario is identified by its operational parameters so that it is clear at any given time which scenario is in effect, and further provided that the source conducts rule-prescribed tests to determine compliance under each scenario.

In addition, subdivision 3.4.b of 45CSR10 provides that: "The owner or operator of a source subject to subsections 3.1, 3.2 or 3.3 of this rule which has more than one stack, may petition the Director for individual stack allowable emission rates differing from those calculated under subdivision 3.4.a . . ." with specific requirements for CEMS and demonstration that the NAAQS will not be adversely impacted, among other requirements. The OAQ believes that the above-quoted sections provide sources with ample flexibility.

**Comment C:** *Manufacturing Process Source(s). The agency has included a provision under 45CSR10A, §5.2.b that provides that process sources utilizing a flare as a control device shall be exempt from compliance testing requirements. This provision was included in the interpretive rule in acknowledgment of the fact that testing of flares is inappropriate. The Chamber and WVMA endorse the agency's inclusion of this provision.*

*The agency has also included a provision under 45CSR10A, §5.2.c that allows for the petitioning of the Director by a source for an alternative to compliance testing. The Chamber and WVMA support the agency's inclusion of this provision*

*which will allow for the regulated community to adequately demonstrate compliance via methods other than those specifically identified in 45CSR10A, §5.2.a.*

*Stack Testing Requirement Relative to CEMS Application. The agency has included in 45CSR10A, §5.4 an exemption from testing requirements for those fuel burning units, manufacturing process units, or combustion units that employ CEMS. The Chamber and WVMA applaud the agency's inclusion of this provision in light of the amount of data the CEMS will provide.*

**Response C**: No response needed.

**Comment D:** *Fuel Burning Units. The Chamber and WVMA agree with the recognition by the agency that the operation of CEMS is an adequate monitoring plan. Also of importance is the provision that those sources that burn fuel with a sulfur content equal to or greater than 90% of the allowable sulfur content are able to use CEMS or "as burned" fuel analysis. It is entirely appropriate for the agency to accept either type of monitoring.*

*Manufacturing Process Source(s). The Chamber and WVMA support the recognition by the agency that operation of CEMS is an adequate monitoring plan. Also of importance is the provision that establishes a threshold for those sources that may or may not need to operate CEMS. We are very supportive of the provision that allows for the ability to petition for an alternative to CEMS as set forth in 45CSR10A, §6.2.1.b. There will be sources filing such petitions and we look forward to working with the agency on approval of such as appropriate.*

*Combustion Sources. The Chamber and WVMA support the recognition by the agency that operation of CEMS is an adequate monitoring plan. Also of importance is the provision that establishes a threshold for those sources that may or may not need to operate CEMS.*

**Response E:** No response needed.

**Comment F:** *The Chamber and WVMA support the exemption from the recordkeeping provisions of 45CSR10A §7.1.a and §7.1.b provided such sources operate CEMS. We also support the schedule for the frequency of analysis of fuel quality based upon percentage of the compliance limit within which the facility operates. These are reasonable and appropriate standards.*

*With respect to 45CSR10A, §7.2 exception reporting a few clarifications need to be made. It was originally discussed that those reports generated pursuant to 40 CFR Part 75 would be sufficient for this section therefore avoiding the generation*

*and filing of additional reports to the state. Inclusion of language that recognizes this issue is essential.*

**Response F:** See Response to AEP Comment D.