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

Form #3

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: WV DEP - Division of Air Quality TITLE NUMBER: 45

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

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ___

TITLE OF RULE BEING AMENDED: ___

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 26

TITLE OF RULE BEING PROPOSED: "NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides From Electric Generating Units"

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

Authorized Signature

$17.00

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: June 28, 2001

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (*Agency Name, Address & Phone No.*) West Virginia Division of Air Quality
7012 MacCorkle Avenue, Southeast
Charleston, West Virginia 25304

LEGISLATIVE RULE TITLE: 45CSR26 - "NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides From Electric Generating Units"

1. Authorizing statute(s) citation W. Va. Code §22-5-1 et seq.

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

   June 6, 2001

   b. What other notice, including advertising, did you give of the hearing?

   Class I legal advertisement; Charleston Daily Mail & Charleston Gazette
   Sent a copy of the Public Notice to our agency mailing list
   Public Notice placed on Department's and Division's web sites
   ~~Press Release~~

   c. Date of Public Hearing(s) ***or*** Public Comment Period ended:

   Public Hearing - July 12, 2001 Public Comment Period Ended - July 12, 2001

   d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

   Attached X No comments received ______

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

July 27, 2001

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

John A. Benedict, Deputy Director	Cindy Lawson, Administrative Secretary
7012 MacCorkle Avenue, SE Charleston, WV 25304	10 McJunkin Road Nitro, WV 25143-2506
Phone: (304) 926-3647 Fax: (304) 926-3637	Phone: (304) 759-0515 Fax: (304) 759-0526
jbenedict@mail.dep.state.wv.us	clawson@mail.dep.state.wv.us

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

See "f" above

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

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

   N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: 45CSR26 "NO_X Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units"

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

B. SUMMARY OF RULE:

This rule partially fulfills the State's obligations in responding to U.S. EPA's final rule, *Findings of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone* (27 Oct 1998, 63 FR 207 at 57356, herein referred to as the *NOx SIP Call*). Essentially, the federal rule requires that large emitters of Nitrogen Oxides (NO_X) significantly reduce emissions and constrain them to fixed budgets, starting in 2004 and maintaining them thereafter. Flexibility is built in through "trading" provisions which allow sources to buy/trade NO_X emission allowances from other participants. For example, a source which has been unable to achieve the required amount of emission reductions may purchase NO_X allowances under the federal NO_X Budget Trading Program to obtain the needed emission allowances.

This State rule applies to Electric Generating Units (EGUs) which have an electric generating capacity of 250 megawatts or greater. 45CSR26 uses control requirements and emission credit transfer procedures parallel to the federal presumptions so that the state rule may interface with the federal NO_X Budget Trading Program. It requires that EGUs effectively achieve a NO_X emission rate of 0.15 lb NO_X/mmBTU by May 2004 and allows flexibility through NO_X emissions trading. To accommodate growth of existing EGUs and proposed new EGUs, the rule establishes a more realistic limit on total state NO_X emissions (a "cap") than the NO_X SIP Call. The Department of Environmental Protection, Division of Air Quality (DAQ) is addressing non-EGUs in a separate rulemaking, 45CSR1.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

U.S. EPA has identified 23 jurisdictions, including West Virginia, which contribute to ground-level ozone nonattainment in downwind states. U.S. EPA accordingly promulgated federal rules requiring these jurisdictions to submit revisions to their State Implementation Plans (SIPs), including state rules, to reduce NOx emissions pursuant to §110(a)(2)(D) of the 1990 Clean Air Act Amendments. Originally, States were to submit control plans as revisions to the applicable SIP by September 1999. However, several States, including West Virginia, filed legal challenges to U.S. EPA's rulemaking. A federal court subsequently stayed indefinitely the submittal requirement. In June 2000, the U.S. Court of Appeals for the D.C. Circuit made a final ruling that largely upheld U.S. EPA's action. Consequently, 19 jurisdictions, including West Virginia were then required to submit SIP revisions by October

30, 2000. However, litigation continued through an appeal to the U.S. Supreme Court. On March 5, 2001, the Supreme Court largely upheld the NO_X SIP Call. The D.C. Circuit Court on May 15, 2001 remanded the Section 126 NO_X budgets back to EPA, so that established state NO_X budgets may be revised or more fully supported and documented by EPA.

The Office of Air Quality (now the Division of Air Quality or DAQ) proceeded with the promulgation of a previous proposed rule which achieved part of the federally mandated reductions, pending the outcome of the legal challenge. Partly based on significant negative comments from the U.S. EPA, OAQ withdrew the 2000 proposed rule.

DAQ is proceeding with the promulgation of this proposed rule containing provisions that parallel the federal requirements, with the exception of a state-derived NO_X budget. If EPA revises the state budget in the proposed rule, 45CSR26 may be withdrawn or modified accordingly.

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

Federal counterparts to this proposed rule exist. Two related, parallel federal rulemakings may impose similar requirements on affected facilities. These include the Federal Implementation Plan (FIP) associated with the NO_X SIP Call and the separate but related rulemaking by U.S. EPA on Petitions filed pursuant to Section 126 of the 1990 Clean Air Act Amendments. The latter became effective on February 17, 2000 and imposes similar requirements regardless of any State action.

Both federal and State rules have averaging or trading provisions that allow sources to vary emission rates. Monitoring, record-keeping, and reporting requirements of the proposed rule and federal counterparts are parallel. However, the emissions cap established under the federal rule is based upon a 3 percent growth factor while that of the proposed rule is based on a 20 percent growth factor (1990-2007) plus an additional margin to accommodate new and proposed EGUs. Therefore, the Secretary has determined that the agency proposed rule is less stringent than the federal counterpart rules.

Proposed development of this rule has been, and continues to be, unusually dynamic. Litigation and subsequent court decisions have affected several aspects of the rule in its various stages of development. The DAQ has also addressed the difference in potential emissions between the 20 percent growth rate used in the proposed rule and the 3 percent growth estimated by U.S. EPA. Last summer's (1999) hot weather already required an electricity utilization level for some in-state utilities that exceeded U.S. EPA's projected level for 2007. This fact, in combination with other considerations, indicates that the lower growth estimate for West Virginia is significantly inadequate. U.S. EPA assumed growth rates exceeding 20 percent for many other states, including Kentucky, Maryland, North Carolina and South Carolina.

To the extent practicable, proposed rule 45CSR26 emulates the model rule contained in the NOx SIP Call with revisions contained in the Section 126 action, as updated by U.S. EPA rulemaking and modified according to judicial actions with the following exception. The proposed rule 45CSR26 contains a state NO_X budget (a "cap") which provides for a more realistic limit on total state NO_X emissions than the NO_X SIP Call to accommodate growth of existing EGUs and proposed new EGUs.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

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

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR26 - "NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units"

Type of Rule: X Legislative ______ Interpretive ______ Procedural

Agency: Office of Air Quality

Address: 7012 MacCorkle Avenue, SE
Charleston, WV 25304-2943

1. Effect of Proposed rule:

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$ 69,950	$ 0	$ 66,600	$ 66,600	$ 69,950
PERSONAL SERVICES	62,370	0	60,000	60,000	62,370
CURRENT EXPENSE	6,980	0	6,600	6,600	6,980
REPAIRS & ALTERATIONS	0	0	0	0	0
EQUIPMENT	600	0	0	300	600
OTHER	0	0	0	0	0

2. Explanation of Above Estimates:
Aproximately one (1) FTE personnel costs plus associated operating and equipment cost are estimated for rule development and implementation activities in the current and next fiscal years and thereafter.

3. Objectives of These Rules:
To respond to U.S. EPA's requirement for a state plan (SIP) to reduce nitrogen oxides emissions from electric utility emission units to mitigate interstate ozone transport.

Rule Title: 45CSR26 - "NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units"

4. Explanation of Overall Economic Impact of Proposed Rule:

   A. Economic Impact on State Government:
   See the Table above (Item 1) for estimated direct cost of rule implementation to WVDEP/OAQ. It is estimated that electricity costs in West Virginia may increase by 3-4% as a result of this rule implementation. However, as noted in the briefing document, federal counterpart rules impose equivalent requirements and would result in similar increases regardless of the existence of this state rule. This fact applies to B. and C. below as well.

   B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:
   It is estimated that electricity costs may increase by 3-4% as a result of this rule. Annualized costs of compliance for electric power generating facilities within the State are estimated to be $191million using data provided by the power industry and $152 million using U.S. EPA estimates. These estimated costs may be significantly reduced under alternative compliance provisions of the rule which allow delayed compliance for innovative emissions control technology installation.

   C. Economic Impact on Citizens/Public at Large.
   It is estimated that electric power costs for residential consumers may increase by 3-4% with implementation of this rule.

Date: ______________________________

Signature of Agency Head or Authorized Representative:

____

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

SERIES 26
NO_X BUDGET TRADING PROGRAM AS A MEANS OF CONTROL AND REDUCTION OF NITROGEN OXIDES FROM ELECTRIC GENERATING UNITS

§45-26-1. General.

1.1. Scope. -- This rule establishes general provisions and the definitions, applicability, permitting, allowance, excess emissions and monitoring provisions for a state NO_X Budget Trading Program as a means of control and reduction of nitrogen oxides (NO_X), an ozone precursor from electric generating units. The Secretary of the Department of Environmental Protection authorizes the Administrator of the U.S. Environmental Protection Agency to assist the Secretary in implementing the state NO_X Budget Trading Program as a participant in the federal NO_X Budget Trading Program by carrying out the functions set forth for the Administrator in the requirements of sections 4. through 76. of this rule and 40 CFR Part 51. This rule follows the intent of 40 CFR Part 96 for electric generating units.

1.2. The owner or operator of a fossil fuel-fired electric generating unit shall comply with applicable requirements of this rule.

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

1.4. Filing Date. --

1.5. Effective Date. --

§45-26-2. Definitions.

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

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

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

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

2.5. "Automated data acquisition and handling system" or "DAHS" means that component of the CEMS or other emissions monitoring system approved for use under sections 70. through 76., designed to interpret and convert individual output signals from pollutant concentration monitors, flow monitors, diluent gas monitors and other component parts of the monitoring system to produce a continuous record of the measured parameters in the measurement units required by sections 70. through 76.

2.6. "Boiler" means an enclosed fossil or other fuel-fired combustion device used to produce heat and to transfer heat to recirculating water, steam or other medium.

2.7. "CAA" means the Clean Air Act, 42 U.S.C. 7401, et seq., as amended by Pub. L. No. 101-549 (November 15, 1990).

2.8. "Combined cycle system" means a system comprised of one or more combustion turbines, heat recovery steam generators and steam turbines configured to improve overall efficiency of electricity generation or steam production.

2.9. "Combustion turbine" means an enclosed fossil or other fuel-fired device that is comprised of a compressor, a combustor and a turbine and in which the flue gas resulting from the combustion of fuel in the combustor passes through the turbine, rotating the turbine.

2.10. "Commence commercial operation" means, with regard to a unit that serves a generator, to have begun to produce steam, gas or other heated medium used to generate electricity for sale or use, including test generation. Except as provided in subsection 4.1. or section 5., for a unit that is a NO_X Budget unit under subsection 4.1. on the date the unit commences commercial operation, such date shall remain the unit's date of commencement of commercial operation even if the unit is subsequently modified, reconstructed or repowered. Except as provided in subsection 4.1. or section 5., for a unit that is not a NO_X Budget unit under subsection 4.1. on the date the unit commences commercial operation, the date the unit becomes a NO_X Budget unit under subsection 4.1. shall be the unit's date of commencement of commercial operation.

2.11. "Commence operation" means to have begun any mechanical, chemical or electronic process, including, with regard to a unit, start-up of a unit's combustion chamber. Except as provided in subsection 4.1. or section 5., for a unit that is a NO_X Budget unit under subsection 4.1. on the date of commencement of operation, such date shall remain the unit's date of commencement of operation even if the unit is subsequently modified, reconstructed or repowered. Except as provided in subsection 4.1. or section 5., for a unit that is not a NO_X Budget unit under subsection 4.1. on the date of commencement of operation, the date the unit becomes a NO_X Budget unit under subsection 4.1. shall be the unit's date of commencement of operation.

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

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

2.14. "Continuous emission monitoring system" or "CEMS" means the equipment required under sections 70. through 76. to sample, analyze, measure and provide, by readings taken at least once every 15 minutes of the measured parameters, a permanent record of nitrogen oxides emissions, expressed in tons per hour for nitrogen oxides. The following systems are component parts included, to the extent consistent with sections 70. through 76. and 40 CFR Part 75, in a continuous emission monitoring system:

2.14.a. Flow monitor;

2.14.b. NO_X pollutant concentration monitors;

2.14.c. Diluent gas monitor (oxygen or carbon dioxide);

2.14.d. A continuous moisture monitor; and

2.14.e. An automated data acquisition and handling system.

2.15. "Electric generating unit" means a fossil fuel-fired stationary boiler, combustion turbine or combined cycle system which serves a generator with a nameplate capacity greater than 25 MW_e.

2.16. "Electricity for sale under firm contract to the grid" means electricity for sale where the capacity involved is intended to be available at all times during the period covered by a guaranteed commitment to deliver, even under adverse conditions.

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

2.18. "Energy Information Administration" means the Energy Information Administration of the United States Department of Energy.

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

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

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

2.21.a. For units that commenced operation before January 1, 1996, the combination of fossil fuel, alone or in combination with any other fuel, where fossil fuel actually combusted comprises more than 50 percent of the annual heat input on a Btu basis during 1995, or, if a unit had no heat input in 1995, during the last year of operation of the unit prior to 1995;

2.21.b. For units that commenced operation on or after January 1, 1996 and before January 1, 1997, the combination of fossil fuel, alone or in combination with any other fuel, where fossil fuel actually combusted comprises more than 50 percent of the annual heat input on a Btu basis during 1996; or

2.21.c. For units that commence operation on or after January 1, 1997:

2.21.c.1. The combination of fossil fuel, alone or in combination with any other fuel, where fossil fuel actually combusted comprises more than 50 percent of the annual heat input on a Btu basis during any year; or

2.21.c.2. The combination of fossil fuel, alone or in combination with any other fuel, where fossil fuel is projected to comprise more than 50 percent of the annual heat input on a Btu basis during any year, provided that the unit shall be "fossil fuel-fired" as of the date, during such year, on which the unit begins combusting fossil fuel.

2.22. "General account" means a NO_X Allowance Tracking System account, established under sections 50. through 57., that is not a compliance account or an overdraft account.

2.23. "Generator" means a device that produces electricity.

2.24. "Heat input" means the product (in mmBtu/time) of the gross calorific value of the fuel (in Btu/lb) and the fuel feed rate into a combustion device (in mass of fuel/time), as measured, recorded and reported to the Administrator by the NO_X authorized account representative and as determined by the Administrator in accordance with sections 70. through 76. and does not include the heat derived from preheated combustion air, recirculated flue gases or exhaust from other sources.

2.25. "Heat input rate" means the amount of heat input (in mmBtu) divided by unit operating time (in hr) or, with regard to a specific fuel, the amount of heat input attributed to the fuel (in mmBtu) divided by the unit operating time (in hr) during which the unit combusts the fuel.

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

2.26.a. For the life of the unit;

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

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

2.27. "Maximum design heat input" means the ability of a unit to combust a stated maximum amount of fuel per hour on a steady state basis, as determined by the physical design and physical characteristics of the unit.

2.28. "Maximum potential hourly heat input" means an hourly heat input used for reporting purposes when a unit lacks certified monitors to report heat input. If the unit intends to use Appendix D of 40 CFR Part 75 to report heat input, this value shall be calculated in accordance with 40 CFR Part 75, using the maximum fuel flow rate and the maximum gross calorific value. If the unit intends to use a flow monitor and a diluent gas monitor, this value should be reported in accordance with 40 CFR Part 75, using the maximum potential flowrate and either the maximum carbon dioxide concentration (in percent CO_2) or the minimum oxygen concentration (in percent O_2).

2.29. "Maximum potential NO_X emission rate" means the emission rate of nitrogen oxides (in lb/mmBtu) calculated in accordance with section 3 of Appendix F of 40 CFR Part 75, using the maximum potential concentration of NO_X under section 2 of Appendix A of 40 CFR Part 75 and either the maximum oxygen concentration (in percent O_2) or the minimum carbon dioxide concentration (in percent CO_2), under all operating conditions of the unit except for unit startup, shutdown and upsets.

2.30. "Maximum rated hourly heat input" means a unit-specific maximum hourly heat input (mmBtu) which is the higher of the manufacturer's maximum rated hourly heat input or the highest observed hourly heat input.

2.31. "Monitoring system" means any monitoring system that meets the requirements of sections 70. through 76., including a continuous emissions monitoring system, an excepted monitoring system or an alternative monitoring system.

2.32. "Most stringent state or federal NO_X emissions limitation" means the lowest NO_X emissions limitation (in terms of lb/mmBtu) that is applicable to the unit under state or federal law, regardless of the averaging period to which the emissions limitation applies.

2.33. "Nameplate capacity" means the maximum electrical generating output (in MW_e) that a generator can sustain over a specified period of time when not restricted by seasonal or other deratings as measured in accordance with the United States Department of Energy standards.

2.34. "Non-title V permit" means a federally enforceable permit administered by the secretary pursuant to the CAA and regulatory authority under the CAA, other than title V of the CAA and 40 CFR Part 70 or 40 CFR Part 71.

2.35. "NO_X allowance" means a limited authorization under the NO_X Budget Trading Program to emit up to one ton of nitrogen oxides during the ozone season of the specified year or of any year thereafter, except as provided under subsection 54.6. No provision of the NO_X Budget Trading Program, the NO_X budget permit application, the NO_X budget permit, or an exemption under subdivision 4.2.a. or section 5. and no provision of law shall be construed to limit the authority of the United States to terminate or limit such authorization, which does not constitute a property right. For purposes of all sections of this rule, except sections 40., 41., 42. or 43., "NO_X allowance" also includes an authorization to emit up to one ton of nitrogen oxides during the ozone season of the specified year or of any year thereafter in accordance with a Federal NO_X Budget Trading Program established by the Administrator under 40 CFR Part 97.

2.36. "NO_X allowance deduction" or "deduct NO_X allowances" means the permanent withdrawal of NO_X allowances by the Administrator from a NO_X Allowance Tracking System compliance account or overdraft account to account for the number of tons of NO_X emissions from a NO_X Budget unit for an ozone season, determined in accordance with sections 70. through 76. and sections 50. through 57. or for any other NO_X allowance withdrawal requirement under this rule.

2.37. "NO_X allowances held" or "hold NO_X allowances" means the NO_X allowances recorded by the Administrator or submitted to the Administrator for recordation, in accordance with sections 50. through 57. and sections 60. through 62., in a NO_X Allowance Tracking System account.

2.38. "NO_X Allowance Tracking System" means the system by which the Administrator records allocations, deductions and transfers of NO_X allowances under the NO_X Budget Trading Program.

2.39. "NO_X Allowance Tracking System account" means an account in the NO_X Allowance Tracking System established by the Administrator for purposes of recording the allocation, holding, transferring or deducting of NO_X allowances.

2.40. "NO_X allowance transfer deadline" means midnight of November 30 or, if November 30 is not a business day, midnight of the first business day thereafter and is the deadline by which NO_X allowances may be submitted for recordation in a NO_X Budget unit's compliance account or the overdraft account of the source where the unit is located, in order to meet the unit's NO_X budget emissions limitation for the ozone season immediately preceding such deadline.

2.41. "NO_X authorized account representative" means, for a NO_X budget source or NO_X Budget unit at the source, the natural person who is authorized by the owners and operators of the source and all NO_X Budget units at the source, in accordance with sections 10. through 14., to represent and legally bind each owner and operator in matters pertaining to the NO_X Budget Trading Program or, for a general account, the natural person who is authorized, in accordance with sections 50. through 57., to transfer or otherwise dispose of NO_X allowances held in the general account.

2.42. "NO_X budget emissions limitation" means, for a NO_X Budget unit, the tonnage equivalent of the NO_X allowances available for compliance deduction for the unit under subsections 54.1., 54.2., 54.5. and 54.6. in an ozone season adjusted by any deductions of such NO_X allowances to account for actual heat input under subsection 42.5. for the ozone season or to account for excess emissions for a prior ozone season under subsection 54.4.

2.43. "NO_X budget permit" means the legally binding and federally enforceable written document or portion of such document, issued by the secretary, including any permit revisions, specifying the NO_X Budget Trading Program requirements applicable to a NO_X budget source, to each NO_X Budget unit at the NO_X budget source and to the owners and operators and the NO_X authorized account representative of the NO_X budget source and each NO_X Budget unit.

2.44. "NO_X budget source" means a source that includes one or more NO_X Budget units.

2.45. "NO_X Budget Trading Program" means a multi-state nitrogen oxides air pollution control and emission reduction program approved and administered by the Administrator pursuant to 40 CFR 51.121, as a means of mitigating the interstate transport of ozone and nitrogen oxides, an ozone precursor.

2.46. "NO_X Budget unit" means an applicable unit under section 4. that is subject to the NO_X Budget Trading Program under this rule.

2.47. "Operator" means any person who operates, controls or supervises a NO_X Budget unit or a NO_X budget source and shall include, but not be limited to, any holding company, utility system or plant manager of such a unit or source.

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

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

2.49.a. Any holder of any portion of the legal or equitable title in a NO_X Budget unit; or

2.49.b. Any holder of a leasehold interest in a NO_X Budget unit; or

2.49.c. Any purchaser of power from a NO_X Budget unit under a life-of-the-unit, firm power contractual arrangement. However, unless expressly provided for in a leasehold agreement, owner shall not include a passive lessor or a person who has an equitable interest through such lessor, whose rental payments are not based, either directly or indirectly, upon the revenues or income from the NO_X Budget unit; or

2.49.d. With respect to any general account, any person who has an ownership interest with respect to the NO_X allowances held in the general account and who is subject to the binding agreement for the NO_X authorized account representative to represent that person's ownership interest with respect to NO_X allowances.

2.50. "Ozone season" means the period beginning May 1 of a year and ending on September 30 of the same year, inclusive, provided that in 2004 "ozone season" means the period beginning May 31 and ending September 30 of that year, inclusive.

2.51. "Percent monitor data availability" means, for purposes of subdivision 43.1.a., total unit operating hours for which quality-assured data were recorded under sections 70. through 76. in an ozone season, divided by the total unit operating hours in the ozone season and multiplied by 100 percent.

2.52. "Person" means any and all persons, natural or artificial, including the state of West Virginia or any other state, the United States of America, any municipal, statutory, public or private corporation organized or existing under the laws of this or any other state or country and any firm, partnership or association of whatever nature.

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

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

2.55. "Recordation, record or recorded" means, with regard to NO_X allowances, the movement of NO_X

allowances by the Administrator from one NO_X Allowance Tracking System account to another, for purposes of allocation, transfer or deduction.

2.56. "Reference method" means any direct test method of sampling and analyzing for an air pollutant as specified in Appendix A of 40 CFR Part 60.

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

2.58. "Serial number" means, when referring to NO_X allowances, the unique identification number assigned to each NO_X allowance by the Administrator under subsection 53.3.

2.59. "Shutdown" means: the period of time a unit is cooled from its normal operating temperature to cold or ambient temperature.

2.60. "Source" means any governmental, institutional, commercial or industrial structure, installation, plant, building or facility that emits or has the potential to emit any regulated air pollutant under the CAA. For purposes of section 502(c) of the CAA, a "source," including a "source" with multiple units, shall be considered a single "facility."

2.61. "Startup" means: the period of time a unit is heated from cold or ambient temperature to its normal operating temperature as specified by the manufacturer.

2.62. "State" means one of the 48 contiguous states or a portion thereof or the District of Columbia that is specified in 40 CFR §52.34 and in which are located units for which the Administrator makes an effective finding under 40 CFR §52.34.

2.63. "State NO_X Budget Trading Program" means a nitrogen oxides air pollution control and emission reduction program established in accordance with this rule and pursuant to 40 CFR 51.121 as a means of mitigating the interstate transport of ozone and nitrogen oxides, an ozone precursor.

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

2.64.a. In person;

2.64.b. By United States Postal Service; or

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

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

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

2.67. "Ton" or "tonnage" means any "short ton" (i.e., 2,000 pounds). For the purpose of determining compliance with the NO_X budget emissions limitation, total tons for an ozone season shall be calculated as the sum of all recorded hourly emissions (or the tonnage equivalent of the recorded hourly emissions rates) in accordance with sections 70. through 76., with any remaining fraction of a ton equal to or greater than 0.50 ton deemed to equal one ton and any fraction of a ton less than 0.50 ton deemed to equal zero tons.

2.68. "Unit" means a fossil fuel-fired stationary boiler, combustion turbine or combined cycle system.

2.69. "Unit operating day" means a calendar day in which a unit combusts any fuel.

2.70. "Unit operating hour" or "hour of unit operation" means any hour (or fraction of an hour) during which a unit combusts any fuel.

2.71. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in W.Va. Code §§22-5-1 et seq. and 40 CFR 72.2.

§45-26-3. Measurements, Abbreviations and Acronyms.

Measurements, abbreviations and acronyms used in this rule are defined as follows:

Btu - British thermal unit

hr - hour

kW - kilowatt electrical

kWh - kilowatt hour

lb - pounds

mmBtu - million Btu

MW_e - megawatt electrical

ton - 2000 pounds

TPH - tons per hour

CO_2 - carbon dioxide

NO_X - nitrogen oxides

O_2 - oxygen.

§45-26-4. NO_X Budget Trading Program Applicability.

4.1. The following electric generating units in West Virginia (or units, as defined in subsection 2.68.) shall be designated NO_X Budget units, and any source that includes one or more such units shall be a NO_X budget source, subject to the requirements of this rule:

4.1.a. For units that commenced operation before January 1, 1997, a unit which served during 1995 or 1996 a generator that had a nameplate capacity greater than 25 MW_e and produced electricity for sale under a firm contract to the electric grid;

4.1.b. For units that commenced operation on or after January 1, 1997 and before January 1, 1999, a unit which served during 1997 or 1998 a generator that had a nameplate capacity greater than 25 MW_e and produced electricity for sale under a firm contract to the electric grid; and

4.1.c. For units that commence operation on or after January 1, 1999, a unit serving at any time a generator that has a nameplate capacity greater than 25 MW_e and produces electricity for sale.

4.2.a. Notwithstanding subsection 4.1., a unit under subdivisions 4.1.a., 4.1.b. or 4.1.c. that has a federally enforceable permit which includes a NO_X emission limitation restricting NO_X emissions during an ozone season to 25 tons or less and includes the special provisions in subdivision 4.2.d. shall be exempt from the requirements of the NO_X Budget Trading Program, except for the provisions of this subdivision, sections 2. and 3.; subsection 4.1.; section 7., sections 40. through 42., sections 50. through 57. and sections 60. through 62. The NO_X emission limitation under this subdivision shall restrict NO_X emissions during the ozone season by limiting unit operating hours. The restriction on unit operating hours shall be calculated by dividing 25 tons by the unit's maximum potential hourly NO_X mass emissions, which shall equal the unit's maximum rated hourly heat input multiplied by the highest default NO_X emission rate otherwise applicable to the unit under 40 CFR 75.19.

4.2.b. The exemption under subdivision 4.2.a. shall become effective as follows:

4.2.b.1. The exemption shall become effective on the date on which the NO_X emission limitation and the special provisions in the permit under subdivision 4.2.a. become final; or

4.2.b.2. If the NO_X emission limitation and the special provisions in the permit under subdivision 4.2.a. become final during an ozone season and after the first date on which the unit operates during such ozone season, then the exemption shall become effective on May 1 of such ozone season, provided that such NO_X emission limitation and the special provisions apply to the unit as of such first date of operation. If such NO_X emission limitation and the special provisions do not apply to the unit as of such first date of operation, then the exemption under subdivision 4.2.a. shall become effective on October 1 of the year during which such NO_X emission limitation and the special provisions become final.

4.2.c. The Secretary will provide the Administrator written notice of the issuance of a federally enforceable permit under subdivision 4.2.a. for a unit under subdivisions 4.1.a., 4.1.b. or 4.1.c. and, upon request by the Administrator, a copy of the permit.

4.2.d. Special provisions.

4.2.d.1. A unit exempt under subdivision 4.2.a. shall comply with the restriction on unit operating hours described in subdivision 4.2.a. during the ozone season in each year.

4.2.d.2. The Secretary will allocate NO_X allowances to the unit under subsections 41.1., 41.2., 41.3., 42.2. and subdivision 42.1.a. For each ozone season for which the unit is allocated NO_X allowances under subsections 41.1., 41.2., 41.3., 42.2. and subdivision 42.1.a.:

4.2.d.2.A. The owners and operators of the unit must specify a general account, in which the Secretary will record the NO_X allowances; and

4.2.d.2.B. After the Secretary records a NO_X allowance allocation under subsections 41.1., 41.2., 41.3., 42.2. and subdivision 42.1.a., the Secretary will deduct, from the general account under subparagraph 4.2.d.2.A., NO_X allowances that are allocated for the same or a prior ozone season as the NO_X allowances allocated to the unit under subsections 41.1., 41.2., 41.3., 42.2. and subdivision 42.1.a. and that equal the NO_X emission limitation (in tons of NO_X) on which the unit's exemption under subdivision 4.2.a. is based. The NO_X authorized account representative shall ensure that such general account contains the NO_X allowances necessary for completion of such deduction.

4.2.d.3. A unit exempt under subdivisions 4.2.a. and 4.2.b. shall report hours of unit operation during the ozone season in each year to the Secretary by November 1 of that year.

4.2.d.4. For a period of 5 years from the date the records are created, the owners and operators of a unit exempt under subdivision 4.2.a. shall retain, at the source that includes the unit, records demonstrating that the conditions of the federally enforceable permit under subdivision 4.2.a. were met, including the restriction on unit operating hours. The 5-year period for keeping records may be extended for cause, at any time prior to the end of the period, in writing by the Secretary or the Administrator. The owners and operators bear the burden of proof that the unit met the restriction on unit operating hours.

4.2.d.5. The owners and operators, and to the extent applicable, the NO_X authorized account representative of a unit exempt under subdivision 4.2.a. shall comply with the requirements of the NO_X Budget Trading Program concerning all periods for which the exemption is not in effect, even if such requirements arise or must be complied with, after the exemption takes effect.

4.2.d.6. On the earlier of the following dates, a unit exempt under subdivision 4.2.a. shall lose its exemption:

4.2.d.6.A. The date on which the restriction on unit operating hours described in subdivision 4.2.a. is removed from the unit's federally enforceable permit or otherwise becomes no longer applicable to any ozone season starting in 2004; or

4.2.d.6.B. The first date on which the unit fails to comply, or with regard to which the owners and operators fail to meet their burden of proving that the unit is complying, with the restriction on unit operating hours described in subdivision 4.2.a. during any ozone season starting in 2004.

4.2.d.7. A unit that loses its exemption in accordance with paragraph 4.2.d.6. shall be subject to the requirements of this rule. For the purpose of applying permitting requirements under sections 20. through 24., allocating allowances under sections 40. through 42., and applying monitoring requirements under sections 70. through 76., the unit shall be treated as commencing commercial operation on the date the unit loses its exemption.

§45-26-5. Retired Unit Exemption.

5.1. This section applies to any NO_X Budget unit that is permanently retired.

5.2.a. Any NO_X Budget unit that is permanently retired shall be exempt from the NO_X Budget Trading Program, except for the provisions of this section, sections 2., 3., 4. and 7.; sections 40. through 42., sections 50. through 57. and sections 60. through 62.

5.2.b. The exemption under subsection 5.2.a. shall become effective the day on which the unit is permanently retired. Within 30 days of permanent retirement, the NO_X authorized account representative (authorized in accordance with sections 10. through 14.) shall submit a statement to the Secretary (and a copy of the statement to the Administrator) which states, in a format prescribed by the Secretary, that the unit is permanently retired and will comply with the special provisions of subsection 5.3.

5.2.c. After receipt of the notice under subdivision 5.2.b., the Secretary will amend any permit covering the source at which the unit is located to add the provisions and requirements of the exemption under subdivision 5.2.a. and subsection 5.3.

5.3. Retired units exempted under this section shall be subject to the following special provisions:

5.3.a. A unit exempt under this section shall not emit any nitrogen oxides, starting on the date that the exemption takes effect;

5.3.b. The Secretary will allocate NO_X allowances in accordance with sections 40. through 42. to a unit exempt under this section. For each ozone season for which the unit is allocated one or more NO_X allowances, the owners and operators of the unit shall specify a general account, in which the Secretary will record such NO_X allowances;

5.3.c. For a period of 5 years from the date the records are created, the owners and operators of a unit exempt under this section shall retain at the source that includes the unit, records demonstrating that the unit is permanently retired. The 5-year period for keeping records may be extended for cause, at any time prior to the end of the period, in writing by the Secretary or the Administrator. The owners and operators bear the burden of proof that the unit is permanently retired; and

5.3.d. The owners and operators and, to the extent applicable, the NO_X authorized account representative of a unit exempt under this section shall comply with the requirements of the NO_X Budget Trading Program concerning all periods for which the exemption is not in effect, even if such requirements arise or must be complied with, after the exemption takes effect;

5.3.e.1. A unit exempt under this section and located at a source that is required or but for this exemption would be required, to have a title V operating permit shall not resume operation unless the NO_X authorized account representative of the source submits a complete NO_X budget permit application under section 22. for the unit not less than 18 months (or such lesser time provided by the Secretary) before the later of May 31, 2004 or the date on which the unit is to first resume operation; and

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

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

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

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

5.3.f.3. The date on which the unit resumes operation, if the authorized account representative is not required to submit a NO_X budget permit application.

5.3.g. For the purpose of applying monitoring requirements under sections 70. through 76., a unit that loses its exemption under this section shall be treated as a unit that commences operation or commercial operation on the first date on which the unit resumes operation.

§45-26-6. NO_X Budget Trading Program Standard Requirements.

6.1. Permit Requirements.

6.1.a. The NO_X authorized account representative of each NO_X budget source required to have a federally enforceable permit and each NO_X Budget unit required to have a federally enforceable permit at the source shall:

6.1.a.1. Submit to the Secretary a complete NO_X budget permit application under section 22. in accordance with the deadlines specified in subsections 21.2. and 21.3.; and

6.1.a.2. Submit in a timely manner any supplemental information that the Secretary determines is necessary in order to review a NO_X budget permit application and issue or deny a NO_X budget permit.

6.1.b. The owners and operators of each NO_X budget source required to have a federally enforceable permit and each NO_X Budget unit required to have a federally enforceable permit at the source shall have a NO_X budget permit issued by the Secretary and operate the unit in compliance with such NO_X budget permit.

6.2. Monitoring requirements.

6.2.a. The owners and operators, and to the extent applicable, the NO_X authorized account representative of each NO_X budget source and each NO_X Budget unit at the source shall comply with the monitoring requirements of sections 70. through 76.

6.2.b. The emissions measurements recorded and reported in accordance with sections 70. through 76. shall be used to determine compliance by the unit with the NO_X budget emissions limitation under subsection 6.3.

6.3. Nitrogen oxides requirements.

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

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

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

6.3.d. NO_X allowances shall be held in, deducted from or transferred among NO_X Allowance Tracking System accounts in accordance with sections 40. through 42., sections 50. through 57. and sections 60. through 62.

6.3.e. A NO_X allowance shall not be deducted, in order to comply with the requirements under subdivision 6.3.a., for an ozone season in a year prior to the year for which the NO_X allowance was allocated.

6.3.f. A NO_X allowance allocated by the Secretary or the Administrator under the NO_X Budget Trading Program is a limited authorization to emit one ton of nitrogen oxides in accordance with the NO_X Budget Trading Program. No provision of the NO_X Budget Trading Program, the NO_X budget permit application, the NO_X budget permit or an exemption under section 5. and no provision of law shall be construed to limit the authority of the Administrator or the Secretary to terminate or limit such authorization.

6.3.g. A NO_X allowance allocated by the Secretary or the Administrator under the NO_X Budget Trading Program does not constitute a property right.

6.3.h. Upon recordation by the Administrator under sections 50. through 57. or sections 60. through 62., every allocation, transfer or deduction of a NO_X allowance to or from a NO_X Budget unit's compliance account or the overdraft account of the source where the unit is located is deemed to amend automatically and become a part of, any NO_X budget permit of the NO_X Budget unit by operation of law without any further review.

6.4. Excess emissions requirements.

6.4.a. The owners and operators of a NO_X Budget unit that has excess emissions in any ozone season shall:

6.4.a.1. Surrender the NO_X allowances required for deduction under subdivision 54.4.a.; and

6.4.a.2. Pay any fine, penalty or assessment or comply with any other remedy imposed under subdivision 54.4.c.

6.5. Recordkeeping and reporting requirements.

6.5.a. Unless otherwise provided, the owners and operators of the NO_X budget source and each NO_X Budget unit at the source shall keep on site at the source each of the following documents for a period of 5 years from the date the document is created. This period may be extended for cause, at any time prior to the end of 5 years, in writing by the Secretary or the Administrator.

6.5.a.1. The account certificate of representation for the NO_X authorized account representative for the source and each NO_X Budget unit at the source and all documents that demonstrate the truth of the statements in the account certificate of representation, in accordance with section 13.; provided that the certificate and documents shall be retained on site at the source beyond such 5-year period until such documents are superseded because of the submission of a new account certificate of representation changing the NO_X authorized account representative.

6.5.a.2. All emissions monitoring information, in accordance with sections 70. through 76.; provided that to the extent that sections 70. through 76. provides for a 3-year period for recordkeeping, the 3-year period shall apply.

6.5.a.3. Copies of all reports, compliance certifications and other submissions and all records made or required under the NO_X Budget Trading Program.

6.5.a.4. Copies of all documents used to complete a NO_X budget permit application and any other submission under the NO_X Budget Trading Program or to demonstrate compliance with the requirements of the NO_X Budget Trading Program.

6.5.b. The NO_X authorized account representative of a NO_X budget source and each NO_X Budget unit at the source shall submit the reports and compliance certifications required under the NO_X Budget Trading Program, including those under sections 30. and 31. or sections 70. through 76.

6.6. Liability.

6.6.a. Any person who knowingly violates any requirement or prohibition of the NO_X Budget Trading Program, a NO_X budget permit or an exemption under subdivision 4.2.a. or section 5. shall be subject to enforcement pursuant to §§22-5-1 et seq. or the CAA.

6.6.b. Any person who knowingly makes a false material statement in any record, submission or report under the NO_X Budget Trading Program shall be subject to enforcement pursuant to §§22-5-1 et seq. or the CAA.

6.6.c. No permit revision shall excuse any violation of the requirements of the NO_X Budget Trading Program that occurs prior to the date that the revision takes effect.

6.6.d. Each NO_X budget source and each NO_X Budget unit shall meet the requirements of the NO_X Budget Trading Program.

6.6.e. Any provision of the NO_X Budget Trading Program that applies to a NO_X budget source (including a provision applicable to the NO_X authorized account representative of a NO_X budget source) shall also apply to the owners and operators of such source and of the NO_X Budget units at the source.

6.6.f. Any provision of the NO_X Budget Trading Program that applies to a NO_X Budget unit (including a provision applicable to the NO_X authorized account representative of a NO_X Budget unit) shall also apply to the owners and operators of such unit. Except with regard to the requirements applicable to units with a common stack under sections 70. through 76., the owners and operators and the NO_X authorized account representative of one NO_X Budget unit shall not be liable for any violation by any other NO_X Budget unit of which they are not owners or operators or the NO_X authorized account representative and that is located at a source of which they are not owners or operators or the NO_X authorized account representative.

6.7. Effect on other authorities. -- No provision of the NO_X Budget Trading Program, a NO_X budget permit application, a NO_X budget permit or an exemption under subdivision 4.2.a. or section 5. shall be construed as exempting or excluding the owners and operators and, to the extent applicable, the NO_X authorized account representative of a NO_X budget source or NO_X Budget unit from compliance with any other provision of §§22-5-1 et seq., the approved West Virginia state implementation plan, a federally enforceable permit or the CAA.

§45-26-7. Computation of Time.

7.1. Unless otherwise stated, any time period scheduled, under the NO_X Budget Trading Program, to begin on the occurrence of an act or event shall begin on the day the act or event occurs.

7.2. Unless otherwise stated, any time period scheduled, under the NO_X Budget Trading Program, to begin before the occurrence of an act or event shall be computed so that the period ends the day before the act or event occurs.

7.3. Unless otherwise stated, if the final day of any time period, under the NO_X Budget Trading

Program, falls on a weekend or a state or federal holiday, the time period shall be extended to the next business day.

§45-26-10. Authorization and Responsibilities of the NO_X Authorized Account Representative.

10.1. Except as provided under section 11., each NO_X budget source, including all NO_X Budget units at the source, shall have one and only one NO_X authorized account representative, with regard to all matters under the NO_X Budget Trading Program concerning the source or any NO_X Budget unit at the source.

10.2. The NO_X authorized account representative of the NO_X budget source shall be selected by an agreement binding on the owners and operators of the source and all NO_X Budget units at the source.

10.3. Upon receipt by the Administrator of a complete account certificate of representation under section 13., the NO_X authorized account representative of the source shall represent and, by his or her representations, actions, inactions or submissions, legally bind each owner and operator of the NO_X budget source represented and each NO_X Budget unit at the source in all matters pertaining to the NO_X Budget Trading Program, not withstanding any agreement between the NO_X authorized account representative and such owners and operators. The owners and operators shall be bound by any decision or order issued to the NO_X authorized account representative by the Secretary, the Administrator or a court regarding the source or unit.

10.4. No NO_X budget permit shall be issued and no NO_X Allowance Tracking System account shall be established for a NO_X Budget unit at a source until the Administrator has received a complete account certificate of representation under section 13. for a NO_X authorized account representative of the source and the NO_X Budget units at the source.

10.5.a. Each submission under the NO_X Budget Trading Program shall be submitted, signed and certified by the NO_X authorized account representative for each NO_X budget source on behalf of which the submission is made. Each such submission shall include the following certification statement by the NO_X authorized account representative: "I am authorized to make this submission on behalf of the owners and operators of the NO_X budget sources or NO_X Budget units for which the submission is made. I certify under penalty of law that I have personally examined and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."

10.5.b. The Secretary and the Administrator will accept or act on a submission made on behalf of owner or operators of a NO_X budget source or a NO_X Budget unit only if the submission has been made, signed and certified in accordance with subsection 10.5.a.

§45-26-11. Alternate NO_X Authorized Account Representative.

11.1. An account certificate of representation may designate one and only one alternate NO_X authorized account representative who may act on behalf of the NO_X authorized account representative. The agreement by which the alternate NO_X authorized account representative is selected shall include a procedure for authorizing the alternate NO_X authorized account representative to act in lieu of the NO_X authorized account representative.

11.2. Upon receipt by the Administrator of a complete account certificate of representation under section 13., any representation, action, inaction or submission by the alternate NO_X authorized account representative shall be deemed to be a representation, action, inaction or submission by the NO_X authorized account representative.

11.3. Except in this section and subsection 10.1., sections 12., 13. and 51., whenever the term "NO_X authorized account representative" is used in this rule, the term shall be construed to include the alternate NO_X authorized account representative.

§45-26-12. Changing the NO_X Authorized Account Representative and the Alternate NO_X Authorized Account Representative; Changes in Owners and Operators.

12.1. Changing the NO_X authorized account representative. -- The NO_X authorized account representative may be changed at any time upon receipt by the Administrator of a superseding complete account certificate of representation under section 13. Notwithstanding any such change, all representations, actions, inactions and submissions by the previous NO_X authorized account representative prior to the time and date when the Administrator receives the superseding account certificate of representation shall be binding on the new NO_X authorized account representative and the owners and operators of the NO_X budget source and the NO_X Budget units at the source.

12.2. Changing the alternate NO_X authorized account representative. -- The alternate NO_X authorized account representative may be changed at any time upon receipt by the Administrator of a superseding complete account certificate of representation under section 13. Notwithstanding any such change, all representations, actions, inactions and submissions by the previous alternate NO_X authorized account representative prior to the time and date when the Administrator receives the superseding account certificate of representation shall be binding on the new alternate NO_X authorized account representative and the owners and operators of the NO_X budget source and the NO_X Budget units at the source.

12.3. Changes in owners and operators.

12.3.a. In the event a new owner or operator of a NO_X budget source or a NO_X Budget unit is not included in the list of owners and operators submitted in the account certificate of representation, such new owner or operator shall be deemed to be subject to and bound by the account certificate of representation, the representations, actions, inactions and submissions of the NO_X authorized account representative and any alternate NO_X authorized account representative of the source or unit and the decisions orders, actions and inactions of the Secretary or the Administrator, as if the new owner or operator were included in such list.

12.3.b. Within 30 days following any change in the owners and operators of a NO_X budget source or a NO_X Budget unit, including the addition of a new owner or operator, the NO_X authorized account representative or alternate NO_X authorized account representative shall submit to the Administrator a revision to the account certificate of representation amending the list of owners and operators to include the change.

§45-26-13. Account Certificate of Representation.

13.1. A complete account certificate of representation for a NO_X authorized account representative or an alternate NO_X authorized account representative shall include the following elements in a format prescribed by the Administrator:

13.1.a. Identification of the NO_X budget source and each NO_X Budget unit at the source for which the account certificate of representation is submitted;

13.1.b. The name, address, e-mail address (if any), telephone number and facsimile transmission number (if any) of the NO_X authorized account representative and any alternate NO_X authorized account representative;

13.1.c. A list of the owners and operators of the NO_X budget source and of each NO_X Budget unit at the source;

13.1.d. The following certification statement by the NO_X authorized account representative and any alternate NO_X authorized account representative: "I certify that I was selected as the NO_X authorized account representative or alternate NO_X authorized account representative, as applicable, by an agreement binding on the owners and operators of the NO_X budget source and each NO_X Budget unit at the source. I certify that I have all the necessary authority to carry out my duties and responsibilities under the NO_X Budget Trading Program on behalf of the owners and operators of the NO_X budget source and of each NO_X Budget unit at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions or submissions and by any decision or order issued to me by the Secretary, the Administrator or a court regarding the source or unit"; and

13.1.e. The signature of the NO_X authorized account representative and any alternate NO_X authorized account representative and the dates signed.

13.2. Unless otherwise required by the Secretary or the Administrator, documents of agreement referred to in the account certificate of representation shall not be submitted to the Secretary or the Administrator. Neither the Secretary nor the Administrator shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

§45-26-14. Objections Concerning the NO_X Authorized Account Representative.

14.1. Once a complete account certificate of representation under section 13. has been submitted and received, the Secretary and the Administrator will rely on the account certificate of representation unless and until a superseding complete account certificate of representation under section 13. is received by the Administrator.

14.2. Except as provided in subsections 12.1. or 12.2., no objection or other communication submitted to the Secretary or the Administrator concerning the authorization or any representation, action, inaction or submission of the NO_X authorized account representative shall affect any representation, action, inaction or submission of the NO_X authorized account representative or the finality of any decision or order by the Secretary or the Administrator under the NO_X Budget Trading Program.

14.3. Neither the Secretary nor the Administrator will adjudicate any private legal dispute concerning the authorization or any representation, action, inaction or submission of any NO_X authorized account representative, including private legal disputes concerning the proceeds of NO_X allowance transfers.

§45-26-20. General NO_X Budget Trading Program Permit Requirements.

20.1. For each NO_X budget source required to have a federally enforceable permit, such permit shall include a NO_X budget permit administered by the Secretary.

20.1.a. For NO_X budget sources required to have a title V operating permit, the NO_X budget portion of the title V permit shall be administered in accordance with 45CSR30, except as provided otherwise by section 20. The applicable provisions of 45CSR30 shall include, but are not limited to, those provisions addressing operating permit applications, operating permit application shield, operating permit duration, operating permit shield, operating permit issuance, operating permit revision and reopening, public participation and review by the Secretary and Administrator.

20.1.b. For NO_X budget sources required to have a non-title V permit, the NO_X budget portion of the non-title V permit shall be administered in accordance with 45CSR13, except as provided otherwise by sections 20. through 24. The applicable provisions of 45CSR13 may include, but are not limited to, provisions addressing permit applications, permit duration, permit issuance, permit revision and reopening, public participation and review by the Secretary.

20.2. Each NO_X budget permit (including a draft or proposed NO_X budget permit, if applicable) shall include all applicable NO_X Budget Trading Program requirements and shall be a complete and segregable portion of the permit under subsection 20.1.

§45-26-21. NO_X Budget Permit Applications.

21.1. Duty to apply. -- The NO_X authorized account representative of any NO_X budget source required to have a federally enforceable permit shall submit to the Secretary a complete NO_X budget permit application under section 22. by the applicable deadline in subsection 21.2.

21.2. Deadlines for NO_X budget permit applications.

21.2.a. For NO_X budget sources required to have a title V operating permit:

21.2.a.1. For any source, with one or more NO_X Budget units under subsection 4.1. that commenced operation before January 1, 2000, the NO_X authorized account representative shall submit a complete NO_X budget permit application under section 22. covering such NO_X Budget units to the Secretary at least 18 months before May 31, 2004; and

21.2.a.2. For any source, with any NO_X Budget unit under subsection 4.1. that commences operation on or after January 1, 2000, the NO_X authorized account representative shall submit a complete NO_X budget permit application under section 22. covering such NO_X Budget unit to the Secretary at least 6 months before the later of May 31, 2004 or the date on which the NO_X Budget unit commences operation.

21.2.b. For NO_X budget sources required to have a non-title V permit:

21.2.b.1. For any source, with one or more NO_X Budget units under subsection 4.1. that commenced operation before January 1, 2000, the NO_X authorized account representative shall submit a complete NO_X budget permit application under section 22. covering such NO_X Budget units to the Secretary at least 6 months before May 31, 2004; and

21.2.b.2. For any source, with any NO_X Budget unit under subsection 4.1. that commences operation on or after January 1, 2000, the NO_X authorized account representative shall submit a complete NO_X budget permit application under section 22. covering such NO_X Budget unit to the Secretary at least 6 months before the later of May 31, 2004 or the date on which the NO_X Budget unit commences operation.

21.3. Duty to reapply.

21.3.a. For a NO_X budget source required to have a title V operating permit, the NO_X authorized account representative shall submit a complete NO_X budget permit application under section 22. for the NO_X budget source covering the NO_X Budget units at the source in accordance with the operating permit renewal requirements set forth in 45CSR30.

21.3.b. For a NO_X budget source required to have a non-title V permit, the NO_X authorized account representative shall submit a complete NO_X budget permit application under section 22. for the NO_X budget source covering the NO_X Budget units at the source in accordance with 45CSR13.

§45-26-22. Information Requirements for NO_X Budget Permit Applications.

22.1. A complete NO_X budget permit application shall include the following elements concerning the NO_X budget source for which the application is submitted, in a format prescribed by the Secretary:

22.1.a. Identification of the NO_X budget source, including plant name and the ORIS (Office of Regulatory Information Systems) or facility code assigned to the source by the Energy Information Administration, if applicable;

22.1.b. Identification of each NO_X Budget unit at the NO_X budget source and whether it is a NO_X Budget unit under subsection 4.1.; and

22.1.c. The standard requirements under section 6.

§45-26-23. NO_X Budget Permit Contents.

23.1. Each NO_X budget permit (including any draft or proposed NO_X budget permit) will contain, in a format prescribed by the Secretary, all elements required for a complete NO_X budget permit application under section 22.

23.2. Each NO_X budget permit is deemed to incorporate automatically the definitions of terms under section 2. and, upon recordation by the Administrator under sections 50. through 57. or sections 60. through 62., every allocation, transfer or deduction of a NO_X allowance to or from the compliance accounts of the NO_X Budget units covered by the permit or the overdraft account of the NO_X budget source covered by the permit.

§45-26-24. NO_X Budget Permit Revisions.

24.1. For a NO_X budget source with a title V operating permit, except as provided in subsection 23.2., the Secretary will revise the NO_X budget permit, as necessary, in accordance with the operating permit revision requirements set forth in 45CSR30.

24.2. For a NO_X budget source with a non-title V permit, except as provided in subsection 23.2., the Secretary will reissue the NO_X budget permit as necessary, in accordance with 45CSR13.

§45-26-30. Compliance Certification Report.

30.1. Applicability and deadline. -- For each ozone season in which one or more NO_X Budget units at a source are subject to the NO_X budget emissions limitation, the NO_X authorized account representative of the source shall submit to the Secretary and the Administrator by November 30 of that year, a compliance certification report for each source covering all such units.

30.2. Contents of report. -- The NO_X authorized account representative shall include in the compliance certification report under subsection 30.1. the following elements, in a format prescribed by the Administrator, concerning each unit at the source and subject to the NO_X budget emissions limitation for the ozone season covered by the report:

30.2.a. Identification of each NO_X Budget unit;

30.2.b. At the NO_X authorized account representative's option, the serial numbers of the NO_X allowances that are to be deducted from each unit's compliance account under section 54. for the ozone season;

30.2.c. At the NO_X authorized account representative's option, for units sharing a common stack and having NO_X emissions that are not monitored separately or apportioned in accordance with sections 70. through 76., the percentage of allowances that is to be deducted from each unit's compliance account under subsection 54.5.; and

30.2.d. The compliance certification under subsection 30.3.

30.3. Compliance certification. -- In the compliance certification report under subsection 30.1., the NO_X authorized account representative shall certify, based on reasonable inquiry of those persons with primary responsibility for operating the source and the NO_X Budget units at the source in compliance with the NO_X Budget Trading Program, whether each NO_X Budget unit for which the compliance certification is submitted was operated during the calendar year covered by the report in compliance with the requirements of the NO_X Budget Trading Program applicable to the unit, including:

30.3.a. Whether the unit was operated in compliance with the NO_X budget emissions limitation;

30.3.b. Whether the monitoring plan that governs the unit has been maintained to reflect the actual operation and monitoring of the unit and contains all information necessary to attribute NO_X emissions to the unit, in accordance with sections 70. through 76.;

30.3.c. Whether all the NO_X emissions from the unit or a group of units (including the unit) using a common stack, were monitored or accounted for through the missing data procedures and reported in the quarterly monitoring reports, including whether conditional data were reported in the quarterly reports in accordance with sections 70. through 76. If conditional data were reported, the owner or operator shall indicate whether the status of all conditional data has been resolved and all necessary quarterly report resubmissions have been made;

30.3.d. Whether the facts that form the basis for certification under sections 70. through 76. of each monitor at the unit or a group of units (including the unit) using a common stack or for using an excepted monitoring method or alternative monitoring method approved under sections 70. through 76., if any, have changed; and

30.3.e. If a change is required to be reported under subdivision 30.3.d., specify the nature of the change, the reason for the change, when the change occurred and how the unit's compliance status was determined subsequent to the change, including what method was used to determine emissions when a change mandated the need for monitor recertification.

§45-26-31. Secretary's and Administrator's Action on Compliance Certifications.

31.1. The Secretary or the Administrator may review and conduct independent audits concerning any compliance certification or any other submission under the NO_X Budget Trading Program and make appropriate adjustments of the information in the compliance certifications or other submissions.

31.2. The Administrator may deduct NO_X allowances from or transfer NO_X allowances to a unit's compliance account or a source's overdraft account based on the information in the compliance certifications or other submissions, as adjusted under subsection 31.1.

§45-26-40. State NO_X Trading Program Budget.

40.1. In accordance with sections 41. and 42., the Secretary will allocate to the NO_X Budget units under subsection 4.1. for each ozone season specified in section 41., a total number of allowances equal to 37,125 tons, less the sum of the NO_X emission limitations (in tons) for each unit exempt under subdivision 4.2.a. that is not allocated any NO_X allowances under subsection 42.2. for the ozone season and whose NO_X emission limitation (in tons of NO_X) is not included in the amount calculated under subparagraph 42.4.e.2.B. for the ozone season.

§45-26-41. Timing Requirements for State NO_X

Allowance Allocations.

41.1. By April 1, 2002, the Secretary will determine by order and submit to the Administrator the state NO_X allowance allocations, in accordance with subdivision 42.1.a. and subsection 42.2., for the ozone seasons in 2004 through 2007.

41.2. By April 1, 2005, the Secretary will determine by order and submit to the Administrator the NO_X allowance allocations, in accordance with subdivision 42.1.a. and subsection 42.2. for the ozone seasons in 2008 through 2012.

41.3. By April 1, 2010, by April 1 of 2015 and thereafter by April 1 of the year that is 5 years after the last year for which NO_X allowance allocations are determined, the Secretary will determine by order and submit to the Administrator the NO_X allowance allocations, in accordance with subdivision 42.1.a. and subsection 42.2. for the ozone seasons in the years that are 3, 4, 5, 6 and 7 years after the applicable deadline under this subsection.

41.4. By April 1, 2004 and April 1 of each year thereafter, the Secretary will determine by order and submit to the Administrator the NO_X allowance allocations from the allocation set-aside, in accordance with subsection 42.4., for the ozone season in the year of the applicable deadline under this subsection.

41.5. The Secretary will make available to the public and the Administrator the draft order determining the NO_X allowance allocations under subsections 41.2., 41.3. or 41.4. by February 1 of the applicable year by filing the draft order with the Secretary of State for publication in the State Register and submittal to the Administrator. The draft order shall be accompanied with a notice providing for a 30 day comment period during which the submission of written objections to the determinations in the draft order will be accepted. Objections shall be limited to addressing whether the determinations are in accordance with section 42. Based on any such objections, the Secretary will adjust each determination to the extent necessary to ensure that it is in accordance with section 42. If error in any such order is discovered after the April 1 issuance of the final orders, the Secretary may issue a revised order making correction to such orders. Any such revised final order shall then be submitted to the Administrator, filed with the Secretary of State and published in the State Register.

§45-26-42. State NO_X Allowance Allocations.

42.1.a. The heat input (in mmBtu) used for calculating state NO_X allowance allocations for each NO_X Budget unit under subsection 4.1. will be:

42.1.a.1. For a state NO_X allowance allocation under subsection 41.1., the average of the two highest amounts of the unit's heat input for the ozone seasons 1995 through 1998.

42.1.a.2. For a NO_X allowance allocation under subsection 41.2., the unit's average heat input for the ozone seasons in 2002 through 2004.

42.1.a.3. For a NO_X allowance allocation under subsection 41.3., the unit's average heat input for the ozone season in the years that are 4, 5, 6, 7 and 8 years before the first ozone season for which the allocation is being calculated.

42.1.b. The unit's total heat input for the ozone season in each year specified under subdivision 42.1.a. will be determined in accordance with 40 CFR Part 75. Notwithstanding the first sentence of this subdivision:

42.1.b.1. For a NO_X allowance allocation under subsection 41.1., such heat input will be determined using the best available data reported to the Secretary for the unit if the unit was not otherwise subject to the requirements of 40 CFR Part 75 for the ozone season; and

42.1.b.2. For a NO_X allowance allocation under subsections 41.2. or 41.3., for a unit exempt under subdivision 4.2.a., such heat input shall be treated as zero if the unit is exempt under subdivision 4.2.a. during the ozone season.

42.2. For each block of ozone seasons specified in subsections 41.1., 41.2. and 41.3., the Secretary will allocate to all NO_X Budget units under subsection 4.1. that commenced operation before: May 1, 1997 for allocations under subsection 41.1.; May 1, 2003 for allocations under subsection 41.2.; and May 1 of the year 5 years before the first ozone season for which the allocation under subsection 41.3. is being calculated, a total number of NO_X allowances equal to the portion of state trading program budget under section 40. covering such units less the allocation set-aside set forth in subdivision 42.4.a. The Secretary will allocate in accordance with the following procedures:

42.2.a. The Secretary will allocate NO_X allowances to each NO_X Budget unit under subsection 4.1. for each ozone season in an amount that does not exceed the lesser of:

42.2.a.1. 0.15 lb/mmBtu multiplied by the heat input determined under subdivision 42.1.a., divided by 2,000 lb/ton and rounded to the nearest whole number of NO_X allowances as appropriate; or

42.2.a.2. The unit's most stringent state or federal NO_X emission limitation multiplied by the heat input determined under subdivision 42.1.a., divided by 2,000 lb/ton and rounded to the nearest whole number of NO_X allowances as appropriate.

42.2.b. If the initial total number of NO_X allowances allocated to all NO_X Budget units under subsection 4.1. for an ozone season under subdivision 42.2.a. does not equal the portion of state trading program budget under section 40. covering such units less the allocation set-aside set forth in subdivision 42.4.a., the Secretary will adjust the total number of NO_X allowances allocated to all such NO_X Budget units for the ozone season under subdivision 42.2.a. so that the total number of NO_X allowances allocated does equal such portion of state trading program budget less the allocation set-aside set forth in subdivision 42.4.a. This adjustment will be made by multiplying each unit's allocation by the portion of the state trading program budget less the allocation set-aside set forth in subdivision 42.4.a.; dividing by the total number of NO_X allowances allocated under subdivision 42.2.a. for the ozone season; and rounding to the nearest whole number of NO_X allowances as appropriate.

42.3. Reserved.

42.4. New source NO_X allocation set-aside. -- For each ozone season under subsection 41.4., the Secretary will allocate NO_X allowances from the allocation set-aside to NO_X Budget units under subsection 4.1. (except for units exempt under subdivision 4.2.a.) that commence operation or are projected to commence operation, on or after: May 1, 1997 (for ozone seasons under subsection 41.1.); May 1, 2003 (for ozone seasons under subsection 41.2.); and May 1 of the year 5 years before the beginning of the group of 5 years that includes the ozone season (for ozone seasons under subsection 41.3.). The Secretary will make the allocations under this subsection in accordance with the following procedures:

42.4.a. The Secretary will establish one allocation set-aside for each ozone season. Each allocation set-aside will be allocated NO_X allowances equal to 5,833 tons of NO_X emissions in the state NO_X trading program budget under section 40., rounded to the nearest whole number of NO_X allowances as appropriate;

42.4.b. The NO_X authorized account representative of a NO_X Budget unit under subsection 42.4. may submit to the Secretary a request, in writing or in a format specified by the Secretary, to be allocated NO_X allowances from the allocation set-aside for the ozone season. The NO_X allowance allocation request must be received by the Secretary on or after the date on which the Secretary issues a permit to construct the unit and by January 1 before the ozone season for which NO_X allowances are requested;

42.4.c. In the NO_X allowance allocation request under subdivision 42.4.b., the NO_X authorized account representative for a NO_X Budget unit under subsection 4.1. may request for the ozone season NO_X allowances in an amount that does not exceed the lesser of:

42.4.c.1. 0.15 lb/mmBtu multiplied by the unit's maximum design heat input, multiplied by the lesser of 3,672 hours or the number of hours remaining in the ozone season starting with the day in the ozone season on which the unit commences operation or is projected to commence operation, divided by 2,000 lb/ton and rounded to the nearest whole number of NO_X allowances as appropriate; or

42.4.c.2. The unit's most stringent state or federal NO_X emission limitation multiplied by the unit's maximum design heat input, multiplied by the lesser of 3,672 hours or the number of hours remaining in the ozone season starting with the day in the ozone season on which the unit commences operation or is projected to commence operation, divided by 2,000 lb/ton and rounded to the nearest whole number of NO_X allowances as appropriate.

42.4.d. Reserved.

42.4.e. The Secretary will review each NO_X allowance allocation request submitted in accordance with subdivision 42.4.b. and will allocate NO_X allowances pursuant to such request as follows:

42.4.e.1. Upon receipt of the NO_X allowance allocation request, the Secretary will make any necessary adjustments to the request to ensure the requirements of subsection 42.4. and subdivisions 42.4.b. and 42.4.c. are met;

42.4.e.2. The Secretary will determine the following amounts:

42.4.e.2.A. The sum of the NO_X allowances requested (as adjusted under paragraph 42.4.e.1.) in all NO_X allowance allocation requests under subdivision 42.4.b. for the ozone season; and

42.4.e.2.B. For units exempt under subdivision 4.2.a. that commenced operation, or are projected to commence operation, on or after May 1, 1997 (for ozone seasons under subsection 41.1.); May 1, 2003, (for ozone seasons under subsection 41.2.); and May 1 of the year 5 years before the beginning of the group of 5 years that includes the ozone season (for ozone seasons under subsection 41.3.), the sum of the NO_X emission limitations (in tons of NO_X) on which each unit's exemption under subdivision 4.2.a. is based;

42.4.e.3. If the number of NO_X allowances in the allocation set-aside for the ozone season less the amount under subparagraph 42.4.e.2.B. is not less than the amount determined under subparagraph 42.4.e.2.A., the Secretary will allocate the amount of the NO_X allowances requested (as adjusted under paragraph 42.4.e.1.) to the NO_X Budget unit for which the allocation request was submitted; and

42.4.e.4. If the number of NO_X allowances in the allocation set-aside for the ozone season less the amount under subparagraph 42.4.e.2.B. is less than the amount determined under subparagraph 42.4.e.2.A., the Secretary will allocate, to the NO_X Budget unit for which the allocation request was submitted, the amount of NO_X allowances requested (as adjusted under paragraph 42.4.e.1.) multiplied by the number of NO_X allowances in the allocation set-aside for the ozone season less the amount determined under subparagraph 42.4.e.2.B., divided by the amount determined under subparagraph 42.4.e.2.A. and rounded to the nearest whole number of NO_X allowances as appropriate.

42.5.a. For a NO_X Budget unit that is allocated NO_X allowances under subsection 42.4. for an ozone season, the Administrator will deduct NO_X allowances under subsections 54.2., 54.5. or 54.6. to account for the actual heat input of the unit during the ozone season. The Administrator will calculate the number of NO_X allowances to be deducted to account for the unit's actual heat input using the following formulas and rounding to the nearest whole number of NO_X allowances as appropriate, provided that the number of NO_X allowances to be deducted shall be zero if the number calculated is less than zero:

NO_X allowances deducted for actual heat input for units under subsection 4.1. = (unit's NO_X allowances allocated for ozone season) - [(unit's actual ozone season heat input X the lessor of 0.15 lb/mmBtu or the unit's most stringent state or federal NO_X emission limitation) ÷ 2000 lb/ton].

where:

"Unit's NO_X allowances allocated for ozone season" is the number of NO_X allowances allocated to the unit for the ozone season under subsection 42.4.; and

"Unit's actual ozone season heat input" is the heat input (in mmBtu) of the unit during the ozone season.

42.5.b. The Secretary will transfer any NO_X allowances deducted under subdivision 42.5.a. to the allocation set-aside for the ozone season for which they were allocated.

42.6. After making the deductions for compliance under subsections 54.2., 54.5. or 54.6. for an ozone season, the Administrator will determine whether any NO_X allowances remain in the allocation set-aside for the ozone season. The Secretary will allocate any such NO_X allowances to the NO_X Budget units using the following formula and rounding to the nearest whole number of NO_X allowances as appropriate:

Unit's share of NO_X allowances remaining in allocation set-aside = (Total NO_X allowances remaining in allocation set-aside) X (Unit's NO_X allowance allocation) ÷ (state NO_X trading program budget excluding allocation set-aside)

where:

"Total NO_X allowances remaining in allocation set-aside" is the total number of NO_X allowances remaining in the allocation set-aside for the ozone season;

"Unit's NO_X allowance allocation" is the number of NO_X allowances allocated under subsection 42.2. to the unit for the ozone season to which the allocation set-aside applies; and

"State NO_X trading program budget excluding allocation set-aside" is the state NO_X trading program budget under section 40. for the ozone season to which the allocation set-aside applies less the allocation set-aside set forth in subdivision 42.4.a., rounded to the nearest whole number of NO_X allowances as appropriate.

42.7. If the Administrator determines that NO_X allowances were allocated under subsections 42.2. or 42.4. for an ozone season and the recipient of the allocation is not actually a NO_X Budget unit under subsection 4.1., the Administrator will notify the NO_X authorized account representative and then will act in accordance with the following procedures:

42.7.a.1. The Administrator will not record such NO_X allowances for the ozone season in an account under section 53.;

42.7.a.2. If the Administrator already recorded such NO_X allowances for the ozone season in an account under section 53. and if the Administrator makes such determination before making all deductions pursuant to section 54. (except deductions pursuant to subdivision 54.4.b.) for the ozone season, then the Administrator will deduct from the account NO_X allowances equal in number to and allocated for the same or a prior ozone season as the NO_X allowances allocated to such recipient for the ozone season. The NO_X authorized account representative shall ensure the account contains the NO_X allowances necessary for completion of such deduction. If the account does not contain the necessary NO_X allowances, the Administrator will deduct the required number of NO_X allowances, regardless of the ozone season for which they were allocated, whenever NO_X allowances are recorded in the account or:

42.7.a.3. If the Administrator already recorded such NO_X allowances for the ozone season in an account under section 53. and if the Administrator makes such determination after making all deductions pursuant to section 54. (except deductions pursuant to subdivision 54.4.b.) for the ozone season, then the Administrator will apply paragraph 42.7.a.2. to any subsequent ozone season for which NO_X allowances were allocated to such recipient.

42.7.b. The Administrator will transfer the NO_X allowances that are not recorded, or that are deducted, pursuant to paragraphs 42.7.a.1., 42.7.a.2. and 42.7.a.3. to the state allocation set-aside.

§45-26-43. Compliance Supplement Pool.

43.1. For any NO_X Budget unit that reduces its NO_X emission rate in the 2002 or 2003 ozone season, the owners and operators may request early reduction credits in accordance with the following requirements:

43.1.a. Each NO_X Budget unit for which the owners and operators intend to request, or request, any early reduction credits in accordance with subdivision 43.1.d. shall monitor and report NO_X emissions in accordance with sections 70. through 76. starting in the 2001 ozone season and for each ozone season for which such early reduction credits are requested. The unit's percent monitor data availability shall not be less than 90 percent during the 2001 ozone season and the unit must be in full compliance with any applicable state or federal NO_X emission control requirements during 2001 through 2003;

43.1.b. NO_X emission rate and heat input under subdivisions 43.1.c. and 43.1.d. shall be determined in accordance with sections 70. through 76.;

43.1.c. Each NO_X Budget unit for which the owners and operators intend to request, or request, any early reduction credits under subdivision 43.1.d. shall reduce its NO_X emission rate, for each ozone season for which early reduction credits are requested, to less than both 0.25 lb/mmBtu and 80 percent of the unit's NO_X emission rate in the 2001 ozone season; and

43.1.d. The NO_X authorized account representative of a NO_X Budget unit that meets the requirements of subdivisions 43.1.a. and 43.1.c. may submit to the Secretary a request for early reduction credits for the unit based on NO_X emission rate reductions made by the unit in the ozone season for 2002 or 2003.

43.1.d.1. In the early reduction credit request, the NO_X authorized account representative may request early reduction credits for such ozone season in an amount equal to the unit's heat input for such ozone season multiplied by the difference between 0.25 lb/mmBtu and the unit's NO_X emission rate for such ozone season, divided by 2000 lb/ton and rounded to the nearest whole number of tons.

43.1.d.2. The early reduction credit request must be submitted in a format specified by the Secretary by February 1, 2004.

43.2. Reserved.

43.2.a. Reserved.

43.2.b. Reserved.

43.2.c. Reserved.

43.3. The Secretary will review each early reduction credit request submitted in accordance with subsection 43.1. and will allocate NO_X allowances to NO_X Budget units covered by such request as follows:

43.3.a. Upon receipt of each early reduction credit request, the Secretary will make any necessary adjustments to the request to ensure that the amount of the early reduction credits requested meets the requirements of subsection 43.1.;

43.3.b. After February 1, 2004, the Secretary will make available to the public a statement of the total number of early reduction credits requested by NO_X Budget units;

43.3.c. If the compliance supplement pool has a number of NO_X allowances not less than the amount of early reduction credits in all early reduction credit requests under subsection 43.1. for 2002 and 2003 (as adjusted under subdivision 43.3.a.) submitted by February 1, 2004, the Secretary will allocate to each NO_X Budget unit covered by such requests one allowance for each early reduction credit requested (as adjusted under subdivision 43.3.a.);

43.3.d. If the compliance supplement pool has a smaller number of NO_X allowances than the amount of early reduction credits in all early reduction credit requests under subsection 43.1. for 2002 and 2003 (as adjusted under subdivision 43.3.a.) submitted by February 1, 2004, the Secretary will allocate NO_X allowances to each NO_X Budget unit covered by such requests according to the following formula and rounding to the nearest whole number of NO_X allowances as appropriate:

Unit's allocation for early reduction credits = Unit's adjusted early reduction credits X (state's compliance supplement pool ÷ total adjusted early reduction credits for all units)

Where:

"Unit's allocation for early reduction credits" is the number of NO_X allowances allocated to the unit for early reduction credits;

"Unit's adjusted early reduction credits" is the amount of early reduction credits requested for the unit for 2002 and 2003 in early reduction credit requests under subsection 43.1., as adjusted under subdivision 43.3.a.;

"Compliance supplement pool" is 16,709 tons of NO_X allowances;

"Total adjusted early reduction credits for all units" is the amount of early reduction credits requested for all units for 2002 and 2003 in early reduction credit requests under subsection 43.1., as adjusted under subdivision 43.3.a.;

43.3.e. By April 1, 2004, the Secretary will determine by order the allocations under subdivisions 43.3.c. or 43.3.d. The Secretary will make available to the public each determination of NO_X allowance allocations and will provide an opportunity for submission of objections to the determination. Objections shall be limited to addressing whether the determination is in accordance with subdivisions 43.3.a., 43.3.c. or 43.3.d. Based on any such objections, the Secretary will adjust each determination to the extent necessary to ensure that it is in accordance with subdivisions 43.3.a., 43.3.c. or 43.3.d.;

43.3.f. By May 1, 2004, the Secretary will record the allocations under subdivisions 43.3.c. or 43.3.d.;

43.3.g. NO_X allowances recorded under subdivision 43.3.f. may be deducted for compliance under section 54. for the ozone season in 2004 or 2005. Notwithstanding subsection 55.1., the Secretary will deduct as retired any NO_X allowance that is recorded under subdivision 43.3.f. and that is not deducted for compliance under section 54. for the ozone season in 2004 or 2005; and

43.3.h. NO_X allowances recorded under subdivision 43.3.f. are treated as banked allowances in 2005 for the purposes of subsections 54.6. and 55.2.

§45-26-50. NO_X Allowance Tracking System Accounts.

50.1. Nature and function of compliance accounts and overdraft accounts. -- Consistent with subsection 51.1., the Administrator will establish one compliance account for each NO_X Budget unit and one overdraft account for each source with one or more NO_X Budget units. Allocations of NO_X allowances pursuant to sections 40. through 42. and deductions or transfers of NO_X allowances pursuant to sections 31., 54. and 56. or sections 60. through 62. will be recorded in the compliance accounts or overdraft accounts in accordance with sections 50. through 57.

50.2. Nature and function of general accounts. -- Consistent with subsection 51.2., the Administrator will establish, upon request, a general account for any person. Allocations of NO_X allowances pursuant to paragraph 4.2.d.2. or subdivision 5.3.b. and transfers of allowances pursuant to sections 60. through 62. will be recorded in the general accounts in accordance with sections 50. through 57.

§45-26-51. Establishment of Accounts.

51.1. Compliance accounts and overdraft accounts. -- Upon receipt of a complete account certificate of representation under section 13., the Administrator will establish:

51.1.a. A compliance account for each NO_X Budget unit for which the account certificate of representation was submitted; and

51.1.b. An overdraft account for each source for which the account certificate of representation was submitted and that has two or more NO_X Budget units.

51.2. General accounts.

51.2.a. Any person may apply to open a general account for the purpose of holding and transferring allowances. A complete application for a general account shall be submitted to the Administrator and shall include the following elements in a format prescribed by the Administrator:

51.2.a.1. Name, mailing address, e-mail address (if any), telephone number and facsimile transmission number (if any) of the NO_X authorized account representative and any alternate NO_X authorized account representative;

51.2.a.2. At the option of the NO_X authorized account representative organization name and type of organization;

51.2.a.3. A list of all persons subject to a binding agreement for the NO_X authorized account representative or any alternate NO_X authorized account representative to represent their ownership interest with respect to the allowances held in the general account;

51.2.a.4. The following certification statement by the NO_X authorized account representative and any alternate NO_X authorized account representative: "I certify that I was selected as the NO_X authorized account representative or the NO_X alternate authorized account representative, as applicable, by an agreement that is binding on all persons who have an ownership interest with respect to NO_X allowances held in the general account. I certify that I have all the necessary authority to carry out my duties and responsibilities under the NO_X Budget Trading Program on behalf of such persons and that each such person shall be fully bound by my representations, actions, inactions or submissions and by any order or decision issued to me by the Administrator or a court regarding the general account";

51.2.a.5. The signature of the NO_X authorized account representative and any alternate NO_X authorized account representative and the dates signed; and

51.2.a.6. Unless otherwise required by the Secretary or the Administrator, documents of agreement referred to in the account certificate of representation shall not be submitted to the Secretary or the Administrator. Neither the Secretary nor the Administrator shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

51.2.b. Upon receipt by the Administrator of a complete application for a general account under subdivision 51.2.a.:

51.2.b.1. The Administrator will establish a general account for the person or persons for whom the application is submitted;

51.2.b.2. The NO_X authorized account representative and any alternate NO_X authorized account representative for the general account shall represent and, by his or her representations, actions, inactions or submissions, legally bind each person who has an ownership interest with respect to NO_X allowances held in the general account in all matters pertaining to the NO_X Budget Trading Program, not withstanding any agreement between the NO_X authorized account representative or any alternate NO_X authorized account representative and such person. Any such person shall be bound by any order or decision issued to the NO_X authorized account representative or any alternate NO_X authorized account representative by the Administrator or a court regarding the general account;

51.2.b.3. Each submission concerning the general account shall be submitted, signed and certified by the NO_X authorized account representative or any alternate NO_X authorized account representative for the persons having an ownership interest with respect to NO_X allowances held in the general account. Each such submission shall include the following certification statement by the NO_X authorized account representative or any alternate NO_X authorized account representative any: "I am authorized to make this submission on behalf of the persons having an ownership interest with respect to the NO_X allowances held in the general account. I certify under penalty of law that I have personally examined and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment"; and

51.2.b.4. The Administrator will accept or act on a submission concerning the general account only if the submission has been made, signed and certified in accordance with paragraph 51.2.b.3.

51.2.c.1. An application for a general account may designate one and only one NO_X authorized account representative and one and only one alternate NO_X authorized account representative who may act on behalf of the NO_X authorized account representative. The agreement by which the alternate NO_X authorized account representative is selected shall include a procedure for authorizing the alternate NO_X authorized account representative to act in lieu of the NO_X authorized account representative.

51.2.c.2. Upon receipt by the Administrator of a complete application for a general account under subdivision 51.2.a., any representation, action, inaction or submission by any alternate NO_X authorized account representative shall be deemed to be a representation, action, inaction or submission by the NO_X authorized account representative.

51.2.d.1. The NO_X authorized account representative for a general account may be changed at any time upon receipt by the Administrator of a superseding complete application for a general account under subdivision 51.2.a. Notwithstanding any such change, all representations, actions, inactions and submissions by the previous NO_X authorized account representative prior to the time and date when the Administrator receives the superseding application for a general account shall be binding on the new NO_X authorized account representative and the persons with an ownership interest with respect to the allowances in the general account.

51.2.d.2. The alternate NO_X authorized account representative for a general account may be changed at any time upon receipt by the Administrator of a superseding complete application for a general account under subdivision 51.2.a. Notwithstanding any such change, all representations, actions, inactions and submissions by the previous alternate NO_X authorized account representative prior to the time and date when the Administrator receives the superseding application for a general account shall be binding on the new alternate NO_X authorized account representative and the persons with an ownership interest with respect to the allowances in the general account.

51.2.d.3.A. In the event a new person having an ownership interest with respect to NO_X allowances in the general account is not included in the list of such persons in the account certificate of representation, such new person shall be deemed to be subject to and bound by the account certificate of representation, the representation, actions, inactions and submissions of the NO_X authorized account representative and any alternate NO_X authorized account representative of the source or unit and the decisions orders, actions and inactions of the Administrator, as if the new person were included in such list.

51.2.d.3.B. Within 30 days following any change in the persons having an ownership interest with respect to NO_X allowances in the general account, including the addition of persons, the NO_X authorized account representative or any alternate NO_X authorized account representative shall submit a revision to the application for a general account amending the list of persons having an ownership interest with respect to the NO_X allowances in the general account to include the change.

51.2.e.1. Once a complete application for a general account under subdivision 51.2.a. has been submitted and received, the Administrator will rely on the application unless and until a superseding complete application for a general account under subdivision 51.2.a. is received by the Administrator.

51.2.e.2. Except as provided in subdivision 51.2.d., no objection or other communication submitted to the Administrator concerning the authorization or any representation, action, inaction or submission of the NO_X authorized account representative or any alternate NO_X authorized account representative for a general account shall affect any representation, action, inaction or submission of the NO_X authorized account representative or any alternate NO_X authorized account representative or the finality of any decision or order by the Administrator under the NO_X Budget Trading Program.

51.2.e.3. The Administrator will not adjudicate any private legal dispute concerning the authorization or any representation, action, inaction or submission of the NO_X authorized account representative or any alternate NO_X authorized account representative for a general account, including private legal disputes concerning the proceeds of NO_X allowance transfers.

51.3. Account identification. -- The Administrator will assign a unique identifying number to each account established under subsections 51.1. or 51.2.

§45-26-52. NO_X Allowance Tracking System Responsibilities of NO_X Authorized Account Representative.

52.1. Following the establishment of a NO_X Allowance Tracking System account, all submissions to the Administrator pertaining to the account, including, but not limited to, submissions concerning the deduction or transfer of NO_X allowances in the account, shall be made only by the NO_X authorized account representative for the account.

52.2. Authorized account representative identification. -- The Administrator will assign a unique identifying number to each NO_X authorized account representative.

§45-26-53. Recordation of NO_X Allowance Allocations.

53.1. The Administrator will record the NO_X allowances for 2004 for a NO_X Budget unit allocated under sections 40. through 42. in the unit's compliance account, except for NO_X allowances under paragraph 4.2.d.2. or subdivision 5.3.b. which will be recorded in the general account specified by the owners and operators of the unit.

53.2. By May 1, 2002, the Administrator will record the NO_X allowances for 2005 for a NO_X Budget unit allocated under sections 40. through 42. in the unit's compliance account, except for NO_X allowances under paragraph 4.2.d.2. or subdivision 5.3.b., which will be recorded in the general account specified by the owners and operators of the unit.

53.3. By May 1, 2003, the Administrator will record the NO_X allowances for 2006 for a NO_X Budget unit allocated under sections 40. through 42. in the unit's compliance account, except for NO_X allowances under paragraph 4.2.d.2. or subdivision 5.3.b., which will be recorded in the general account specified by the owners and operators of the unit.

53.4. By May 1, 2004, the Administrator will record the NO_X allowances for 2007 for a NO_X Budget unit allocated under sections 40. through 42. in the unit's compliance account, except for NO_X allowances under paragraph 4.2.d.2. or subdivision 5.3.b., which will be recorded in the general account specified by the owners and operators of the unit.

53.5. Each year starting with 2005, after the Administrator has made all deductions from a NO_X Budget unit's compliance account and the overdraft account pursuant to section 54. (except deductions pursuant to subdivision 54.4.b.), the Administrator will record:

53.5.a. NO_X allowances, in the compliance account, as allocated to the unit under sections 40. through 42. for the third year after the year of the ozone season for which such deductions were or could have been made; and

53.5.b. NO_X allowances, in the general account specified by the owners and operators of the unit, as allocated under paragraph 4.2.d.2. or subdivision 5.3.b. for the third year after the year of the ozone season for which such deductions are or could have been made.

53.6. Serial numbers for allocated NO_X allowances. -- When allocating NO_X allowances to a NO_X Budget unit and recording them in an account, the Administrator will assign each NO_X allowance a unique identification number that will include digits identifying the year for which the NO_X allowance is allocated.

§45-26-54. Compliance.

54.1. NO_X allowance transfer deadline. -- The NO_X allowances are available to be deducted for compliance with a unit's NO_X budget emissions limitation for an ozone season in a given year only if the NO_X allowances:

54.1.a. Were allocated for an ozone season in a prior year or the same year; and

54.1.b. Are held in the unit's compliance account or the overdraft account of the source where the unit is located, as of the NO_X allowance transfer deadline for that ozone season or are transferred into the compliance account or overdraft account by a NO_X allowance transfer correctly submitted for recordation under section 60. by the NO_X allowance transfer deadline for that ozone season.

54.2. Deductions for compliance.

54.2.a. Following recordation in accordance with section 61. of NO_X allowance transfers submitted for recordation in the unit's compliance account or the overdraft account of the source where the unit is located by the NO_X allowance transfer deadline for an ozone season, the Administrator will deduct NO_X allowances available under subsection 54.1. to cover the unit's NO_X emissions (as determined in accordance with sections 70. through 76.) or to account for actual heat input under subsection 42.5. for the ozone season:

54.2.a.1. From the compliance account; and

54.2.a.2. Only if no more NO_X allowances available under subsection 54.1. remain in the compliance account, from the overdraft account. In deducting allowances for units at the source from the overdraft account, the Administrator will begin with the unit having the compliance account with the lowest NO_X Allowance Tracking System account number and end with the unit having the compliance account with the highest NO_X Allowance Tracking System account number (with account numbers sorted beginning with the left-most character and ending with the right-most character and the letter characters assigned values in alphabetical order and less than all numeric characters).

54.2.b. The Administrator will deduct NO_X allowances first under paragraph 54.2.a.1. and then under paragraph 54.2.a.2.:

54.2.b.1. Until the number of NO_X allowances deducted for the ozone season equals the number of tons of NO_X emissions, determined in accordance with sections 70. through 76. from the unit for the ozone season for which compliance is being determined, plus the number of NO_X allowances required for deduction to account for actual heat input under subsection 42.5. for the ozone season; or

54.2.b.2. Until no more NO_X allowances available under subsection 54.1. remain in the respective account.

54.3.a. Identification of NO_X allowances by serial number. -- The NO_X authorized account representative for each compliance account may identify by serial number the NO_X allowances to be deducted from the unit's compliance account under subsections 54.2., 54.4. or 54.5. Such identification shall be made in the compliance certification report submitted in accordance with section 30.

54.3.b. First-in, first-out. -- The Administrator will deduct NO_X allowances for an ozone season from the compliance account, in the absence of an identification or in the case of a partial identification of NO_X allowances by serial number under subdivision 54.3.a. or the overdraft account on a first-in, first-out (FIFO) accounting basis in the following order:

54.3.b.1. Those NO_X allowances that were allocated for the ozone season to the unit under sections 40. through 42.;

54.3.b.2. Those NO_X allowances that were allocated for the ozone season to any unit and transferred and recorded in the account pursuant to sections 60. through 62., in order of their date of recordation;

54.3.b.3. Those NO_X allowances that were allocated for a prior ozone season to the unit under sections 40. through 42.; and

54.3.b.4. Those NO_X allowances that were allocated for a prior ozone season to any unit and transferred and recorded in the account pursuant to sections 60. through 62., in order of their date of recordation.

54.4. Deductions for excess emissions.

54.4.a. After making the deductions for compliance under subsection 54.2., the Administrator will deduct from the unit's compliance account or the overdraft account of the source where the unit is located a number of NO_X allowances, allocated for an ozone season after the ozone season in which the unit has excess emissions, equal to three times the number of the unit's excess emissions.

54.4.b. If the compliance account or overdraft account does not contain sufficient NO_X allowances, the Administrator will deduct the required number of NO_X allowances, regardless of the ozone season for which they were allocated, whenever NO_X allowances are recorded in either account.

54.4.c. Any allowance deduction required under subsection 54.4. shall not affect the liability of the owners and operators of the NO_X Budget unit for any fine, penalty or assessment or their obligation to comply with any other remedy, for the same violation, as ordered under §§22-5-1 et seq. or the CAA. The following guidelines will be followed in assessing fines, penalties or other obligations:

54.4.c.1. For purposes of determining the number of days of violation, if a NO_X Budget unit has excess emissions for an ozone season, each day in the ozone season (153 days) constitutes a day in violation unless the owners and operators of the unit demonstrate that a lesser number of days should be considered; and

54.4.c.2. Each ton of excess emissions is a separate violation.

54.5. Deductions for units sharing a common stack. -- In the case of units sharing a common stack and having emissions that are not separately monitored or apportioned in accordance with sections 70. through 76.:

54.5.a. The NO_X authorized account representative of the units may identify the percentage of NO_X allowances to be deducted from each such unit's compliance account to cover the unit's share of NO_X emissions from the common stack for an ozone season. Such identification shall be made in the compliance certification report submitted in accordance with section 30.; and

54.5.b. Notwithstanding paragraph 54.2.b.1., the Administrator will deduct NO_X allowances for each such unit until the number of NO_X allowances deducted equals the unit's identified percentage (under subdivision 54.5.a.) of the number of tons of NO_X emissions, as determined in accordance with sections 70. through 76., from the common stack for the ozone season for which compliance is being determined or, if no percentage is identified, an equal percentage for each such unit plus the number of allowances required for deduction to account for actual heat input under subsection 42.5. for the ozone season.

54.6. Deduction of banked allowances. -- Each year starting in 2005, after the Administrator has completed the designation of banked NO_X allowances under subdivision 55.1.b. and before May 1 of the year, the Administrator will determine the extent to which banked NO_X allowances otherwise available under subsection 54.1. are available for compliance in the ozone season for the current year, as follows. The terms "compliance account", "overdraft account", "general account", "states" and "trading program budgets" in subdivision 54.6.a. through paragraph 54.6.c.2. shall be read to include respectively a compliance account, an overdraft account, a general account, each state or portion of a state, and the trading program budget of each state or portion of a state under the NO_X Budget Trading Program established by the Administrator pursuant to 40 CFR Part 97.

54.6.a. The Administrator will determine the total number of banked NO_X allowances held in compliance accounts, overdraft accounts, or general accounts;

54.6.b. If the total number of banked NO_X allowances determined under subdivision 54.6.a. to be held in compliance accounts, overdraft accounts, or general accounts is less than or equal to 10 percent of the sum of the trading program budgets for all states for the ozone season, any banked NO_X allowance may be deducted for compliance in accordance with subsections 54.1. through 54.5.

54.6.c. If the total number of banked NO_X allowances determined under subdivision 54.6.a. to be held in compliance accounts, overdraft accounts, or general accounts exceeds 10 percent of the sum of the trading program budgets for all states for the ozone season, any banked allowance may be deducted for compliance in accordance with subsections 54.1. through 54.5., except as follows:

54.6.c.1. The Administrator will determine the following ratio: 0.10 multiplied by the sum of the trading program budgets for all states for the ozone season and divided by the total number of banked NO_X allowances determined under subdivision 54.6.a. to be held in compliance accounts, overdraft accounts, or general accounts; and

54.6.c.2. The Administrator will multiply the number of banked NO_X allowances in each compliance account or overdraft account by the ratio determined under paragraph 54.6.c.1. The resulting product is the number of banked NO_X allowances in the account that may be deducted for compliance in accordance with subsections 54.1. through 54.5. Any banked NO_X allowances in excess of the resulting product may be deducted for compliance in accordance with subsections 54.1. through 54.5., except that, if such NO_X allowances are used to make a deduction under subsections 54.2. or 54.5., two (rather than one) such NO_X allowances shall authorize up to one ton of NO_X emissions during the ozone season and must be deducted for each deduction of one NO_X allowance required under subsections 54.2. or 54.5.

54.7. Recordation of deductions. -- The Administrator will record in the appropriate compliance account or overdraft account all deductions from such an account pursuant to subsections 54.2., 54.4., 54.5. or 54.6.

§45-26-55. NO_X Allowance Banking.

55.1. NO_X allowances may be banked for future use or transfer in a compliance account, an overdraft account or a general account, as follows:

55.1.a. Any NO_X allowance that is held in a compliance account, an overdraft account or a general account will remain in such account unless and until the NO_X allowance is deducted or transferred under sections 31., 54., 56. or sections 60. through 62.; and

55.1.b. The Administrator will designate, as a "banked" NO_X allowance, any NO_X allowance that remains in a compliance account, an overdraft account or a general account after the Administrator has made all deductions for a given ozone season from the compliance account or overdraft account pursuant to section 54. (except deductions pursuant to subdivision 54.4.b.) and that was allocated for that ozone season or an ozone season in a prior year.

§45-26-56. Account Error.

The Administrator may, at his or her sole discretion and on his or her own motion, correct any error in any NO_X Allowance Tracking System account. Within 10 business days of making such correction, the Administrator will notify the NO_X authorized account representative for the account.

§45-26-57. Closing of General Accounts.

57.1. The NO_X authorized account representative of a general account may instruct the Administrator to close the account by submitting a statement requesting deletion of the account from the NO_X Allowance Tracking System and by correctly submitting for recordation under section 60. an allowance transfer of all NO_X allowances in the account to one or more other NO_X Allowance Tracking System accounts.

57.2. If a general account shows no activity for a period of a year or more and does not contain any NO_X allowances, the Administrator may notify the NO_X authorized account representative for the account that the account will be closed and deleted from the NO_X Allowance Tracking System following 20 business days after the notice is sent. The account will be closed after the 20-day period unless before the end of the 20-day period the Administrator receives a correctly submitted transfer of NO_X allowances into the account under section 60. or a statement submitted by the NO_X authorized account representative demonstrating to the satisfaction of the Administrator good cause as to why the account should not be closed.

§45-26-60. Submission of NO_X Allowance Transfers.

60.1. The NO_X authorized account representatives seeking recordation of a NO_X allowance transfer shall submit the transfer to the Administrator. To be considered correctly submitted, the NO_X allowance transfer shall include the following elements in a format specified by the Administrator:

60.1.a. The numbers identifying both the transferor and transferee accounts;

60.1.b. A specification by serial number of each NO_X allowance to be transferred; and

60.1.c. The printed name and signature of the NO_X authorized account representative of the transferor account and the date signed.

§45-26-61. Allowance Transfer Recordation.

61.1. Within 5 business days of receiving a NO_X allowance transfer, except as provided in subsection 61.2., the Administrator will record a NO_X allowance transfer by moving each NO_X allowance from the transferor account to the transferee account as specified by the request, provided that:

61.1.a. The transfer is correctly submitted under section 60.; and

61.1.b. The transferor account includes each NO_X allowance identified by serial number in the transfer.

61.2. A NO_X allowance transfer that is submitted for recordation following the NO_X allowance transfer deadline and that includes any NO_X allowances allocated for an ozone season prior to or the same as the ozone season to which the NO_X allowance transfer deadline applies will not be recorded until after the Administrator completes the recordation of NO_X allowances under section 53., for the ozone season in the third year after the NO_X allowance transfer deadline.

61.3. Where a NO_X allowance transfer submitted for recordation fails to meet the requirements of subsection 61.1., the Administrator will not record such transfer.

§45-26-62. Notification.

62.1. Notification of recordation. -- Within 5 business days of recordation of a NO_X allowance transfer under section 61., the Administrator will notify each party to the transfer. Notice will be given to the NO_X authorized account representatives of both the transferor and transferee accounts.

62.2. Notification of non-recordation. -- Within 10 business days of receipt of a NO_X allowance transfer that fails to meet the requirements of subsection 61.1., the Administrator will notify the NO_X authorized account representatives of both accounts subject to the transfer of:

62.2.a. A decision not to record the transfer; and

62.2.b. The reasons for such non-recordation.

62.3. Nothing in this section shall preclude the submission of a NO_X allowance transfer for recordation following notification of non-recordation.

§45-26-70. General Monitoring Requirements. --

The owners and operators and to the extent applicable, the NO_X authorized account representative of a NO_X Budget unit, shall comply with the monitoring, recordkeeping and reporting requirements as provided in sections 70. through 76. and subpart H of 40 CFR Part 75. For purposes of complying with such requirements, the definitions in section 2. and in 40 CFR 72.2 shall apply, and the terms "affected unit," "designated representative," and "continuous emission monitoring system" (or "CEMS") in 40 CFR Part 75 shall be replaced by the terms "NO_X Budget unit," "NO_X authorized account representative," and "continuous emission monitoring system" (or "CEMS") respectively, as defined section 2. The owner or operator of a unit that is not a NO_X Budget unit but that is monitored under 40 CFR 75.72(b)(2)(ii) shall comply with the monitoring, recordkeeping and reporting requirements for a NO_X

Budget unit.

70.1. Requirements for installation, certification and data accounting. -- The owner or operator of each NO_X Budget unit shall meet the following requirements:

70.1.a. Install all monitoring systems required under this subpart for monitoring NO_X mass emissions. This includes all systems required to monitor NO_X emission rate, NO_X concentration, heat input rate and stack flow rate, in accordance with 40 CFR 75.72 and 40 CFR 75.76;

70.1.b. Install all monitoring systems for monitoring heat input rate.

70.1.c. Successfully complete all certification tests required under section 71. and meet all other requirements of sections 70. through 76. and 40 CFR Part 75 applicable to the monitoring systems under subdivisions 70.1.a. and 70.1.b.; and

70.1.d. Record, report and quality-assure the data from the monitoring systems under subdivisions 70.1.a. and 70.1.b.

70.2. Compliance deadlines. -- The owner or operator shall meet the certification and other requirements of subdivisions 70.1.a. through 70.1.c. on or before the following dates. The owner or operator shall record, report and quality-assure the data from the monitoring systems under subdivisions 70.1.a. and 70.1.b. on and after the following dates:

70.2.a. For the owner or operator of a NO_X Budget unit for which the owner or operator intends to apply for early reduction credits under section 43., by May 1, 2001. If the owner or operator of a NO_X Budget unit fails to meet this deadline, he or she is not eligible to apply for early reduction credits and is subject to the deadline under subdivision 70.2.b.;

70.2.b. For the owner or operator of a NO_X Budget unit under subsection 4.1. that commences operation before January 1, 2003 and that is not subject to or does not meet the deadline under subdivision 70.2.a., by May 1, 2003;

70.2.c. For the owner or operator of a NO_X Budget unit under subsection 4.1. that commences operation on or after January 1, 2003 and that reports on an annual basis under section 74.4. by the later of the following dates:

70.2.c.1. May 1, 2003; or

70.2.c.2. 90 days after the date on which the unit commences commercial operation.

70.2.d. For the owner or operator of a NO_X Budget unit under subsection 4.1. that commences operation on or after January 1, 2003 and that reports on an ozone season basis under paragraph 74.4.b.2., by no later than 90 days after the date on which the unit commences commercial operation, provided that this date is during an ozone season. If this date does not occur during an ozone season, the applicable deadline is May 1 immediately following this date.

70.2.e. Reserved.

70.2.f. Reserved.

70.2.g. For the owner or operator of a NO_X Budget unit that has a new stack or flue for which construction is completed after the applicable deadline under subdivisions 70.2.a., 70.2.b., 70.2.c. or 70.2.d. and that reports on an annual basis under subsection 74.4., by 90 days after the date on which emissions first exit to the atmosphere through the new stack or flue; and

70.2.h. For the owner or operator of a NO_X Budget unit that has a new stack or flue for which construction is completed after the applicable deadline under subdivisions 70.2.a., 70.2.b., 70.2.c. or 70.2.d. and that reports on an ozone season basis under paragraph 74.4.b.2., by 90 days after the date on which emissions first exit to the atmosphere through the new stack or flue, provided that this date is during an ozone season. If this date does not occur during the ozone season, the applicable deadline is May 1 immediately following this date.

70.3. Reporting data prior to initial certification. -- The owner or operator of a NO_X Budget unit under subdivisions 70.2.c. or 70.2.d. shall determine, record and report NO_X mass emissions, heat input rate and any other values required to determine NO_X mass emissions (e.g., NO_X emission rate and heat input rate, or NO_X concentration and stack flow rate) in accordance with 40 CFR 75.70(g), from the date and hour that the unit starts operating until the date and hour on which the continuous emission monitoring system, excepted monitoring system under appendix D or E of 40 CFR Part 75, or excepted monitoring methodology under 40 CFR 75.19 is provisionally certified.

70.4. Prohibitions.

70.4.a. No owner or operator of a NO_X Budget unit shall use any alternative monitoring system, alternative reference method or any other alternative for the required continuous emission monitoring system without having obtained prior written approval in accordance with section 75.

70.4.b. No owner or operator of a NO_X Budget unit shall operate the unit so as to discharge, or allow to be discharged, NO_X emissions to the atmosphere without accounting for all such emissions in accordance with the applicable provisions of sections 70. through 76. and 40 CFR Part 75, except as provided in 40 CFR 75.74.

70.4.c. No owner or operator of a NO_X Budget unit shall disrupt the continuous emission monitoring system, any portion thereof, or any other approved emission monitoring method and thereby avoid monitoring and recording NO_X mass emissions discharged into the atmosphere, except for periods of recertification or periods when calibration, quality assurance testing or maintenance is performed in accordance with the applicable provisions of sections 70. through 76. and 40 CFR Part 75 or except as provided in 40 CFR 75.74.

70.4.d. No owner or operator of a NO_X Budget unit shall retire or permanently discontinue use of the continuous emission monitoring system, any component thereof, or any other approved emission monitoring system under sections 70. through 76., except under any one of the following circumstances:

70.4.d.1. During the period that the unit is covered by an exemption under subdivision 4.2.a. or section 5. that is in effect;

70.4.d.2. The owner or operator is monitoring emissions from the unit with another certified monitoring system approved, in accordance with the applicable provisions of sections 70. through 76. and 40 CFR Part 75, by the Secretary for use at that unit that provides emission data for the same pollutant or parameter as the retired or discontinued monitoring system; or

70.4.d.3. The NO_X authorized account representative submits notification of the date of certification testing of a replacement monitoring system for the retired or discontinued monitoring system in accordance with subdivision 71.2.b.

§45-26-71. Initial Certification and Recertification Procedures.

71.1. The owner or operator of a NO_X Budget unit that is subject to an Acid Rain emissions limitation shall comply with the initial certification and recertification procedures of 40 CFR Part 75, except that:

71.1.a. If, prior to January 1, 1998, the Administrator approved a petition under 40 CFR 75.17(a) or (b) for apportioning the NO_X emission rate measured in a common stack or a petition under 40 CFR 75.66 for an alternative to a requirement in 40 CFR 75.17, the NO_X authorized account representative shall resubmit the petition to the Administrator under subsection 75.1. to determine if the approval applies under the NO_X Budget Trading Program; and

71.1.b. For any additional CEMS required under the common stack provisions in 40 CFR 75.72 or for any NO_X concentration CEMS used under the provisions of 40 CFR 75.71(a)(2), the owner or operator shall meet the requirements of subsection 71.2.

71.2. The owner or operator of a NO_X Budget unit that is not subject to an Acid Rain emissions limitation shall comply with the following initial certification and recertification procedures. The owner or operator of such a unit that qualifies to use the low mass emissions excepted monitoring methodology under 40 CFR 75.19 or that qualifies to use an alternative monitoring system under subpart E of 40 CFR Part 75 shall comply with the following procedures, as modified by subsections 71.3. or 71.4. The owner or operator of a NO_X Budget unit that is subject to an Acid Rain emissions limitation and that requires additional CEMS under the common stack provisions in 40 CFR 75.72 or uses a NO_X concentration CEMS under 40 CFR 75.71(a)(2) shall comply with the following procedures:

71.2.a. Requirements for initial certification. -- The owner or operator shall ensure that each monitoring system required by subpart H of 40 CFR Part 75 (which includes the automated data acquisition and handling system) successfully completes all of the initial certification testing required under 40 CFR 75.20 by the applicable deadline in subsection 70.2. In addition, whenever the owner or operator installs a monitoring system in order to meet the requirements of this rule in a location where no such monitoring system was previously installed, initial certification in accordance with 40 CFR 75.20 is required;

71.2.b. Requirements for recertification. – Whenever the owner or operator makes a replacement, modification or change in a certified monitoring system that may significantly affect the ability of the system to accurately measure or record NO_X mass emissions or heat input rate or to meet the requirements of 40 CFR 75.21 or appendix B to 40 CFR Part 75, the owner or operator shall recertify the monitoring system in accordance with 40 CFR 75.20(b). Furthermore, whenever the owner or operator makes a replacement, modification or change to the flue gas handling system or the unit's operation that may significantly change the stack flow or concentration profile, the owner or operator shall recertify the continuous emissions monitoring system in accordance with 40 CFR 75.20(b). Examples of changes that require recertification include: replacement of the analyzer, complete replacement of an existing continuous emission monitoring system or change in location or orientation of the sampling probe or site; and

71.2.c. Certification approval process for initial certification and recertification.

71.2.c.1. Notification of certification. -- The NO_X authorized account representative shall submit to the Administrator, the appropriate EPA Regional Office and the Secretary written notice of the dates of certification in accordance with section 73.

71.2.c.2. Certification application. -- The NO_X authorized account representative shall submit to the Administrator, the appropriate EPA Regional Office and the Secretary a certification application for each monitoring system required under subpart H of 40 CFR Part 75. A complete certification application shall include the information specified in subpart H of 40 CFR Part 75.

71.2.c.3. Except for units using the low mass emission excepted methodology under 40 CFR 75.19, the provisional certification date for a monitor shall be determined in accordance with 40 CFR 75.20(a)(3). A provisionally certified monitor may be used under the NO_X Budget Trading Program for a period not to exceed 120 days after receipt by the Secretary of the complete certification application for the monitoring system or component thereof under paragraph 71.2.c.2. Data measured and recorded by the provisionally certified monitoring system or component thereof, in accordance with the requirements of 40 CFR Part 75, will be considered valid quality-assured data (retroactive to the date and time of provisional certification), provided that the Secretary does not invalidate the provisional certification by issuing a notice of disapproval within 120 days of receipt of the complete certification application by the Secretary.

71.2.c.4. Certification application formal approval process. -- The Secretary will issue a written notice of approval or disapproval of the certification application to the owner or operator within 120 days of receipt of the complete certification application under paragraph 71.2.c.2. In the event the Secretary does not issue such a notice within such 120-day period, each monitoring system that meets the applicable performance requirements of 40 CFR Part 75 and is included in the certification application will be deemed certified for use under the NO_X Budget Trading Program.

71.2.c.4.A. Approval notice. -- If the certification application is complete and shows that each monitoring system meets the applicable performance requirements of 40 CFR Part 75, then the Secretary will issue a written notice of approval of the certification application within 120 days of receipt.

71.2.c.4.B. Incomplete application notice. -- A certification application will be considered complete when all of the applicable information required to be submitted under paragraph 71.2.c.2. has been received by the Secretary. If the certification application is not complete, then the Secretary will issue a written notice of incompleteness that sets a reasonable date by which the NO_X authorized account representative must submit the additional information required to complete the certification application. If the NO_X authorized account representative does not comply with the notice of incompleteness by the specified date, then the Secretary may issue a notice of disapproval under subparagraph 71.2.c.4.C. The 120-day review period shall not begin prior to receipt of a complete certification application.

71.2.c.4.C. Disapproval notice. -- If the certification application shows that any monitoring system or component thereof does not meet the performance requirements of sections 70. through 76., or if the certification application is incomplete and the requirement for disapproval under subparagraph 71.2.c.4.B. has been met, then the Secretary will issue a written notice of disapproval of the certification application. Upon issuance of such notice of disapproval, the provisional certification is invalidated by the Secretary and the data measured and recorded by each uncertified monitoring system or component thereof shall not be considered valid quality-assured data beginning with the date and hour of provisional certification (as defined under 40 CFR 75.20(a)(3)). The owner or operator shall follow the procedures for loss of certification in paragraph 71.2.c.5. for each monitoring system or component thereof that is disapproved for initial certification.

71.2.c.4.D. Audit decertification. -- The Secretary may issue a notice of disapproval of the certification status of a monitor in accordance with subsection 72.2.

71.2.c.5. Procedures for loss of certification. -- If the Secretary issues a notice of disapproval of a certification application under subparagraph 71.2.c.4.C. or a notice of disapproval of certification status under subparagraph 71.2.c.4.D., then:

71.2.c.5.A. The owner or operator shall substitute the following values, for each hour of unit operation during the period of invalid data specified under 40 CFR 75.20(a)(4)(iii), 40 CFR 75.20(h)(4) or 40 CFR 75.21(e) and continuing until the date and hour specified under 40 CFR 75.20(a)(5)(i):

71.2.c.5.A.1. For units that the owner or operator intends to monitor or monitors for NO_X emission rate and heat input rate or intends to determine or determines NO_X mass emissions using the low mass emission excepted methodology under 40 CFR 75.19, the maximum potential NO_X emission rate and the maximum potential hourly heat input of the unit; and

71.2.c.5.A.2. For units that the owner or operator intends to monitor or monitors for NO_X mass emissions using a NO_X pollutant concentration monitor and a flow monitor, the maximum potential concentration of NO_X and the maximum potential flow rate of the unit under section 2 of appendix A of 40 CFR Part 75.

71.2.c.5.B. The NO_X authorized account representative shall submit a notification of certification retest dates and a new certification application in accordance with paragraphs 71.2.c.1. and 71.2.c.2.; and

71.2.c.5.C. The owner or operator shall repeat all certification tests or other requirements that were failed by the monitoring system, as indicated in the Secretary's notice of disapproval, no later than 30 unit operating days after the date of issuance of the notice of disapproval.

71.3. Initial certification and recertification procedures for low mass emission units using the excepted methodologies under 40 CFR 75.19. -- The owner or operator of a gas-fired or oil-fired unit using the low mass emissions excepted methodology under 40 CFR 75.19 and not subject to an Acid Rain emissions limitation shall meet the applicable general operating requirements of 40 CFR 75.10 and the applicable requirements of 40 CFR 75.19. The owner or operator of such a unit shall also meet the applicable certification and recertification procedures of subsection 71.2., except that the excepted methodology shall be deemed provisionally certified for use under the NO_X Budget Trading Program as of the following dates:

71.3.a. For a unit that does not have monitoring equipment initially certified or recertified for the NO_X Budget Trading Program as of the date on which the NO_X authorized account representative submits the certification application under 40 CFR 75.19 for the unit, starting on the date of such submission until the completion of the period for the Secretary's review;

71.3.b. For a unit that has monitoring equipment initially certified or recertified for the NO_X Budget Trading Program as of the date on which the NO_X authorized account representative submits the certification application under 40 CFR 75.19 for the unit and that reports data on an annual basis under subsection 74.4., starting January 1 of the year after the year of such submission until the completion of the period for the Secretary's review; and

71.3.c. For a unit that has monitoring equipment initially certified or recertified for the NO_X Budget Trading Program as of the date on which the NO_X Authorized Account Representative submits the certification application under 40 CFR 75.19 for the unit and that reports on a control season basis under subsection 74.4., starting May 1 of the ozone season after the year of such submission until the completion of the period for the Secretary's review.

71.4. Certification/recertification procedures for alternative monitoring systems. -- The NO_X authorized account representative of each unit not subject to an Acid Rain emissions limitation for which the owner or operator intends to use an alternative monitoring system approved by the Administrator under subpart E of 40 CFR Part 75 shall comply with the applicable certification procedures of subsection 71.2. before using the system under the NO_X Budget Trading Program. The NO_X authorized account representative shall also comply with the applicable recertification procedures of subsection 71.2. and 40 CFR 75.20(f).

§45-26-72. Out of Control Periods.

72.1. Whenever any monitoring system fails to meet the quality assurance or data validation requirements of 40 CFR Part 75, data shall be substituted using the applicable procedures in subpart D, appendix D, or appendix E of 40 CFR Part 75.

72.2. Audit decertification. -- Whenever both an audit of a monitoring system and a review of the initial certification or recertification application reveal that any system or component should not have been certified or recertified because it did not meet a particular performance specification or other requirement under section 71. or the applicable provisions of 40 CFR Part 75, both at the time of the initial certification or recertification application submission and at the time of the audit, the Secretary will issue a notice of disapproval of the certification status of such system or component. For the purposes of this subsection, an audit shall be either a field audit or an audit of any information submitted to the Secretary or the Administrator. By issuing the notice of disapproval, the Secretary revokes prospectively the certification status of the system or component. The data measured and recorded by the system or component shall not be considered valid quality-assured data from the date of issuance of the notification of the revoked certification status until the date and time that the owner or operator completes subsequently approved initial certification or recertification tests for the system or component.

§45-26-73. Notifications.

73.1. The NO_X authorized account representative for a NO_X Budget unit shall submit written notice to the Administrator, the appropriate EPA Regional Office and the Secretary in accordance with 40 CFR 75.61.

73.2. For any unit that does not have an Acid Rain emissions limitation, the Secretary may waive the requirement to notify the Secretary in subsection 73.1.

§45-26-74. Recordkeeping and Reporting.

74.1. General provisions.

74.1.a. The NO_X authorized account representative shall comply with all recordkeeping and reporting requirements in this section and with the requirements of subdivision 10.5.a.

74.1.b. If the NO_X authorized account representative for a NO_X Budget unit subject to an Acid Rain emission limitation who signed and certified any submission that is made under subpart F or G of 40 CFR Part 75 and that includes data and information required under sections 70. through 76. or subpart H of 40 CFR Part 75 is not the same person as the designated representative or the alternative designated representative for the unit under 40 CFR Part 72, then the submission must also be signed by the designated representative or the alternative designated representative.

74.2. Monitoring Plans.

74.2.a. The owner or operator of a unit subject to an Acid Rain emissions limitation shall comply with requirements of 40 CFR 75.62, except that the monitoring plan shall also include all of the information required by subpart H of 40 CFR Part 75.

74.2.b. The owner or operator of a unit that is not subject to an Acid Rain emissions limitation shall comply with requirements of 40 CFR 75.62, except that the monitoring plan is only required to include the information required by subpart H of 40 CFR Part 75.

74.3. Certification applications. -- The NO_X authorized account representative shall submit an application to the Administrator, the appropriate EPA Regional Office and the Secretary within 45 days after completing all initial certification or recertification tests required under section 71. including the information required under subpart H of 40 CFR Part 75.

74.4. Quarterly reports. -- The NO_X authorized account representative shall submit quarterly reports, as follows:

74.4.a. If a unit is subject to an Acid Rain emission limitation or if the owner or operator of the NO_X Budget unit chooses to meet the annual reporting requirements of sections 70. through 76., the NO_X authorized account representative shall submit a quarterly report for each calendar quarter beginning with:

74.4.a.1. For a unit for which the owner or operator intends to apply or applies for the early reduction credits under section 43., the calendar quarter that includes the date of initial provisional certification under paragraph 71.2.c.3. or subsection 71.3. Data shall be recorded and reported from the date and hour corresponding to the date and hour of provisional certification; or

74.4.a.2. For a unit that commences operation on or before May 1, 2003 and is not subject to paragraph 74.4.a.1., the earlier of the calender quarter that includes the date of initial provisional certification under paragraph 71.2.c.3. or subsection 71.3. or, if the certification tests are not completed by May 1, 2003, the calendar quarter covering May 1, 2003 through June 30, 2003. Data shall be recorded and reported from the earlier of the date and hour corresponding to the date and hour of provisional certification or the first hour on May 1, 2003; or

74.4.a.3. For a unit that commences operation after May 1, 2003, the calendar quarter in which the unit commences operation. Data shall be recorded and reported from the date and hour corresponding to when the unit commences operation;

74.4.b. If a NO_X Budget unit is not subject to an Acid Rain emission limitation, then the NO_X authorized account representative shall either:

74.4.b.1. Meet all of the requirements of 40 CFR Part 75 related to monitoring and reporting NO_X mass emissions during the entire year and meet the deadlines specified in subdivision 74.4.a.; or

74.4.b.2. Submit quarterly reports covering the period May 1 through September 30 of each year and including the data described in 40 CFR 75.74(c)(6). The NO_X authorized account representative shall submit such quarterly reports, beginning with:

74.4.b.2.A. For a unit for which the owner or operator intends to apply or applies for early reduction credits under section 43., the calendar quarter that includes the date of initial provisional certification under paragraph 71.2.c.3. or subsection 71.3. Data shall be recorded and reported from the date and hour corresponding to the date and hour of provisional certification; or

74.4.b.2.B. For a unit that commences operation on or before May 1, 2003 and that is not subject to paragraph 74.4.b.1., the calendar quarter covering May 1 through June 30, 2003. Data shall be recorded and reported from the earlier of the date and hour corresponding to the date and hour of initial provisional certification under paragraph 71.2.c.3. or subsection 71.3. or the first hour of May 1, 2003; or

74.4.b.2.C. For a unit that commences operation after May 1, 2003 and during an ozone season, the calendar quarter in which the unit commences operation. Data shall be reported from the date and hour corresponding to when the unit commences operation; or

74.4.b.2.D. For a unit that commences operation after May 1, 2003 and not during an ozone season, the calendar quarter covering the first ozone season after the unit commences operation. Data shall be recorded and reported from the earlier of the date and hour corresponding to the date and hour of initial provisional certification under paragraph 71.2.c.3. or subsection 71.3. or the first hour of May 1 of the first ozone season after the unit commences operation;

74.4.c. The NO_X authorized account representative shall submit each quarterly report to the Administrator within 30 days following the end of the calendar quarter covered by the report. Quarterly reports shall be submitted in the manner specified in subpart H of 40 CFR Part 75 and 40 CFR 75.64.

74.4.c.1. For units subject to an Acid Rain emissions limitation, quarterly reports shall include all of the data and information required in subpart H of 40 CFR Part 75 for each NO_X Budget unit (or group of units using a common stack) and the data and information required in subpart G of 40 CFR Part 75.

74.4.c.2. For units not subject to an Acid Rain emissions limitation, quarterly reports are only required to include all of the data and information required in subpart H of 40 CFR Part 75 for each NO_X Budget unit (or group of units using a common stack); and

74.4.d. Compliance certification. -- The NO_X authorized account representative shall submit to the Secretary a compliance certification in support of each quarterly report based on reasonable inquiry of those persons with primary responsibility for ensuring that all of the unit's emissions are correctly and fully monitored. The certification shall state that:

74.4.d.1. The monitoring data submitted were recorded in accordance with the applicable requirements of sections 70. through 76. and 40 CFR Part 75, including the quality assurance procedures and specifications;

74.4.d.2. For a unit with add-on NO_X emission controls and for all hours where data are substituted in accordance with 40 CFR 75.34(a)(1), the add-on emission controls were operating within the range of parameters listed in the quality assurance/quality control program under appendix B of part 75 and the substitute values do not systematically underestimate NO_X emissions; and

74.4.d.3. For a unit that is reporting on an ozone season basis under paragraph 74.4.b.2., the NO_X emission rate and NO_X concentration values substituted for missing data under subpart D of 40 CFR Part 75 are calculated using only values from an ozone season and do not systematically underestimate NO_X emissions.

§45-26-75. Petitions.

75.1. The NO_X authorized account representative of a NO_X Budget unit that is subject to an Acid Rain emissions limitation may submit a petition under 40 CFR §75.66 to the Administrator requesting approval to apply an alternative to any requirement of sections 70. through 76.

75.1.a. Application of an alternative to any requirement of sections 70. through 76. is in accordance with sections 70. through 76. only to the extent that the petition is approved by the Administrator, in consultation with the Secretary.

75.1.b. Notwithstanding subdivision 75.1.a. of this section, if the petition requests approval to apply an alternative to a requirement concerning any additional CEMS required under the common stack provisions of 40 CFR §75.72, the petition is governed by subsection 75.2.

75.2. The NO_X authorized account representative of a NO_X Budget unit that is not subject to an Acid Rain emissions limitation may submit a petition under 40 CFR §75.66 to the Secretary and the Administrator requesting approval to apply an alternative to any requirement of sections 70. through 76.

75.2.a. The NO_X authorized account representative of a NO_X Budget unit that is subject to an Acid Rain emissions limitation may submit a petition under 40 CFR §75.66 to the Secretary and the Administrator requesting approval to apply an alternative to a requirement concerning any additional CEMS required under the common stack provisions of 40 CFR §75.72 or a NO_X concentration CEMS used under 40 CFR §75.71(a)(2).

75.2.b. Application of an alternative to any requirement of sections 70. through 76. is in accordance with sections 70. through 76. only to the extent the petition under subsection 75.2. is approved by both the Secretary and the Administrator.

§45-26-76. Additional Requirements to Provide Heat Input Data.

76.1. The owner or operator of a NO_X Budget unit that monitors and reports NO_X mass emissions using a NO_X concentration system and a flow system shall also monitor and report heat input rate at the unit level using the procedures set forth in 40 CFR Part 75.

ORIGINAL

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

In the matter of:

PUBLIC HEARING ON PROPOSED LEGISLATIVE RULE

45 CSR 26 **"NOx BUDGET TRADING PROGRAM AS A MEANS OF CONTROL AND REDUCTION OF NITROGEN OXIDES FROM ELECTRIC GENERATING UNITS"**

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

P R O C E E D I N G S

MS. CHANDLER: This public hearing is being held to accept comments on 45CSR26 -"NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units". For purposes of this hearing Nitrogen Oxides, I'll refer to as NOx.

This rule partially fulfills the State's obligations in responding to U.S. EPA's final rule, Findings of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, herein referred to as the NOx SIP Call. Essentially, the federal rule requires that large emitters of Nitrogen Oxides significantly reduce emissions and constrain them to fixed budgets, starting in 2004 and maintaining them thereafter. Flexibility is built in through "trading" provisions which allow sources to buy and or trade NOx emission allowances from other participants. For example, a source which has been unable to achieve the required amount of emission reductions may purchase NOx allowances under the federal NOx Budget Trading Program to obtain the needed emission allowances.

This State rule applies to Electric Generating

Units, and for purposes of this herein we'll call them EGUs, which have an electric generating capacity of 250 megawatts or greater. 45CSR26 uses control requirements and emission credit transfer procedures parallel to the federal presumptions so that the state rule may interface with the federal NOx Budget Trading Program. It requires that EGUs effectively achieve a NOx emission rate of 0.15 lb NOx/mmBTU by May 2004 and allows flexibility through NOx emissions trading. An implementation delay, up to May 2006, is provided for sources which opt to control multiple pollutants through the use of innovative air pollution control technology. To accommodate growth of existing EGUs and proposed new EGUs, the rule establishes a more realistic limit on total state NOx emissions, a cap, than the NOx SIP Call. The Department of Environmental Protection, Division of Air Quality is addressing non-EGUs in a separate rulemaking, 45CSR1.

In the 2000 Legislative Session, the Division of Air Quality proposed a previous version of 45CSR26 which achieved part of the federally mandated reductions. However, partly based on significant negative comments from the U.S. Environmental Protection Agency, the Division of Air Quality withdrew the 2000 proposed rule.

The Division of Air Quality is proceeding with the promulgation of this proposed rule containing provisions that parallel the federal requirements, with the exception of a state-derived NOx budget and addition of an innovative technology alternative. If EPA revises state budgets or fails to approve the innovative technology provisions in the proposed rule, 45CSR26 may be withdrawn or modified accordingly.

Upon authorization and promulgation of 45CSR26, the rule will be submitted to the U.S. Environmental Protection Agency for approval as part of the State Implementation Plan pursuant to the federal Clean Air Act.

The floor is now open for public comment. Please identify yourself and affiliation, before making comments.

There being nothing further, this public hearing for 45CSR26 is concluded.

(WHEREUPON, the public hearing was concluded.)

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

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

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

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

Missy L. Young, C.C.R.
Certified Court Reporter
Commissioner for the State of West Virginia

My commission expires April 15, 2008.

DEP

Department of Environmental Protection
West Virginia

Public Hearing on Rules:
45CSR1, 45CSR8, 45CSR9, 45CSR15,
45CSR16, 45CSR18, 45CSR25, 45CSR26,
45CSR33, 45CSR34
DAQ, 7012 MacCorkle Ave. SE, Charleston
July 12, 2001 6P.M.

Sign-In

NAME	ADDRESS	ORGANIZATION	PHONE/FAX	E-MAIL	Comment YES	Comment NO
Tim Mallen	301 Virginia St E Charleston WV	AEP	~~304/348-4763~~ 304-348-4715	cpmolon@aep.com		✓
Kim Brown Poland	P.O. Box 1791 Charleston WV	WVMA	304/347-8348	KBP@ramlaw.com		✓
David M Flannery	PO Box 553 Charleston WV	WV Chamber	304/340-1017 304 340-1136	dmflannery@jacksonkelly.com		✓
Karen Watson	~~DAQ~~	DAQ	926-3743			
Jim Mason	7012 MacCorkle Ave	DAQ	926 3731			✓
Russ Lorince	7 Greenbrier St.	Allegheny Energy	345.4694	rlorince@alleghenyenergy.com		✓

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

2001 JUL -9 P 2:57

RECEIVED

June 28, 2001

Mr. John Benedict, Deputy Chief
West Virginia Division of Environmental Protection
Office of Air Quality
7012 MacCorkle Ave., SE
Charleston, West Virginia 25304

Dear ~~Mr. Benedict~~: John

In a June 6, 2001, letter from the West Virginia Division of Environmental Protection to the Environmental protection Agency (EPA), you requested EPA review and comment on the proposed NOx SIP Call rules 45CSR26 and 45CSR1. In response to your request, EPA reviewed rules 45CSR26 and 45CSR1, and prepared the following comments listed in the enclosure. EPA appreciates the care you have taken to include the provisions of the Model Rule, 40 CFR Part 96. Please enter the enclosed comments into the official public record for this rule, which closes on July 12, 2001.

Thank you for the opportunity to comment on your proposed rules. If you have any questions or wish to discuss these comments, please contact me or Cristina Fernandez at (215) 814-2178.

Sincerely,

Marcia

Marcia L. Spink, Associate Director
Office of Air Programs

Enclosure

U.S. EPA Comments on West Virginia's NOx SIP Call Rules 45CSR26 and 45CSR1

The following are our comments in response to West Virginia's proposed rules 45CSR26 entitled "NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides From Electric Generating Units" and 45CSR1 entitled "NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides". Thank you for letting us review this rule. We hope that our comments are helpful.

Overall, the content West Virginia's proposed rule 45CSR26 for electric generating units (EGUs) is good. We appreciate the care West Virginia has taken to include the provisions of the model rule (40 CFR part 96), as well as the State's efforts to consider part 97 in the development of the proposed rule. However, there are several significant problems with the proposed rule that will affect its approvability.

The following are specific comments on the rule 45CSR26:

1. Approvability Concerns

One significant problem is that West Virginia's expansion of the State budget for EGUs in 45CSR26 appears to be inconsistent with requirements of 40 CFR 51.121, "Findings and Requirements for Submission of State Implementation Plan Revisions Related to Emissions of Oxides of Nitrogen". If the West Virginia EGU budget is increased, West Virginia must demonstrate that it will achieve offsetting reductions from sources under some other sector of the State budget. Also, West Virginia must include the list of affected sources in this rule and a budget demonstration.

A second significant problem is the inclusion of an alternative compliance plan which exempts from the trading program those large EGUs that make reductions without traditional NOx control technologies is contrary to §51.121(f)(2). That section requires that, if a State elects to control large EGUs and non-EGUs, all such units must be subject to either the emissions limits or other requirements that provide the same assurance that the State will meet its 2007 budget. The Alternative Compliance Plan does not appear to provide such assurance. Under the plan, a large EGU could surrender its allowance allocation, but could then emit more NOx tons than the allowances it surrendered and still be exempt from the allowance holding requirements of the trading program.

EPA cannot approve 45CSR26 unless West Virginia modifies the trading rule to meet the State NOx emission budget and achieve the required NOx emission reductions on a schedule consistent with the NOx SIP call requirements.[1/] Further, without removal of the Alternative Compliance Plan provisions, EPA cannot approve 45CSR26 and West Virginia's sources will not be able to participate in the multi-state NOx trading program administered by EPA.

[1/] EPA's approvability concerns are based only on the information that has been made available to the Agency.

2. Additional Trading Comments

45-26-40. State Trading Program Budget

The total number of allowances should be revised to reflect West Virginia's State budget under 51.121 for electric generating units. See comments regarding approvability above.

45-26-42. State NOx Allowance Allocations

West Virginia should include the list of affected sources and the allocations in this rule.

45-26-43. Compliance Supplement Pool

The Compliance Supplement Pool for West Virginia is 16,709 tons of Nox. West Virginia should include its Compliance Supplement Pool in this rule.

45-27-80. Alternative Compliance Plan

As discussed above, EPA has significant concerns regarding the proposed Alternative Compliance Plan. Additional concerns include the following:

First, the Agency does not believe that an exemption from the program is a constructive way of encouraging innovation in NOx control technology. Sources subject to the program already have an incentive to reduce NOx emissions below their allocation, since they can sell surplus allowances on the market. Second, from the standpoint of program administration, the Agency cannot efficient operate its NOx Allowance Tracking System (NATS) in such a way as to implement these specific provisions of West Virginia's rule.

EPA notes that references elsewhere in the rule to deductions to account for withdrawal from the NOx Budget Program should be removed (e.e., 2.43 and 6.3.a.), along with the Alternative Compliance Plan provision itself.

The following are specific comments on the rule 45CSR1:

1. Approvability Concerns

West Virginia must include the list of affected sources in this rule and include a budget demonstration.

2. Additional Trading Comments

45-26-42. State NOx Allowance Allocations

West Virginia should include the list of affected sources and the allocations in this rule.

45-26-43. Compliance Supplement Pool

The Compliance Supplement Pool for West Virginia is 16,709 tons of NOx. West Virginia should include its Compliance Supplement Pool in this rule.

IOGA
WEST VIRGINIA

TO: Mr. John. A. Benedict

FROM: Mike Herron

DATE: 7/12

3 **PAGES INCLUDING COVER**

COMMENTS:

______ **FOR YOUR INFO.** ______ **RESPOND**

INDEPENDENT OIL & GAS ASSOCIATION OF WEST VIRGINIA
410 Washington Street, East, Suite 301 Charleston, WV 25301-1522 Phone (304) 344-9867 Fax (304) 344-5836

IOGA
WEST VIRGINIA

July 12, 2001

Mr. John A. Benedict, Deputy Chief
Division of Air Quality
7012 MacCorkle Avenue, SE
Charleston, West Virginia 25304-2943

RE: Comments of Independent Oil & Gas Association on Proposed Rule 45 CSR 26, "NO_x Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units"

Dear Mr. Benedict:

The Independent Oil & Gas Association ("IOGA"), is pleased to provide comments on proposed legislative rule 45 CSR 26, titled "NO_x Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units" ("the Proposed Rule"). IOGA, formed in 1959, is West Virginia's largest oil and gas trade association with more than 350 corporate members. IOGA's purpose is to promote and protect the oil and natural gas producing industry through a variety of objectives. These comments focus on support for the Division of Air Quality's allotment from the state electric generating unit NO_x budget in the Proposed Rule to accommodate new sources and future growth in West Virginia.

IOGA fully supports the proposed § 42.4 which assigns a new source set aside of 5,833 tons of NO_x emissions. This proposed emission budget is intended to accommodate all currently proposed new electric generating units in West Virginia. The majority of these new sources will operate using natural gas as a primary fuel. IOGA is supportive of the DAQ's commitment to encourage the construction of these new sources which will produce energy more efficiently and with less pollution to the environment as natural gas is a clean burning fossil fuel.

INDEPENDENT OIL & GAS ASSOCIATION OF WEST VIRGINIA
410 Washington Street, East, Suite 301 Charleston, WV 25301-1522 Phone (304) 344-9867 Fax (304) 344-5836

Currently West Virginia is one of the nation's leading suppliers of natural gas, exporting approximately half of the natural gas produced. The addition of new electric generating units utilizing natural gas is and will continue to positively impact the economy in West Virginia. We complement the DAQ for its proposal and for not imposing costly disincentives to this positive aspect of West Virginia's economy by reducing the NO_x allocation available to these new units.

Thank you for this opportunity to comment on the Proposed Rule.

Sincerely,

Michael D. Herron
Executive Director

cc: Joseph C. Pettey

Bowles Rice
McDavid Graff & Love PLLC

Fax

600 Quarrier Street
Charleston, West Virginia 25301

Post Office Box 1386
Charleston, West Virginia 25325-1386

Leonard Knee
Telephone: (304) 347-1726
Fax: (304) 347-1196
E-Mail: lknee@bowlesrice.com

To:	Mr. John Benedict Deputy Director	Date:	July 12, 2001
		Pages:	3 (including this page)
Fax #:	(304) 926-3637		
From:	Leonard Knee		
Subject:	45 CSR 26 Comments on Proposed Rule		

COMMENTS: **Please see the attached letter regarding the above subject. If you have any questions, please call me.**

Thanks,
Leonard

CHARLESTON • MARTINSBURG • MORGANTOWN • PARKERSBURG, WEST VIRGINIA
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Bowles Rice McDavid Graff & Love PLLC

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July 12, 2001

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Via Facsimile and U.S. Mail

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

Re: 45 CSR 26
<u>Comments on Proposed Rule</u>

Dear Mr. Benedict:

This firm represents several companies who are considering the installation of new electric generating units ("EGUs") in West Virginia. These comments offer support for the Division of Air Quality's proposed new source allotment of 5,833 tons of NO_x per ozone season. This budget encourages construction of new sources which protect of the environment and stimulate economic growth in the State.

In the future, the base budget may be increased as a result of the EPA's reconsideration of the growth projections for the EGU category. If this occurs, then the allocation of the base budget for new EGUs should be increased proportionally as well. This is important in attracting new EGU sources to locate in West Virginia.

Bowles Rice
McDavid Graff & Love PLLC

Thank you for the opportunity to provide comments on the proposed rule. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Leonard Knee

LK/jlh

Dominion Generation
5000 Dominion Boulevard, Glen Allen, VA 23060

Dominion

COPY

July 12, 2001

Mr. John Benedict
Division of Air Quality
West Virginia Department of Environmental Protection
7012 MacCorkle Avenue, SE
Charleston, WV 25304-2943

Regarding: Proposed 45CSR26 "NOx Budget Trading Program As A Means Of Control And Reduction Of Nitrogen Oxides From Electric Generating Units"

Dear Mr. Benedict:

Dominion Generation is pleased for the opportunity to submit the following comments regarding the West Virginia Department of Environmental Protection's (DEP) proposed rule 45CSR26 "NOx Budget Trading Program As A Means Of Control And Reduction Of Nitrogen Oxides From Electric Generating Units", which the DEP has developed in response to EPA's NOx SIP Call rule promulgated in October 1998. Our Corporation owns and operates over 1800 MW of existing electric generation in the State of West Virginia that is affected by the proposed rule, with an additional 790 MW of new generation capacity planned over the next several years that will also be affected by the proposed rule.

In October 2000, the DEP submitted a draft rule to U.S. EPA that differed from EPA's NOx SIP Call model rule in three major respects; (1) the size of the NOx budget for electric generating units (egu's) in the state, (2) the compliance date, and (3) a provision granting an extension to the compliance date for units committing to the installation of innovative, multi-pollutant control technology. EPA issued a Notice of Deficiency to the WV DEP in December 2000 for its SIP Call rule citing these provisions of the rule as well as the fact that WV had not yet adopted (and submitted) a final rule as the basis for a likely disapproval of the WV rule. The latest revision to the WV rule now comports with the May 31, 2004 compliance deadline, but still contains a modified NOx budget for egu's and the innovative technology component. A recent decision in the U.S. Court of Appeals – District of Columbia Circuit, which has remanded the NOx budgets EPA established in its SIP Call rule back to EPA for review, provides a potential legal and technical basis for the DEP's inclusion of a modified budget for egu's. The innovative technology provision, however, will be more difficult to justify and will likely result in an EPA disapproval of the WV rule.

Dominion fully recognizes the pressure the State is facing with respect to developing, adopting and implementing a rule addressing the statewide NOx emission reduction requirements of EPA's NOx SIP Call rule. We commend the State and the DEP for its outstanding leadership role over the last several years in its effort to establish workable, cost-effective solutions to address air quality problems in West Virginia and surrounding states. Dominion fully supports the environmental goal of attaining and/or maintaining the ozone standard in West Virginia and elsewhere, and believes the most constructive, cost-effective and flexible means should be used to achieve this goal. We also believe that it is in the best interest of the State and its regulated sources to move forward with a reasonably approvable rule to assure full state implementation of the rule, avoid federal implementation and possible economic sanctions, and allow affected sources to move forward with certainty in their compliance efforts. It is with these principles in mind that Dominion offers the following comments regarding certain provisions of the proposed 45CSR26 rule.

Compliance Date

Dominion supports the DEP's revision altering the compliance date from May 1, 2005 to the May 31, 2004 date set by the U.S. Court of Appeals as the deadline for achieving compliance for EPA's NOx SIP Call rule.

NOx Budget for Electric Generating Units (EGU's)

Dominion supports the DEP's efforts to include a modified NOx budget for egu's in West Virginia in its proposed rule, and its rationale for adjusting the budget as established by EPA to more accurately account for both realized and future-expected growth in electricity generation in the State. We believe that the proposed increase from EPA's budget of 26,859 tons is justified given that EPA did not assume any new generating units in West Virginia in deriving its projected 3% growth rate over the period 1995-2007 in calculating the NOx budget for egu's. The proposed increase to the egu budget allows for a more flexible, workable allocation methodology that addresses the concerns of both existing (baseline) and new source generation in the State. However, the EPA budget may be changed as a result of EPA's review of the budget per order of the U.S. Court of Appeals. **A provision should be added to the regulations that would allow the budget numbers to be changed to meet the federal requirements in order to avoid federal implementation of the rule and assure state regulation of affected sources under the rule.**

New Source Set-Aside

During deliberations on how to effectively account for new generation in the State that would be required to secure NOx allocations from the existing budget that took place during stakeholder meetings prior to the issuance of the DEP's initial draft issued in November 2000, the DEP and stakeholders (including egu's representing the interests of both "existing" or baseline generation and "new" generation) reached an agreement that the first 31,292 tons of the egu budget would be split 95% / 5% between the baseline and new egu units, respectively, on the basis of the DEP's then proposed total egu budget of 33,688 tons. The additional tons above the 31,292 and up to the maximum 33,688 would be dedicated exclusively to new units. Dominion supported this approach only on the basis of the proposed, total egu budget of 33,688 tons.

In the latest revised draft of the proposed rule, the DEP has established a set aside pool of 5,833 tons for new sources (sources that were constructed and became operational after January 1, 1997 and future planned generation). It is our understanding that this tonnage is based on an estimate of need for new capacity already in place or committed, rather than a percentage set aside from the total egu budget. Dominion believes that this apportionment is feasible only under the modified egu budget of 37,125 tons, which accounts for the growth in existing (baseline) generation as well as additional tonnage for new generation. However, these percentages would not be suitable with a budget less than that currently proposed, including the budget of 26,859 tons established in EPA's NOx SIP Call rule. **Should for any reason the DEP move away from the currently modified budget and the associated allocation methodology and/or adopt EPA's budget of 26,859 tons, we believe the set-aside issue must be revisited.** While we agree that appropriations should be made to accommodate new generation in the State, it is imperative that the ability of existing, baseline generation to continue to provide the State with a reliable and affordable supply of electricity be preserved. Since most of these units will need to operate below the 0.15 lb/mmBtu level, which is the level EPA assumed in projecting compliance costs below its $2,000/ton "significance" criteria, and will be required to expend exorbitant costs to retrofit their facilities to meet the budget, we are concerned that an allocation methodology that further tightens the already stringent budget allocations for existing sources could affect the viability of operating these units with their current, low-cost fuel supply in the future.

Early Reduction Credits (ERC's) and Allocations from the Compliance Supplement Pool (CSP)

In its draft rule issued in November 2000, the DEP proposed to award the CSP allowances earned from generating ERC's annually, following the ozone season during which the early reductions were achieved. However, under the more recent proposal, the DEP is not required to allocate CSP allowances until April 1, 2004, only two months prior to the compliance deadline for the SIP Call rule. This provides affected sources little time if any to incorporate the CSP tons into their compliance strategy planning and to adjust such strategies if the CSP allowances are discounted (due to the limited size of the CSP).

Dominion urges the DEP to award CSP allowances annually and provide notification of CSP allowances as soon as possible following the ozone season during which early reductions are achieved. This will provide affected sources more flexibility and earlier notification (as to how many CSP allowances it has been awarded) than would be achieved in EPA's rule (40 CFR Part 96) and the current draft WV rule. Such flexibility and early notification is needed to more effectively plan for cost-effective strategies to meet the emission reductions required to comply with the seasonal NOx budget.

In addition, we urge the DEP to modify Section 43.3.f. of the rule to allow CSP allowances generated by early reductions achieved during the 2002 ozone season to be used during the 2003 ozone season for the potential purpose of complying with EPA's Section 126 rule if the May 1, 2003 compliance date for the Section 126 rule is not altered. This would provide a mechanism within the state rule for the use of such allowances if EPA allows states to issue allowances from the CSP under the Section 126 rule as suggested in a recent letter from EPA to the State of Indiana. The current proposed state rule allows use of CSP allowances only in the 2004 and 2005 ozone seasons.

Dominion also suggests changes in Section 43.1.d.1 of the rule which describes how ERC's generated during an applicable ozone season are calculated. As currently proposed, the rule calculates ERC's as the "*amount equal to the unit's heat input for such ozone season multiplied by the difference between 0.25 lb/mmBtu and the unit's NOx emission rate for such ozone season, divided by 2000 lb/ton and rounded to the nearest whole number of tons*". **We urge the DEP to alter the threshold emission rate from which early reduction credits are calculated from 0.25 lb/mmBtu to 0.35 lb/mmBtu.** This would allow the opportunity for sources to generate more early reduction credits during the 2002 ozone season, which would help to alleviate the extremely tight compliance schedule for the Section 126 rule should the May 1, 2003 date remain unchanged and EPA allow states to issue CSP allowances for use during the 2003 ozone season for purposes of compliance with the Section 126 rule. The additional flexibility would also encourage affected sources to achieve early reductions.

Dominion also believes the rule should be amended to ensure that ERC's and allowances from the CSP are not issued for reductions not actually achieved if the unit's emission rate before reductions is already below the threshold emission rate from which ERC's would be calculated (0.25 lb/mmBtu or 0.35 lb/mmBtu). For example, although a unit would still have to reduce its emission rate to both below 0.25 lb/mmBtu and a level that is 80% or less of its emission rate in the 2001 control period to qualify for an ERC, the rule as currently stated would allow a unit that already operates at a rate below the threshold rate (0.25 lb/mmBtu) in the 2001 ozone season and reduces its rate by 20% or greater to base the calculation for ERC's on the difference between the reduced rate achieved and 0.25 lb/mmBtu (a rate higher than its actual rate before reducing emissions).

As currently written, the NOx SIP Call rule (and the Section 126 rule) limit the quantity of the CSP allowances in each state. If the total amount of early reduction credits (tons) exceed the size of the state's CSP, the state is required to prorate the award of the CSP allowances. This creates a disincentive for affected sources to generate early reductions since there is no certainty that the additional NOx control operating costs will be awarded with a known quantity of CSP allowances on a ton-for-ton basis. Dominion realizes that the size of the state's CSP has been set by EPA in the SIP Call and Section 126 rules, and that the state will therefore be limited in the number of CSP allowances it can allocate. **We therefore request the DEP to urge EPA to revise the rules and eliminate the cap on CSP allowances.** The elimination of this cap would be a win-win situation for the environment and industry. The environment will benefit from early reductions and the industry benefits from the certainty of a full reward of CSP allowances relative to the early reductions achieved.

Allocation Methodology

In Section 42, the rule proposes to use the average of the two highest amounts of a unit's heat input for the ozone seasons 1995-1998 to determine NOx allocations for the initial compliance period (2004-2007), while using average heat inputs for the ozone seasons in 2002 through 2004 to determine NOx allocations for the 2008-2012 period, and average heat inputs for the ozone season in the years that are 4, 5, 6, 7 and 8 years prior to the first ozone season for which the allocation is being calculated for subsequent 5-year block allocations beyond the year 2012. **We believe the DEP should use the average of the two highest heat inputs for allocation calculations. In addition, we suggest the DEP use the heat inputs from 2000-2004 (5-year period) for determining allocations for the 2008-2012 period.**

Innovative Technology

While Dominion is supportive of efforts to provide affected sources as much flexibility as possible to achieve the required reductions in the rule, we do not believe the provisions allowing exemptions for sources that commit to deploying innovative technology that would achieve multi-emission reductions is feasible in this rule. EPA has already rejected this provision of the rule, and the U.S. Court of Appeals has upheld the merits of the rule and set a May 31, 2004 compliance date. Therefore, unlike the budget growth issue, which the Court has remanded back to EPA, there is no legal basis that would support the inclusion of the innovative technology provisions of this rule. Dominion believes that the continued inclusion of this provision will ensure EPA's disapproval of the rule, thereby severely jeopardizing the ability of the State to obtain EPA approval of the rule by May of 2002 and eliminating opportunities for affected sources to achieve early reduction credits during the 2002 ozone season. **We believe that the DEP should remove the innovative technology provision from the rule.**

Concluding Remarks

Dominion recognizes that the DEP proposal deviates in some respects with certain provisions of EPA's NOx SIP Call rule. Accordingly, Dominion urges the DEP to work closely with EPA and make every effort possible to develop a rule that is reasonably acceptable to EPA, but continues to provide as much flexibility for affected sources as possible in order to assure that the State maintains its ability to implement the SIP Call rule and avoids the imposition of a federally imposed program or FIP. We also urge the State and the DEP to continue every effort to encourage EPA to harmonize the compliance dates between the NOx SIP Call rule and the Section 126 rule to May 31, 2004 and appropriately withdraw its findings under the Section 126 rule for sources within a state that develops a SIP implementing the NOx SIP Call rule with a May 31, 2004 compliance date if the rule is approved by EPA prior to the May 1, 2003 compliance deadline under the Section 126 rule.

We greatly appreciate this opportunity to comment.

Sincerely,

Leonard R. Dupuis
Manager, Environmental Policy
Dominion Generation

cc: Mr. Michael Callighan – WV
Ms. Pamela Faggert – Dominion
Mr. Ed Rivas – Dominion
Mr. Dave Rives – Dominion
Mr. Jesse Locklar – Dominion
Mr. David Flannery – Jackson & Kelly

Allegheny Energy Supply
an Allegheny Energy company
4350 Northern Pike
Monroeville, PA 15146

COPY

July 12, 2001

John A. Benedict, Deputy Chief
Division of Air Quality
West Virginia Department of Environmental Protection
7012 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

Re: Proposed Rule 45 CSR 26, "NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units"

On June 8, 2001, the West Virginia Department of Environmental Protection (WVDEP) published proposed rule 45 CSR 26, "NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units". The attached comments on the proposed rule are provided on behalf of Allegheny Energy Supply (Allegheny), an Allegheny Energy company, which operates and markets competitive retail and wholesale electric generation and operates regulated generation for its affiliates. Allegheny has a total power generation capability of over 8,000 MW, of which approximately 5,000 MW is provided by coal-fired power stations located in West Virginia which would be subject to this rulemaking.

Allegheny has also contributed to, and supports, the comments submitted by the West Virginia Chamber of Commerce.

Allegheny appreciates the opportunity to comment on this proposed rulemaking and reserves the right to make additional comments and to amend, modify, or delete the comments herein prior to issuance of a final rule. The submission of these comments is not intended as a waiver of any rights to which Allegheny may be entitled by law, equity, practice or court order. If you would like to discuss these comments, please feel free to contact me by phone at (412) 858-1281 or e-mail at jmurph1@alleghenyenergy.com.

Sincerely,

James T. Murphy

James T. Murphy
Air Quality Manager

Attachment

Allegheny Energy Supply
Comments on Proposed Rulemaking 45 CSR 26
"NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units"

Submitted to
West Virginia Department of Environmental Protection
July 12, 2001

The following comments regard the West Virginia Department of Environmental Protection (WVDEP) proposed rulemaking 45 CSR 26 "NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units" that was published for public comment on June 8, 2001. These comments are provided on behalf of Allegheny Energy Supply (Allegheny), an Allegheny Energy company, which operates and markets competitive retail and wholesale electric generation and operates regulated generation for its affiliates. Allegheny has a total power generation capability of over 8,000 MW, of which approximately 5,000 MW is provided by coal-fired power stations located in West Virginia which would be subject to this rulemaking.

Allegheny is pleased to have the opportunity to comment on this rule which establishes requirements by which electric generating units (EGUs) would participate in the federal NOx Budget Trading Program. These comments are intended to be supportive of the overall purpose and intent of the proposal, while identifying several areas where further modifications would make the rule more effective in achieving its overall purpose and intent.

1) <u>**Section 40.1 -- EGU Budget & Growth Rate**</u> Allegheny is supportive of the WVDEP's proposal to establish a NOx budget for West Virginia EGU sources at a level of 37,125 tons per ozone season. As the regulated community and State has commented to EPA repeatedly, the 3% growth rate used by EPA to calculate the NOx SIP call EGU budget of 26,859 tons for West Virginia EGU sources is completely inappropriate. Such a proposal is also supported by the June 8, 2001 DC Circuit Court of Appeals decision on the NOx SIP call budget litigation which remanded the State EGU NOx budget calculation back to EPA for reconsideration because of the arbitrary method EPA used to develop the State growth factors used to calculate the NOx budgets.

2) <u>**Section 42.4 -- New Source Set Aside**</u> Allegheny appreciates the WVDEP's concern that there be an adequately sized new source set-aside to provide sufficient allowances for all of the recently announced new generation projects in the State. As currently proposed, the total EGU budget of 37,125 tons provides the existing EGU's

with a reasonable 31,292 tons budget once the 5,833 ton new source set-aside has been deducted. However, Allegheny is concerned that the EPA may not approve the total 37,125 ton budget. If, as a result of adverse comments from the EPA, the WVDEP elects to reduce the total EGU budget in the final version of the rule, Allegheny requests that the EGU budget be allocated between existing and new EGUs on the basis of a 95%/5% split respectively for the first 31,292 tons of allowances. Any NOx allocations above that amount could be dedicated exclusively to new EGU sources. The 95%/5% existing source/new source split is consistent with the EPA's Part 96 NOx Budget Trading Program for State Implementation Plans and also consistent with the majority of other State's NOx SIP call rulemaking requirements.

3) <u>**Section 42.2.a & 42.4.c -- Allocation Methodology**</u> Allegheny agrees with the provision that allocations for an individual unit be calculated using the more stringent of a 0.15 pound per million Btu emission rate or the unit's most stringent state or federal emission limitation. However, the intent of this provision should be to rely on a more stringent emission limitation only to the extent that limitation was in effect on May 1, 1997 or on the date that a new unit commences operation, whichever is later. We urge that this additional clarifying comment be added to Section 42.2.a.2 and 42.4.c.2 to be consistent with this concept. Such a clarification is necessary to prevent a reduction in a units NOx allocation as a result of some future unrelated permitting requirement.

4) <u>**Section 43 -- Compliance Supplement Pool**</u>
   a) The number of NOx allowances in the state compliance supplement pool should be included in Section 43.3.d under the definition of "Compliance supplement pool".
   b) As explained in more detail in the comments being submitted by the West Virginia Chamber of Commerce, Allegheny requests the WVDEP work with the EPA to eliminate the imposition of a cap on the size of the compliance supplement pool (CSP). EGU affected sources should be eligible to receive CSP allowances for all of their early reduction credits without the discounting required under section 43.3.d.

5) <u>**EPA Section 126 Rule -- Withdrawal of Findings**</u> As WVDEP is aware, the EGU sources affected by this rulemaking are also subject to compliance with the EPA's January 18, 2000 Section 126 rule with a compliance date of May 1, 2003. However, the Section 126 rule includes a provision for the withdrawal of section 126 findings under 40 CFR Part 52 Section 52.34(i) upon the EPA's approval by May 1, 2003 of a State Implementation Plan (SIP) that implements equivalent emission reductions as the Section 126 rule. This provision appears to have been upheld in the May 15, 2001 DC Circuit Court of Appeals decision on the Section 126 rule litigation. Therefore, Allegheny requests that upon submittal of its SIP revision to incorporate 45CSR26,

that WVDEP request the EPA to approve the SIP by May 1, 2003 and consequently to withdraw its Section 126 findings per 40 CFR Part 52 Section 52.34(i).

Allegheny appreciates the opportunity to comment on this proposed rule. For further information please contact:

James T. Murphy
Air Quality Manager
Allegheny Energy Supply
4350 Northern Pike
Monroeville, PA 15146

Telephone:	(412) 858-1281
Facsimile:	(412) 856-2393
E-mail:	jmurph1@alleghenyenergy.com

PANDA ENERGY INTERNATIONAL, INC.
The Global Power Company

Fax Cover Sheet

To:	Mr. John A. Benedict – Deputy Chief
Company:	WVDEP; Division of Air Quality
Fax:	1-304-926-3637
From:	Steve McAdams
Company:	Panda Energy International, Inc.
Phone:	(972) 980-7159
Fax:	(972) 980-6815
Date:	July 12, 2001

Project Code: 15410

Total Pages:

Attached are the comments of Panda Culloden Power, L.P. related to the proposed legislative rule 45 CSR 26, "NO_x Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units".

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PANDA
CULLODEN POWER, L.P.
Generating a Brighter Future℠

July 12, 2001

John A. Benedict, Deputy Chief
Division of Air Quality
7012 MacCorkle Avenue, SE
Charleston, West Virginia 25304-2943

RE: Comments of Panda Culloden Power, L.P. on Proposed Rule 45 CSR 26, "NO_x Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units"

Dear Mr. Benedict:

Panda Culloden Power, L.P. ("Panda"), is pleased to provide comments on proposed legislative rule 45 CSR 26, titled "NO_x Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units" ("the Proposed Rule"). These comments focus on support for the Division of Air Quality's proposed allotment from the state electric generating unit budget to accommodate new sources and future growth in West Virginia.

New Source Set Aside

Panda fully supports the proposed § 42.4, which assigns 5,833 tons of NO_x emissions as the new source set aside. As evidenced by the spreadsheet created by your office (Attachment 1), this proposed allocation accommodates new electric generating units currently proposed in West Virginia. The construction and operation of these proposed facilities is important to West Virginia's economic future and benefits the environment.

West Virginia's economy will be benefited by the construction of new electric generating units through the investment in capital, creation of new jobs, and additional tax dollars. The environment will benefit because by increasing the new source set aside, West Virginia is, in effect, encouraging the replacement of older less efficient units with newer cleaner sources. This supports the goal of the Clean Air Act in creating the budget trading program, which is to reduce the increase in emissions of nitrogen dioxides.

Calculation of NO_x Budget Allocation

Section 42.2.a sets out the procedure to be followed by the Secretary in allocating NO_x Budget Allowances. The Proposed Rule uses a two-pronged test. The first prong calculates the allocation using a factor of 0.15 lb/mmBtu multiplied by the heat input for the unit while the second prong uses as a factor, "the unit's most stringent state or federal NO_x emission limitation" multiplied by the heat input. *See* §§ 42.2.a.1 and 42.2.a.2. The Proposed Rule

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requires utilization of the lesser of the two numbers generated by these alternatives. The second prong of this approach, i.e., utilization of the most stringent state or federal NO_x emission limitation, is not included in the federal counterpart NO_x budget regulations. *See* 40 CFR 96.42(b)(1) and 97.42(b)(1). The effect of the inclusion of this provision which is not utilized under federal rules, is to place new units which are likely to have lower permitted emission rates at a disadvantage when they are moved from the new source set aside to the pool of NOx allowances available for existing sources. Panda believes that it is not good policy to disadvantage newer, cleaner burning units in this transition. A better approach is to level the playing field by calculating the allowances for these new units on the same basis as existing units. We, therefore, urge the deletion of subsection 42.2.a.2 from the Proposed Rule.

For the same reasons, we urge the revision of § 42.5 to delete the reference to "the unit's most stringent state or federal NO_x emission limitation" in determining NO_x allowances to be deducted to account for actual heat input.

Transfer of Deducted NO_x Allowances

Under § 42.5, NO_x Budget Allocations are adjusted by deducting NO_x allowances to account for actual heat input of the unit during the ozone season. The final federal rule under the Clean Air Act's § 126 provides that allowances deducted relative to new sources will be transferred to the new source set aside. *See* 40 CFR 97.42(e)(2). This provision has not been reflected in the Proposed Rule. We believe this is an appropriate approach for the utilization of these allocations. Therefore, we recommend that the current § 42.5 be redesignated as § 42.5.a and that a new subsection be inserted to read as follows:

> 42.5.b. The Secretary will transfer any NO_x allowances deducted under paragraph 42.5.a to the allocation set aside for the ozone season for which they were allocated.

Thank you for this opportunity to comment on the Proposed Rule.

Sincerely,

SMcA

Steve McAdams
Senior Director; Project Development

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PHONE - 972/980-7159 FAX - 972/980-6815

PROPOSED NEW EGU'S IN WEST VIRGINIA

MAY 2001

Attachment to Panda Culloden response to legislative rule 45 CSR 26

Company	MW	Plant Type	Fuel	Nox Emissions[2] (Ozone Season)	Estimated Nox Emission Rate (lb/MMBtu)	MDHI (MMBtu/hr)	Expected Date of Commencement of Operations
[1]Big Sandy Peaker Plant, LLC (Constellation)	330	SC/Peaker	NG	245	0.1	3594	Spring 2001
[1]Twelve-Pole Creek, LLC (Columbia Electric)	500	SC/Peaker	NG	245	0.027	5844	Spring 2001
[1]Pleasants Energy, LLC (Dominion)	300	SC/Peaker	NG/FO	241	0.027	-	Spring 2001
[3]Panda Energy	1100	CC/Base Load	NG	203	0.015	9324	April 2003
[4]Anker Energy	1000	Base Load	GOB/Coal	3000	0.15	-	Spring 2004
[4]Century Aluminum	1500	Base Load	Coal	1600	0.08	-	-
[4]COGENTRIX	1000	CC/Base Load	NG	200	0.012	-	-
[4]Allegheny Energy	96	SC/Peaker	NG	99	0.015	-	June 2002
				5833			

[1] Permitted and operating

[2] Peaker plants assume 100% of permitted emissions occur during the ozone season

[3] Application submitted, 512.8 tons projected annual emissions, assume 95% capacity factor and 5/12 of projected annual emissions during ozone season

[4] Proposed, permit application not submitted, assume 95% capacity factor and 5/12 of projected annual emissions during ozone season

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AEP
AMERICAN® ELECTRIC POWER

July 12, 2001

Mr. John Benedict
Deputy Director
Division of Air Quality
West Virginia Department of Environmental Protection
8012 MacCorkle Avenue, S.E.
Charleston, WV 25304

Re: 45 CSR 26
NOx Budget Trading Program for Electric Generating Units

Mark Dempsey
West Virginia President
340 348 4710

Dear Director Benedict:

The operating companies of the American Electric Power System, including Ohio Power Company and Appalachian Power Company, (collectively referred to as "AEP") offer the following comments on the proposed legislative rule establishing requirements for electric generating units ("EGUs") to control and reduce emissions of nitrogen oxides and to participate in the federal NOx Budget Trading Program. AEP adopts and incorporates by reference as if fully set forth herein the comments submitted on behalf of the West Virginia Chamber of Commerce (the "Chamber"), of which AEP is a member. In addition, AEP submitted comments on a previous proposal, dated November 28, 2000, and, except as modified herein, those comments are also incorporated by reference.

As noted in our prior comments, and echoed in the comments submitted by the Chamber, we strongly support West Virginia's efforts to secure fair and even-handed treatment for this State under EPA's NOx SIP Call. In particular, we support West Virginia's untiring efforts to secure a state NOx budget that reflects reasonable and realistic growth rates. To date, those efforts have resulted in a clear determination by the U.S. District Court for the District of Columbia that EPA failed to provide any reasoned justification for its selection of a growth rate that assumed there would be "negative growth" in electric demand over the decade leading up to 2007, and a remand of the existing insufficient budget to the agency for additional rulemaking. What remains unclear is when and how EPA will respond to the Court's remand,[1] and what impact those actions will have upon the ultimate compliance obligations for affected EGUs. The uncertainty created by EPA's inaction has severe implications for affected EGUs, and their ability to achieve compliance in a timely and cost-effective manner. As nearly 38 percent of the electric

[1] In addition to the growth rate issues remanded to the agency on June 8, 2001, EPA was ordered by the Court to conduct additional rulemaking on certain definitions that affect the ultimate size and allocation of State NOx budgets in an earlier decision, issued over a year ago. *Michigan v. EPA*, 213 F.3d 663 (2000). To date, EPA has taken no action to respond to either order.

generating capacity on AEP's system that is affected by the NOx SIP Call is located in the State of West Virginia, EPA's continued delay has extraordinarily adverse consequences on AEP's ability to plan and implement appropriate control measures.

AEP appreciates West Virginia's efforts to help "fill in the gaps" created by the Court's remand and EPA's inaction. But the uncertainties currently present will not be fully addressed until EPA takes action to cure the deficiencies in the budgets through additional rulemaking, as ordered by the Court. And the outcome of any such rulemaking activity is far from certain at this time. Accordingly, although AEP supports at a minimum the total annual NOx budget recommended by the State of West Virginia for existing EGUs (31,292 tons per year), AEP recommends that West Virginia recognize the possibility that further refinement of the estimation and modeling techniques used to establish the budgets may result in a higher total annual budget than that included in the rule for existing EGUs. Suggested language that would allow an existing EGU to petition the Director for an increase in its allocation due to a final action by EPA approving a larger statewide budget is provided in Attachment A, and could be incorporated as a new paragraph in §45-26-41.6.

AEP concurs with the comments of the Chamber on the revised provisions in the rule for the new source set-aside for the initial allocation period. In light of the fact that the growth projections used by EPA included <u>no</u> new units, an increase in the new source set aside should be included for the initial allocation period based on pending and issued permits. However, the rules contemplate that new sources will be incorporated into the existing EGU category over time, and there is currently no reason to believe that a 95% - 5% split for existing and new sources, respectively, would not be appropriate on an ongoing basis after the initial allocation period. Accordingly, AEP urges the State to revise the proposed rule to provide for a 95% - 5% split of the total EGU budget for existing and new sources, respectively, in each of the subsequent allocation periods.

AEP also urges the State to include a specific tonnage allocation for the compliance supplement pool, to distribute allowances from the compliance supplement pool so as to encourage early operation of installed control equipment during the ozone season, and to maximize the number of allowances awarded for early reductions of NOx.

Finally, AEP has long been a proponent of implementing the NOx SIP Call and other air emission reduction programs in ways that maximize flexibility and opportunities for innovation. We supported the inclusion of specific regulatory provisions in West Virginia's NOx Budget Trading Rule to encourage the development and deployment of innovative technologies with the capability of achieving reductions of multiple pollutants, and offered detailed comments on the scope and content of such provisions in our earlier comments. At the time, in our discussions with West Virginia, we noted that the time frames for permitting and implementation of NOx reductions under this program were incompatible with the kind of intense effort associated with bringing on-line some of the promising multi-pollutant technologies in early stages of development. Our commitment to research and development in advanced pollution control technologies is independent of any specific regulatory program, and we will continue to pursue opportunities for innovation. However, we feel that the response of U.S. EPA to proposals of this type is presently unclear, and we are concerned that those sections of the proposal that deal with innovative technology could be determined by U.S. EPA to be a barrier to the final approval of this regulation. Because of this, we suggest that those provisions dealing with innovative multi-pollutant control technologies be deleted from the proposal.

We greatly appreciate the opportunity to offer these comments on the proposed rule, and look forward to working with the agency to finalize a SIP program for approval by EPA.

Very truly yours,

Mark Simpson

Attachment A

§45-26-41.6

The owner(s) and operator(s) of any NOx budget unit may petition the Secretary for additional allowances that become available as a result of an increase in the statewide EGU NOx budget. The Secretary shall grant the petition if, but only if, the statewide EGU NOx budget has been increased as a result of final action by U.S. EPA, final federal legislation, or the mandate of a court of competent jurisdiction. The Secretary shall allocate the additional allowances to EGU NOx budget units in the same proportion and using the same allocation methodology as set forth in §45-26-42.2 and/or §45-26-42.4, as appropriate. The additional allowances shall be awarded for all ozone seasons within the current allocation period, and shall be made available upon issuance of the order of the Secretary finalizing the allocations. The increased budget shall be used as the basis for NOx allowance allocations for EGUs in all subsequent allocation periods. The Secretary shall notify U.S. EPA and the public of the increased budget and the additional allowance allocations, and provide an opportunity for public comment, in accordance with the procedures in §45-26-41.5.

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

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

---

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

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

July 12, 2001

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

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

Dear Mr. Benedict:

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

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

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

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

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

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

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

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

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

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

In regard to 45 CSR 16, Standards of Performance for New Stationary Sources Pursuant to 40 CFR Part 60, the adoption of these standards should not limit the DAQ and prevent its enforcement of statutory requirements. It is after all the Code which provides the authority for adoption, implementation and enforcement of these regulations.

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

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

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

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

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

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

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

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

Sincerely,

David White

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(304) 340-1017

July 12, 2001

Mr. John Benedict
Deputy Director
Division of Air Quality
West Virginia Department of Environmental Protection
7012 MacCorkle Avenue S.E.
Charleston, West Virginia 25304

Re: NOx Budget Trading Program as a Means of Control and Reduction of Nitrogen Oxides from Electric Generating Units; 45 CSR 26

Dear Mr. Benedict:

The West Virginia Chamber of Commerce is pleased to have the opportunity to comment on your agency's proposed Legislative rule establishing requirements by which electric generating units [EGUs] would participate in the federal NOx Budget Trading Program. These comments are intended to be supportive of the overall purpose and intent of the proposal, while identifying several areas where further modifications would make the rule more effective in achieving its overall purpose and intent.

I. Background

For several years, EPA has been advancing the proposition that the NOx SIP Call regulatory program was needed to address the contribution of West Virginia's sources to downwind ozone nonattainment areas. Over the years, thanks to the leadership of the State of West Virginia, we believe that it has been established beyond any question that emissions from West Virginia's sources clearly do not cause or contribute to violations of the ozone ambient air quality standard in any downwind state. Moreover, it is well established that maximum ozone impacts occur locally and that West Virginia has achieved 100% attainment of the ozone standards.

It is this reality that has obviously caused EPA to base its NOx SIP Call not on the need to solve an air quality problem, but rather on the basis of levelizing costs at sources across the eastern portion of the United States. In response to litigation, the U.S. Court of Appeals for the District of Columbia Circuit has remanded the NOx SIP Call to EPA to address the Court's concern over the manner in which EPA generated growth projections for the EGU category. Appalachian Power Company, (No. 99-1268, June 8, 2001). The Court also remanded the source definitions for non-EGUs. Both the issues of the definition for affected sources (EGUs and non-EGUs) as well as appropriate calculation of growth represent significant elements of the NOx SIP call. While we encourage West Virginia to proceed with the development of its response to EPA's NOx SIP Call, we do so under a cloud of considerable uncertainty. We strongly support West Virginia in its attempt to promulgate a compliant NOx SIP call rule. We also support West Virginia's attempt at filling the voids left open for EPA's subsequent rulemaking action.

We recognize that on October 27, 2000 a proposed rule was submitted to the United States Environmental Protection Agency as a part of West Virginia's response to EPA's NOx SIP Call. The Chamber was supportive of West Virginia's submittal to EPA at that time, but as the result of the D.C. Circuit opinion, now believes the rule submitted must be revised. The following comments are both supportive of West Virginia's proposal, while raising concerns about certain significant elements of this proposal.

II. Final Compliance Date - §6.3.c.

EPA's NOx SIP Call establishes a final compliance date of May 1, 2003. By order of the United States Court of Appeals for the District of Columbia Circuit, entered on August 30, 2000, the final compliance date applicable to the State of West Virginia and other states was changed to May 31, 2004. This deadline creates the immediate question of how and when the NOx SIP Call ozone season budget allowances for West Virginia should be implemented since the NOx SIP Call seeks to have West Virginia demonstrate how it will meet an allocation that is applicable to a time period beginning on May 1 and ending September 30 of each year.

The Chamber, however, supports the May 31, 2004 deadline as consistent with the Court ruling. This would result in a correct application of the Court opinion and this date is appropriate to allow sufficient time to install the control equipment that is necessary to comply with the significant emission reduction requirements of the regulation.

III. Growth Rate - §40.1

We are also supportive of DEP's proposal to establish a NOx budget allocation for West Virginia at a level of 37,125 tons per ozone season. As the State has commented to EPA repeatedly, a 3% growth rate for West Virginia is completely inappropriate. The actual experience with growth of the EGU sector makes it obvious that at least a 20% growth rate is the beginning point for a much more realistic growth rate. Ultimately, the Chamber advocates for a reasonable base budget for EGUs to be established, based upon the application of an appropriate growth rate to the 1995/96 emission inventory relied upon by EPA.

In addition, we also agree that an additional allocation of tons per ozone season is appropriate to accommodate the growth in new EGUs that we have experienced to date. This is particularly justifiable given the fact that EPA in its assumptions with respect to West Virginia concluded that there would be no new EGU units. In fact, we have already seen 5,826 megawatts being planned and committed.

IV. New Source Set-Aside - §42.4.a.

DEP has proposed a new source set-aside of 5,833 tons of NOx per ozone season. It is our understanding that this figure is based on the total tonnage of NOx emissions from the 5,826 megawatts of new capacity already committed rather than a percentage set aside of the base budget. While the Chamber is supportive of the 5833 tons of additional allocations above a base budget of 31,292 tons, we strongly urge that DEP preserve no less than 95% of the 31,292 ton base budget for existing EGUs and to set aside no more than 5% of the 31,292 base budget for new EGUs. The Chamber is supportive of a rule that creates a set aside based upon a 95/5% split of the first 31,292 tons of allocation that are available to EGUs in West Virginia. The 5% set aside concept has been adopted by West Virginia for new sources subject to 45 CSR 1 (Non-EGUs) and is that which EPA has set forth in EPA's §126 rule and, therefore, is appropriate for this rule. Any greater allocation to new EGUs would clearly be more stringent than comparable federal requirements and would violate W.Va. Code § 22-1-3a.

IV. Compliance Supplement Pool - §43

a. Tonnage Allocation. We find it confusing that the proposed regulation does not contain a tonnage allocation that would be available for the compliance supplement pool. We ask that DEP offer a better description of how it will achieve an upper limit for CSP allocations or in the alternative include in Section 43 a fixed amount of the CSP.

b. Deadline for Compliance Supplement Pool Determination. The Chamber opposes the proposal to make the determination of the compliance supplement pool allowances as late as the year 2004 We urge that DEP return to the mechanism set forth in previous version of this section of the rule which would allow CSP allowances to be determined at the end of each ozone season rather than to wait to within a few days of the start of the NOx allocation program to announce the CSP allocations. Proper planning compels that CSP allocations be made known as soon as possible.

c. Compliance Supplement Pool Disincentive. Despite the past disagreements between the industry and EPA on the adequacy of the 200,000 ton CSP, there now appears to be additional justification for a revision to the CSP as a result of the August 2000 DC Circuit Court order to postpone the NOx SIP call compliance date from May 1, 2003 to May 31, 2004. Assuming the EPA and/or Court grants a similar one-year postponement of the Section 126 compliance date, the industry concern with electric generation supply reliability would effectively be alleviated. However, the limited size of the CSP now creates a disincentive for utilities to operate their NOx control equipment as it is constructed over the 2001 through 2003 period prior to its required operation in 2004.

As currently written, the NOx SIP call and Section 126 rules limit the quantity of each State's CSP allowances available for reward of early reductions taken prior to the required compliance date. If the total early reduction credits applied for in a State exceed the size of the CSP, then the State is required to prorate the award of CSP allowances. As a result, individual affected sources have little incentive to operate their NOx control equipment as construction is completed during the 2001 through 2003 period since there is no certainty that their additional NOx control operating costs will be offset with the award of a known quantity of CSP allowances.

For example, the State of West Virginia's CSP is 16,709 allowances. At this time the States three largest electric generation companies have announced a total of approximately 7,500 MW of generation capacity that will be equipped with SCR controls. Assuming an average SCR NOx emission rate of 0.08 lb/mmBtu, these facilities could generate a total of approximately 19,000 early reduction credits each year of operation. Unfortunately, their potential award of CSP allowances would be discounted by as much as 40 % assuming the SCR controls are operated for just 1 ½ years earlier than required. With such a heavy discount, there is little incentive to operate their NOx controls prior to the May 31, 2004 compliance date.

It has been recommended that the EPA revise the NOx SIP call and Section 126 regulations to eliminate the 200,000 ton cap on the CSP and allow for the award of CSP allowances for all early reduction credits generated by affected sources. This proposed elimination of the CSP cap offers a win-win situation for the environment and industry. The environment benefits from the early reductions of NOx emissions prior to the May 31, 2004 compliance date and industry benefits from the certainty of a full award of the CSP allowances.

In the past, EPA and environmental advocacy groups have opposed the award of early reduction allowances because they would result in exceedance of the State's utility sector NOx budget during the early years of the control program. However, this should not be a concern for three reasons. First, the regulations limit the use of CSP allowances to the first two years of the control program. Second, the regulations contain a "progressive flow control" provision to limit the use of banked allowances in any year following the second year of the program. And third, the NOx SIP call rule does not require States to meet their total NOx budget until 2007, so that early year exceedances of the utility sector NOx budget should be irrelevant.

The Chamber raises these issues with the state of West Virginia to encourage it to work with EPA to establish and allocate a compliance supplement pool without a cap or with an increased cap to support the early operation of NOx control equipment.

V. Replacement Unit

The Chamber urges the DAQ to give consideration to the inclusion of provisions to address the possibility that a non-EGU included in the federal trading program might be replaced by a unit that by definition would qualify under Series 26 as an EGU. In that case, upon request of the owner or operator of the non-EGU unit, Series 26 should allow the allocation that would have been appropriately assigned to the non-EGU unit under Series 1 to be transferred into Series 26 and be utilized in support of a replacement unit, at least during the initial allocation periods. Such a provision should apply not only in the case of new units that are used to replace existing units, but also in the case of any conversion of an existing unit that would change its nature from non-EGU to EGU.

IV. Section 126 Withdrawal

Finally, the Chamber urges that DEP's submittal of its SIP revision to EPA urge that EPA act to approve the submittal prior to May 1, 2003 to provide a basis for EPA withdrawing its §126 rule as to sources covered by the approved West Virginia SIP.

Very truly yours,

David M. Flannery
Chairman, Environmental Committee
West Virginia Chamber of Commerce

DMF/vlr
cc: Mr. Stephen Roberts

45CSR26

NO_X BUDGET TRADING PROGRAM AS A MEANS OF CONTROL AND REDUCTION OF NITROGEN OXIDES FROM ELECTRIC GENERATING UNITS

RESPONSE TO COMMENTS

On June 6, 2001 the Division of Air Quality (DAQ) commenced the public comment period and subsequently held a public hearing on July 12, 2001 to accept oral comments on the proposed rule, 45CSR26. Written comments were accepted through 6:00 PM on Thursday, July 12, 2001. No person verbally commented at the public hearing concerning proposed rule 45CSR26. Nine commenters submitted written comments which the DAQ addresses below.

I. Commenter: U.S. Environmental Protection Agency

COMMENT A. *"Overall, the content of West Virginia's proposed rule for electric generating units (EGUs) is good. .....However, there are several significant problems with the proposed rule which will affect its approvability. .....One significant problem is that West Virginia's expansion of the State budget for EGUs in 45CSR26 appears to be inconsistent with requirements of 40 CFR 51.121, "Findings and Requirements for Submission of State Implementation Plans Revisions Related to Emissions of Oxides of Nitrogen." If the West Virginia budget is increased, West Virginia must demonstrate that it will achieve offsetting reductions from sources under some other sector of the State budget."*

RESPONSE A. On June 8, 2001, the U.S. District Court for the District of Columbia remanded to EPA the EGU utilization growth factors used to estimate utilization in 2007. West Virginia has raised manifold concerns regarding EPA's failure to accurately project heat input growth rate of the EGU source sector in the state. DAQ recognizes inconsistency with the NO_X budget requirements of 40 CFR 51.121. However, West Virginia maintains that the 3% heat input growth rate assumed by EPA for the period 1996-2007 is inaccurate, unrealistic and inconsistent with projected and actual increases in heat input for EGUs situated in West Virginia. In fact, documented actual heat input for West Virginia EGUs in 1997, 1998 and 1999 is greater than EPA's estimated 2007 heat input assigned to the state. West Virginia must note that EPA's IPM model failed to account for new EGU sources in the state, even though eight new EGUs (5,833 MW_e total) have been planned and committed for construction. It should also be noted West Virginia's projected heat input growth rate of 20% (compared to EPAs 3% heat input growth rate) for the years 1996 to 2007 compares favorably with heat input growth rates assigned by EPA to other states subject to the NO_X SIP Call, such as Maryland (35%), Massachusetts (59%), Delaware (27%), South Carolina (43%), Virginia (32%) and New Jersey (29%). Consequently, West Virginia expects parity on the part of EPA with respect to estimation of West Virginia's EGU heat input growth rate and NO_X budgets assigned to states subject to the NO_X SIP Call. DAQ intends to work closely with EPA in an effort to amend the state NO_X emission budget.

COMMENT B. *".....the inclusion of an alternative compliance plan -- which exempts from the trading program those large EGUs that make reductions without traditional NO_X control technologies -- is contrary to §51.121(f)(2). That section requires that, if a State elects to control large EGUs and non-EGUs, all such units must be subject to either the emissions limits or to other requirements that provide the same assurance that the State will meet its' 2007 budget. The Alternative Compliance Plan does not appear to provide such assurance. Under the plan, a large EGU could surrender its allowance allocation, but could then emit more NO_X tons than the allowances it surrendered and still be exempt from the allowance holding requirements of the trading program."*

RESPONSE B. Based on the above comment and concurrence of other commenters, DAQ has deleted section 80 of proposed rule 45CSR26.

COMMENT C. *"EPA cannot approve 45CSR26 unless West Virginia modifies the trading rule to meet the State NO_X emission budget and achieve the required NO_X emission reductions on a schedule consistent with the NO_X SIP call requirements."*

RESPONSE C. DAQ refers the commenter to Response I.A.

COMMENT D. *".....without removal of the Alternative Compliance Plan provisions, EPA cannot approve 45CSR26 and West Virginia's sources will not be able to participate in the multi-state NO_X trading program administered by EPA."*

RESPONSE D. DAQ refers the commenter to Response I.B.

COMMENT E. *"The total number of allowances should be revised to reflect West Virginia's State budget under §51.121 for electric generating units."*

RESPONSE E. DAQ refers the commenter to Response I.A.

COMMENT F. *"West Virginia should include the list of affected sources and the allocations in this rule."*

RESPONSE F. DAQ intends to establish EGU allocations outside of proposed rule 45CSR26. This is due, in part, to the uncertainty of budgets and allocations subsequent to the June 8, 2001 decision of the U.S. District Court for the District of Columbia, and for the following reasons. DAQ has issued an Order (which is legally enforceable under WV Code §§22-5-1 et.seq. in the same manner as a legislative rule) describing affected sources and their NO_X allocations for Non-EGUs under 45CSR1. The language in subsection 41.1 (directly referring to the Order issued) is taken from federal counterpart language 40 CFR Part 97.41.b. Both of DAQ's rules 45CSR1 (legislative rule for non-EGUs) and 45CSR26 (proposed rule for EGUs) exhibit very similar language and are structured the same. Pursuant to subsection 41.1 of proposed rule 45CSR26, DAQ intends to issue a similar Order for EGUs no later than April 1, 2002. EPA has previously indicated its approvability of Legislative rule 45CSR1, and DAQ intends to issue an Order for EGU allocations under proposed rule 45CSR26 in a parallel manner. Both EGU and non-EGU rules clearly establish NO_X allowance allocation methodolgy. DAQ refers the commenter to Response I.A.

COMMENT G. *" .....the Agency does not believe that an exemption from the program is a constructive way of encouraging innovation in NO_X control technology. Sources subject to the program already have an incentive to reduce NO_X emissions below their allocation, since they can sell surplus allowances on the market. .....from the standpoint of program administration, the Agency cannot efficient* (sic) *operate its NO_X Allowance Tracking System (NATS) is such a way as to implement these specific provisions of West Virginia's rule."*

RESPONSE G. DAQ refers the commenter to Response I.B.

COMMENT H. *"EPA notes that references elsewhere in the rule to deductions "to account for withdrawal from the NO_X Budget Program" should be removed (e.e., 2.43* (sic) *and 6.3.a.), along with the Alternative Compliance Plan provision itself."*

RESPONSE H. DAQ concurs and has revised subsection 2.42 and subdivision 6.3.a accordingly. DAQ refers the commenter to Response I.B.

COMMENT I. *"Compliance supplement pool for West Virginia is 16,709 tons of NO_X. West Virginia should include its compliance supplement pool in this rule."*

RESPONSE I. DAQ concurs and has revised subdivision 43.3.d accordingly.

II. Commenter: Independent Oil & Gas Association of West Virginia

COMMENT A. *"IOGA fully supports the proposed 42.4 which assigns a new source set aside of 5,833 tons of NOx emissions."*

RESPONSE A. DAQ acknowledges the comments of the Independent Oil & Gas Association of West Virginia. DAQ intends to promote a West Virginia EGU budget which provides appropriate allowance allocations to both existing and new NO_X Budget units.

III. Commenter: Bowles, Rice, McDavid, Graff and Love, PLLC

COMMENT A. *"This firm represents several companies who are considering the installation of new electric generating units ("EGUs") in West Virginia. These comments offer support for the*

Division of Air Quality's proposed new source allotment of 5,833 tons of NOx per ozone season. .....In the future, the base budget may be increased as a result of the EPA's reconsideration of the growth projections for the EGU category. If this occurs, then the allocation of the base budget for new EGUs should be increased proportionally as well."

RESPONSE A. DAQ recognizes that the proposed state EGU budget of 37,125 tons may change, thereby necessitating a change in the new source set-aside.

IV. Commenter: Dominion Generation

COMMENT A. *"We also believe that it is in the best interest of the State and its regulated sources to move forward with a reasonably approvable rule to assure full state implementation of the rule, avoid federal implementation and possible economic sanctions, and allow affected sources to move forward with certainty in their compliance efforts."*

RESPONSE A. It is the intent of the DAQ to work with EPA to eliminate significant approvability problems to ensure *"full implementation of the rule, avoid federal implementation and possible economic sanctions, and allow affected sources to move forward with certainty in their compliance efforts."*

COMMENT B. *"Dominion supports the DEP's efforts to include a modified NOx budget for egu's in West Virginia in its proposed rule, and its rationale for adjusting the budget as established by EPA to more accurately account for both realized and future-expected growth in electricity generation in the State. We believe that the proposed increase from EPA's budget of 26,859 tons is justified given that EPA did not assume any new generating units in West Virginia in deriving its projected 3% growth rate over the period 1995-2007 in calculating the NOx budget for egu's. The proposed increase to the egu budget allows for a more flexible, workable allocation methodology that addresses the concerns of both existing (baseline) and new source generation in the State. However, the EPA budget may be changed as a result of EPA's review of the budget per order of the U.S. Court of Appeals. A provision should be added to the regulations that would allow the budget numbers to be changed to meet the federal requirements in order to avoid federal implementation of the rule and assure state regulation of affected sources under the rule."*

RESPONSE B. DAQ intends to revise proposed rule 45CSR26 to accomodate any change in West Virginia's EGU budget, therefore eliminating the need for the suggested provision. DAQ refers the commenter to Response I.A.

COMMENT C. *"In the latest revised draft of the proposed rule, the DEP has established a set aside pool of 5,833 tons for new sources (sources that were constructed and became operational after January 1, 1997 and future planned generation). .....Dominion believes that this apportionment is feasible only under the modified egu budget of 37,125 tons, which accounts for the growth in* *existing (baseline) generation as well as additional tonnage for new generation. However, these percentages would not be suitable with a budget less than that currently proposed, including the budget of 26,859 tons established in EPA's NOx SIP Call rule.* ***Should for any reason the DEP move away from the currently modified budget and the associated allocation methodology and/or adopt EPA's budget of 26,859 tons, we believe the set-aside issue must be revisited."***

RESPONSE C. DAQ refers the commneter to Response III.A.

COMMENT D. *" .....under the more recent proposal, the DEP is not required to allocate CSP allowances until April 1, 2004, only two months prior to the compliance deadline for the SIP Call rule. This provides affected sources little time if any to incorporate the CSP tons into their compliance strategy planning and to adjust such strategies if the CSP allowances are discounted (due to the limited size of the CSP).* ***Dominion urges the DEP to award CSP allowances annually and provide notification of CSP allowances as soon as possible following the ozone season during which early reductions are achieved."***

RESPONSE D. The basic ERC allocation methodology in the proposed rule is established in the federal counterpart rule, 40 CFR Part 96. DAQ believes that awarding early reduction credits on an annual basis would further hinder efforts to ensure a complete, fully adopted NO_X State Implementation Plan (SIP) and avoid the imposition of a Federal Implementation Plan (FIP). DAQ refers the commenter to Response IV.A.

COMMENT E. ***"In addition, we urge the DEP to modify Section 43.3.f. of the rule to allow CSP allowances generated by early reductions achieved during the 2002 ozone season to be used during the 2003 ozone season for the potential purpose of complying with EPA's Section 126 rule if the May 1, 2003 compliance date for the Section 126 rule is not altered.*** *This would provide a mechanism within the state rule for the use of such allowances if EPA allows states to issue allowances from the CSP under the Section 126 rule as suggested in a recent letter from EPA to the State of Indiana."*

RESPONSE E. DAQ considers this a federal Section 126 (40 CFR Part 97) issue and does not intend to revise proposed rule 45CSR26 with language providing for direct interaction between Section 126 and state NO_X SIP Call rules. In the absence of a similar federal counterpart provision, DAQ believes it is inappropriate to address such concerns in proposed rule 45CSR26.

COMMENT F. *"Dominion also suggests changes in Section 43.1.d.1 of the rule which describes how ERC's generated during an applicable ozone season are calculated. As currently proposed, the rule calculates ERC's as the "amount equal to the unit's heat input for such ozone season multiplied by the difference between 0.25 lb/mmBtu and the unit's NOx emission rate for such ozone season, divided by 2000 lb/ton and rounded to the nearest whole number of tons".* ***We urge the DEP to alter the threshold emission rate from which early reduction credits are calculated from 0.25 lb/mmBtu to 0.35 lb/mmBtu."***

RESPONSE F. The 0.25 lb/mmBtu level is established in the federal counterpart rules. DAQ believes that relaxation of the threshold emission rate would further hinder efforts to ensure a complete, fully adopted NO_X State Implementation Plan (SIP) and avoid the imposition of a Federal Implementation Plan (FIP). DAQ refers the commenter to Response IV.A.

COMMENT G. ***"Dominion also believes the rule should be amended to ensure that ERC's and allowances from the CSP are not issued for reductions not actually achieved if the unit's emission rate before reductions is already below the threshold emission rate from which ERC's would be calculated (0.25 lb/mmBtu or 0.35 lb/mmBtu). We therefore request the DEP to urge EPA to revise the rules and eliminate the cap on CSP allowances."***

RESPONSE G. DAQ believes the commenter's suggestion is contrary to the basic ERC allocation eligibility as established in federal counterpart rule 40 CFR Part 97. Subsection 43.1 states that units eligible for ERCs must reduce its NO_X emission rate in the 2002 or 2003 ozone season. A unit is eligible for ERCs if their emission rate in 2002 or 2003 is less than 80 percent of the unit's 2001 emission rate and the emission rate is less than 0.25 lb/mmBtu. The unit must indeed reduce its emission rate by at least 20 percent even though the unit's 2001 emission rate may be below 0.25 lb/mmBtu. Therefore, DAQ has determined the suggested amendment, rule revisions and elimination of the CSP cap are not necessary. With respect to the commenter's request to revise a federal counterpart rule, DAQ believes that such a request is outside the scope of proposed rule 45CSR26. DAQ refers the commenter to Response IV.A.

COMMENT H. ***"We believe the DEP should use the average of the two highest heat inputs for allocation calculations. In addition, we suggest the DEP use the heat inputs from 2000-2004 (5-year period) for determining allocations for the 2008-2012 period."***

RESPONSE H. The basic allocation methodology is established in the federal counterpart rules. DAQ believes that the proposed change would further hinder efforts to ensure a complete, fully adopted NO_X State Implementation Plan (SIP) and avoid the imposition of a Federal Implementation Plan (FIP). DAQ refers the commenter to Response IV.A.

COMMENT I. ***"We believe that the DEP should remove the innovative technology provision from the rule."***

RESPONSE I. DAQ refers the commenter to Response I.B.

V. Commenter: Allegheny Energy Supply

COMMENT A. *"Allegheny is supportive of the WVDEP's proposal to establish a NOx budget for West Virginia EGU sources at a level of 37,125 tons per ozone season. As the regulated* *community and State has commented to EPA repeatedly, the 3% growth rate used by EPA to calculate the NOx SIP call EGU budget of 26,859 tons for West Virginia EGU sources is completely inappropriate. Such a proposal is also supported by the June 8, 2001 DC Circuit Court of Appeals decision on the NOx SIP call budget litigation which remanded the State EGU NOx budget calculation back to EPA for reconsideration because of the arbitrary method EPA used to develop the State growth factors used to calculate the NOx budgets."*

RESPONSE A. DAQ refers the commenter to Response I.A.

COMMENT B. *"Allegheny appreciates the WVDEP's concern that there be an adequately sized new source set-aside to provide sufficient allowances for all of the recently announced new generation projects in the State. As currently proposed, the total EGU budget of 37,125 tons provides the existing EGU's with a reasonable 31,292 tons budget once the 5,833 ton new source setaside has been deducted. However, Allegheny is concerned that the EPA may not approve the total 37,125 ton budget. If, as a result of adverse comments from the EPA, the WVDEP elects to reduce the total EGU budget in the final version of the rule, Allegheny requests that the EGU budget be allocated between existing and new EGUs on the basis of a 95%/5% split respectively for the first 31,292 tons of allowances. Any NOx allocations above that amount could be dedicated exclusively to new EGU sources. The 95%/5% existing source/new source split is consistent with the EPA's Part 96 NOx Budget Trading Program for State Implementation Plans and also consistent with the majority of other State's NOx SIP call rulemaking requirements."*

RESPONSE B. DAQ refers the commenter to Response I.A, II.A and III.A.

COMMENT C. *"Allegheny agrees with the provision that allocations for an individual unit be calculated using the more stringent of a 0.15 pound per million Btu emission rate or the unit's most stringent state or federal emission limitation. However, the intent of this provision should be to rely on a more stringent emission limitation only to the extent that limitation was in effect on May 1, 1997 or on the date that a new unit commences operation, whichever is later. We urge that this additional clarifying comment be added to Section 42.2.a.2 and 42.4.c.2 to be consistent with this concept. Such a clarification is necessary to prevent a reduction in a units NOx allocation as a result of some future unrelated permitting requirement."*

RESPONSE C. A literal review of subsection 42.2 reveals the subsection provides, for the block of ozone seasons in subsection 41., that the Director will allocate to all NO_X Budget units that <u>commenced operation before May 1, 1997</u> for allocations under subsection 41.1..... Therefore, the intent of the May 1, 1997 date in subsection 42.2 is to set a commencement of operation deadline for the first block of ozone seasons. A similar review of paragraph 42.2.a.2, which contains the provision for a unit's most stringent state or federal NO_X emission limitation, does not provide for a cutoff date for such limitations, i.e. does not *"rely on a more stringent emission limitation only to the extent that such a limitation was in effect on May 1, 1997..... or on the date that a new unit commences operation, whichever is later."* The suggested language unfairly awards excess allowances to units that merely comply with required emission limitations. The basic allocation methodology is established in the federal counterpart rules. DAQ disagrees with the suggestion that the intent of the language be revised or interpreted otherwise. DAQ believes that the proposed change would further hinder efforts to ensure a complete, fully adopted NOx State Implementation Plan (SIP) and avoid the imposition of a Federal Implementation Plan (FIP). DAQ refers the commenter to Response IV.A.

COMMENT D. *" The number of NOx allowances in the state compliance supplement pool should be included in Section 43.3.d under the definition of "Compliance supplement pool.""*

RESPONSE D. DAQ refers the commenter to Response I.I.

COMMENT E. *" .....Allegheny requests the WVDEP work with the EPA to eliminate the imposition of a cap on the size of the compliance supplement pool (CSP). EGU affected sources should be eligible to receive CSP allowances for all of their early reduction credits without the discounting required under section 43.3.d."*

RESPONSE E. DAQ refers the commenter to Response IV.G.

COMMENT F. *"As WVDEP is aware, the EGU sources affected by this rulemaking are also subject to compliance with the EPA's January 18, 2000 Section 126 rule with a compliance date of May 1, 2003. However, the Section 126 rule includes a provision for the withdrawal of section 126 findings under 40 CFR Part 52 Section 52.34(i) upon the EPA's approval by May 1, 2003 of a State Implementation Plan (SIP) that implements equivalent emission reductions as the Section 126 rule. This provision appears to have been upheld in the May 15, 2001 DC Circuit Court of Appeals decision on the Section 126 rule litigation. Therefore, Allegheny requests that upon submittal of its SIP revision to incorporate 45CSR26, that WVDEP request the EPA to approve the SIP by May 1, 2003 and consequently to withdraw its Section 126 findings per 40 CFR Part 52 Section 52.34(i)."*

RESPONSE F. DAQ intends to submit an approvable NO_X SIP, and request approval of same by May 1, 2003. DAQ refers the commenter to Section II.B of the Federal Register preamble to 40 CFR Parts 52 and 97, *Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport* (FRL-6515-5; January 18, 2000).

VI. Commenter: Panda Culloden Power, L.P.

COMMENT A. *"Panda fully supports the proposed § 42.4, which assigns 5,833 tons of NO_x emissions as the new source set aside."*

RESPONSE A. DAQ acknowledges Panda's comment. DAQ refers the commenter to Response II.A.

COMMENT B. *"Section 42.2.a sets out the procedure to be followed by the Secretary in allocating NO_x Budget Allowances. The Proposed Rule uses a two-pronged test. The first prong calculates the allocation using as a factor of 0.15 lb/mmBtu multiplied by the heat input for the unit while the second prong uses as a factor, the unit's most stringent state or federal NO_x emission limitation" multiplied by the heat input. See §§ 42.2.a.1 and 42.2.a.2. The Proposed Rule requires utilization of the lesser of the two numbers generated by these alternatives. The second prong of this approach, i.e., utilization of the most stringent state or federal NO_x emission limitation, is not included in the federal counterpart NO_x budget regulations. See40 CFR 96.42(b)(1) and 97.42(b)(1). The effect of the inclusion of this provision which is not utilized under federal rules, is to place new units which are likely to have lower permitted emission rates at a disadvantage when they are moved from the new source set aside to the pool of NOx allowances available for existing sources. Panda believes that it is not good policy to disadvantage newer, cleaner burning units in this transition. A better approach is to level the playing field by calculating the allowances for these new units on the same basis as existing units. We, therefore, urge the deletion of subsection 42.2.a.2 from the Proposed Rule. For the same reasons, we urge the revision of § 42.5 to delete the reference to "the unit's most stringent state or federal NO_x emission limitation" in determining NO_x allowances to be deducted to account for actual heat input."*

RESPONSE B. DAQ believes that when a "new" unit becomes an "existing" unit, allocating allowances based upon 0.15 lb/mmBtu instead of the more stringent state or federally enforceable NO_X emission limitation unfairly awards excess allowances to units that merely comply with required emission limitations. Paragraph 42.2.a.2 ensures that allocations stay the same for new units which become existing units, which provides for steady compliance strategy planning. With respect to the suggested revision of subsection 42.5, it is West Virginia's intent to adopt fully approvable rules which will result in an approved NO_X SIP and thereby avoid implementation of a federal implementation plan and economic sanction. DAQ believes the suggested revision of subsection 42.5 could result in an approvability problem for proposed rule 45CSR26.

COMMENT C. *"Under § 42.5, NO_x Budget Allocations are adjusted by deducting NO_x allowances to account for actual heat input of the unit during the ozone season. The final federal rule under the Clean Air Act's § 126 provides that allowances deducted relative to new sources will be transferred to the new source set aside. See 40 CFR 97.42(e)(2). This provision has not been reflected in the Proposed Rule. We believe this is an appropriate approach for the utilization of these allocations. Therefore, we recommend that the current § 42.5 be redesignated as § 42.5.a and that a new subsection be inserted to read as follows:*

42.5.b. The Secretary will transfer any NO_x allowances deducted under paragraph 42.5.a to the allocation set aside for the ozone season for which they were allocated."

RESPONSE C. DAQ concurs and has inserted subdivision 42.5.b as suggested and redesignated subsection 42.5 to subdivision 42.5.a.

VII. Commenter: American Electric Power System

COMMENT A. *" .....although AEP supports at a minimum the total annual NOx budget recommended by the State of West Virginia for existing EGUs (31,292 tons per year), AEP recommends that West Virginia recognize the possibility that further refinement of the estimation and modeling techniques used to establish the budgets may result in a higher total annual budget than that included in the rule for existing EGUs. Suggested language that would allow an existing EGU to petition the Director for an increase in its allocation due to a final action by EPA approving a larger statewide budget is provided in Attachment A, and could be incorporated as a new paragraph in §45-26-41.6.*

Attachment A

§45-26-41.6

The owner(s) and operator(s) of any NOx budget unit may petition the Secretary for additional allowances that become available as a result of an increase in the statewide EGU NOx budget. The Secretary shall grant the petition if, but only if, the statewide EGU NOx budget has been increased as a result of final action by U.S. EPA, final federal legislation, or the mandate of a court of competent jurisdiction. The Secretary shall allocate the additional allowances to EGU NOx budget units in the same proportion and using the same allocation methodology as set forth in §45-26-42.2 and/or §45-26-42.4, as appropriate. The additional allowances shall be awarded for all ozone seasons within the current allocation period, and shall be made available upon issuance of the order of the Secretary finalizing the allocations. The increased budget shall be used as the basis for NOx allowance allocations for EGUs in all subsequent allocation periods. The Secretary shall notify U.S. EPA and the public of the increased budget and the additional allowance allocations, and provide an opportunity for public comment, in accordance with the procedures in §45-26-41.5."

RESPONSE A. DAQ refers the commenter to Response III.A.

COMMENT B. *"However, the rules contemplate that new sources will be incorporated into the existing EGU category over time, and there is currently no reason to believe that a 95% - 5% split for existing and new sources, respectively, would not be appropriate on an ongoing basis after the initial allocation period. Accordingly, AEP urges the State to revise the proposed rule to provide for a 95% - 5% split of the total EGU budget for existing and new sources, respectively, in each of the subsequent allocation periods."*

RESPONSE B. DAQ notes that if the new source set-aside is undersubscribed in subsequent allocation periods, the remaining allowances will be distributed on a pro-rata basis to existing sources as set forth in subdivision 42.5.b. Therefore the suggested revision is unnecessary. DAQ refers the commenter to Response VI.C.

COMMENT C. *"AEP also urges the State to include a specific tonnage allocation for the compliance supplement pool, to distribute allowances from the compliance supplement pool so as to encourage early operation of installed control equipment during the ozone season, and to maximize the number of allowances awarded for early reductions of NO_X."*

RESPONSE C. DAQ refers the commenter to Response I.I.

COMMENT D. *" .....we are concerned that those sections of the proposal that deal with innovative technology could be determined by U.S. EPA to be a barrier to the final approval of this regulation. Because of this, we suggest that those provisions dealing with innovative multi-pollutant control technologies be deleted from the proposal."*

RESPONSE D. DAQ refers the commenter to Response I.B.

The following are previously submitted comments by American Electric Power on a previous proposal, and are incorporated by reference by request of the commenter:

COMMENT A. *"Section 80.5 details the contents of the alternative NO_X compliance plan permit which will memorialize the commitments made in pursuit of a multi-pollutant reduction program. This section contains requirements that generally become effective upon the permit's "effective date" which is defined as the ozone season following the proposed date of commencement of the innovative technology. We believe there is one provision that should become effective before the "effective date," and that is the obligation to monitor NO_X emissions in Section 80.5.e. Accordingly, an introductory phrase to clarify that monitoring should commence upon issuance has been added. On the other hand, there would be no reason to conduct the stack tests described in Section 80.5.f. until after the commencement of operation of the innovative technology, and a clarifying introductory phrase has also been added to this section."*

RESPONSE A. DAQ refers the commenter to Response I.B.

COMMENT B. *"The other change proposed is to Section 80.10, which describes an additional remedy if a permittee fails to achieve the NO_X reductions required by the alternative NO_X compliance plan permit. .....80.10. The owner and operator of a NO_X Budget unit, for which an alternative compliance plan permit has been issued, that does not meet ~~all~~ <u>the</u> terms and conditions of the alternative compliance <u>plan</u> permit <u>related to NO_X on or after the effective date of the permit</u> shall:.....The additional remedy described in this section should not be triggered by a minor monitoring lapse or a recordkeeping oversight. Rather, only if the NO_X commitments are not met within the time period outlined in the permit should the benefits of the extended compliance schedule be forfeited."*

RESPONSE B. DAQ refers the commenter to Response I.B.

VIII. Commenter: David W. White

COMMENT A. *" .....the extended phase in period for implementation of this regulation appears unnecessarily long."*

RESPONSE A. DAQ notes that *"the extended phase in period"* for this proposed rule is due primarily to two reasons: a.) time required for the regulated community to install air pollution control devices; and b.) implementation delays resulting from manifold litigation.

COMMENT B. *" .....54.4.c.1 provides that, "For purposes of determining the number of days of violation, if a NO_X Budget unit has excess emissions for an ozone season, each day in the ozone season (153 days) constitutes a day in violation unless the owners and operators of the unit demonstrate that a lesser number of days should be considered;" Does this provision mean that exceeding a NO_X Budget would constitute 153 separate violations, each punishable by up to $25,000 in fines?"*

RESPONSE B. DAQ affirms the question and refers the commenter to following additional subdivision and paragraph under subsection 54.4 of proposed rule 45CSR26. DAQ notes that under §22-5-6, civil penalty fines are $10,000 per day and not $25,000 per day.

54.4.a. After making the deductions for compliance under subsection 54.2., the Administrator will deduct from the unit's compliance account or the overdraft account of the source where the unit is located a number of NO_X allowances, allocated for an ozone season after the ozone season in which the unit has excess emissions, equal to three times the number of the unit's excess emissions.

and,

54.4.c.1. Any allowance deduction required under subsection 54.4. shall not affect the liability of the owners and operators of the NO_X Budget unit for any fine, penalty or assessment or their obligation to comply with any other remedy, for the same violation, as ordered under §§22-5-1 et seq. or the CAA.

IX. Commenter: West Virginia Chamber of Commerce

COMMENT A. *"We strongly support West Virginia in its attempt to promulgate a compliant NOx SIP call rule."*

RESPONSE A. It is West Virginia's intent to adopt fully approvable rules which will result in an approved NO_X SIP and thereby avoid implementation of a federal implementation plan and economic sanction. DAQ refers the commenter to Response IV.A.

COMMENT B. *"We are also supportive of DEP's proposal to establish a NOx budget* *allocation for West Virginia at a level of 37,125 tons per ozone season. .....the Chamber advocates for a reasonable base budget for EGUs to be established, based upon the application of an appropriate growth rate to the 1995/96 emission inventory relied upon by EPA."*

RESPONSE B. DAQ refers the commenter to Response I.A.

COMMENT C. *" .....we also agree that an additional allocation of tons per ozone season is appropriate to accommodate the growth in new EGUs that we have experienced to date."*

RESPONSE C. DAQ refers the commenter to Response II.A.

COMMENT D. *" ..... we strongly urge that DEP preserve no less than 95% of the 31,292 ton base budget for existing EGUs and to set aside no more than 5% of the 31,292 base budget for new EGUs. The Chamber is supportive of a rule that creates a set aside based upon a 95/5% split of the first 31,292 tons of allocation that are available to EGUs in West Virginia. The 5% set aside concept has been adopted by West Virginia for new sources subject to 45 CSR 1 (Non-EGUs) and is that which EPA has set forth in EPA's 126 rule and, therefore, is appropriate for this rule. Any greater allocation to new EGUs would clearly be more stringent than comparable federal requirements and would violate W.V. Code §22-1-3a."*

RESPONSE D. DAQ refers the commenter to Response III.A. DAQ also disagrees with the last sentence of the comment, as states have the flexibility under the NO_X SIP call to develop NO_X allocation methodologies.

COMMENT E. *"We ask that DEP offer a better description of how it will achieve an upper limit for CSP allocations or in the alternative include in Section 43 a fixed amount of the CSP."*

RESPONSE E. DAQ refers the commenter to Response I.I.

COMMENT F. *"The Chamber opposes the proposal to make the determination of the compliance supplement pool allowances as late as the year 2004* (sic) *We urge that DEP return to the mechanism set forth in previous version of this section of the rule which would allow CSP allowances to be determined at the end of each ozone season rather than to wait to within a few days of the start of the NOx allocation program to announce the CSP allocations."*

RESPONSE F. DAQ refers the commenter to Response IV.D.

COMMENT G. *"In the past, EPA and environmental advocacy groups have opposed the award of early reduction allowances because they would result in exceedance of the State's utility* *sector NOx budget during the early years of the control program. However, this should not be a concern for three reasons. First, the regulations limit the use of CSP allowances to the first two years of the control program. Second, the regulations contain a "progressive flow control" provision to limit the use of banked allowances in any year following the second year of the program. And third, the NOx SIP call rule does not require States to meet their total NOx budget until 2007, so that early year exceedances of the utility sector NOx budget should be irrelevant."*

RESPONSE G. With respect to the above comment, DAQ disagrees with the Chamber's third comment "*the NOx SIP call rule does not require States to meet their total NOx budget until 2007, so that early year exceedances of the utility sector NOx budget should be irrelevant*" and considers the statement incorrect and misleading. The state budget is established based upon applied controls and projected heat input growth to 2007, but sources are required to have enough allowances to cover their emissions beginning in the 2004 ozone season. The state must also meet its ozone season NO_X budget beginning in 2004.

COMMENT H. *"The Chamber raises these issues with the state of West Virginia to encourage it to work with EPA to establish and allocate a compliance supplement pool without a cap or with an increased cap to support the early operation of NO_X control equipment."*

RESPONSE H. DAQ refers the commenter to Response IV.G.

COMMENT I. *"The Chamber urges the DAQ to give consideration to the inclusion of provisions to address the possibility that a non-EGU included in the federal trading program might be replaced by a unit that by definition would qualify under Series 26 as an EGU. In that case, upon request of the owner or operator of the non-EGU unit, Series 26 should allow the allocation that would have been appropriately assigned to the non-EGU unit under Series 1 to be transferred into Series 26 and be utilized in support of a replacement unit, at least during the initial allocation periods."*

RESPONSE I. DAQ disagrees. 45CSR26 provides that a non- EGU which by definition becomes an EGU, is considered to be a "new" EGU under 45CSR26 and will receive allowance allocations from the new source set-aside in 45CSR26. DAQ believes that the proposed change may hinder efforts to ensure a complete, fully adopted NO_X State Implementation Plan (SIP) and avoid the imposition of a Federal Implementation Plan (FIP).

COMMENT J. *"…..the Chamber urges that DEP's submittal of its SIP revision to EPA urge that EPA act to approve the submittal prior to May 1, 2003 to provide a basis for EPA withdrawing its §126 rule as to sources covered by the approved West Virginia SIP."*

RESPONSE J. DAQ refers the commenter to Response V.F.