WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

FORM #3

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

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

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

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

AMENDMENT TO AN EXISTING RULE: YES ____, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

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

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

THE ABOVE PROPOSED LEGISLATIVE RULE 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.

Edward L Knopp

Authorized Signature

$19.20

Executive Office
#10 McJunkin Road
Nitro, WV 25143-2506
Telephone: (304) 759-0515
Fax: (304) 759-0526

West Virginia Bureau of Environment

Cecil H. Underwood
Governor

Michael P. Miano
Commissioner

January 29, 1999

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

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

Dear Ms. Cooper:

This is to advise that I am giving approval to file the above-referenced rule with your Office and the Legislative Rule-Making Review Committee as Notice of an Agency-Approved rule.

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

Sincerely yours,

Michael P. Miano
Commissioner

MPM:c

Attachment

cc: Skipp Kropp
Karen Watson
Carrie Chambers

Questionnaire

DATE: February 1, 1999

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (AGENCY NAME, ADDRESS & PHONE NUMBER) Division of Environmental Protection
Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311-2599
Phone: 304-558-4022

LEGISLATIVE RULE TITLE: 45CSR28 "Air Pollutant Emissions Banking and Trading"

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:
December 2, 1998

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

I. Class I legal advertisement, Charleston Daily Mail and Charleston Gazette
II. Sent a copy of the Public Notice to our agency mailing list
III. Press Release - December 3, 1998
IV. Public Notice placed on agency's Web site:
http://www.dep.state.wv.us/oaq

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

January 5, 1999

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)

February 1, 1999

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

Edward L. Kropp, Chief
1558 Washington Street, East
Charleston, WV 25311-2599

Phone: 304-558-4022
Fax: 304-558-3287
E-mail: Internet: "s_kropp@mail.dep.state.wv.us"

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

See 'f ' above

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

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

N/A

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 therefore?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: 45CSR28 - "Air Pollutant Emissions Banking and Trading"

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

B. SUMMARY OF RULE:

45CSR28 is a new legislative rule required to be promulgated by W.Va. Code §22-5-18. The objective of the rule is to provide potential air pollution control cost savings to regulated facilities by providing a voluntary air pollutant emissions banking and trading program. The program is intended to achieve overall air quality benefits through partial emission credit retirement provisions.

The proposed rule contains provisions explaining which sources may choose to participate in the program and, if eligible, under what conditions they may participate. Sources are permitted to trade any of the criteria pollutants under the rule. Section 4 of the rule contains certain prohibitions on the use of emission reduction credits under the program, including, *inter alia,* a restriction upon a use which would cause a violation of a national ambient air quality standard or a significant deterioration increment. Another significant restriction in the rule prohibits the use of credits in place of installing air pollution control equipment required by various technology-based emission standards.

Other sections of the rule establish how the emission baseline from which emission reduction credits may be generated is to be determined and prescribe certain emission monitoring and quantification protocols. The rule also establishes how credits may be used within and between geographic areas, including trading in interstate areas.

An important element of the rule is in section 11, which provides that ten (10) percent of all reductions shall be retired to provide an air quality benefit.

Other provisions of the rule provide for a publicly available emissions registry consisting of pertinent information provided by the generator, trader and user of the emission credits and the Director's determination of completeness after review of such information. The rule also contains provisions concerning enforcement, record-keeping and a program evaluation to be conducted every three (3) years.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

House Bill No. 4578, passed by the West Virginia Legislature on March 13, 1998, and effective ninety (90) days thereafter, amended the State Air Pollution Control Act by adding a new section, W.Va. Code §22-5-18.

This new section requires the Director to propose one or more legislative rules establishing a voluntary emissions trading and banking program within one hundred eighty (180) days of the effective date of the amendment.

By filing a proposed rule on December 2, 1998, allowing the public the opportunity to comment on the rule until January 5, 1999, and filing an agency-approved rule on February 1, 1999, the Director is complying with the mandatory provisions of H. B. No. 4578.

It should be noted that the Director utilized a "negotiated rule-making" process in the drafting of this proposed rule, and members of the work group consisted of representatives from the agency, the regulated community and the environmental community. Input from United States Environmental Protection Agency throughout the rule drafting process was also obtained and incorporated into the rule, to the extent possible, in the interest of obtaining necessary United States Environmental Protection Agency approval of the rule and program.

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

There is no direct counterpart federal regulation associated with the proposed rule; however, the United States Environmental Protection Agency has proposed a model regulation governing voluntary emissions trading programs for ozone precursors, has issued various guidance documents on the issue, and should issue final guidance for open market trading program approvals in early 1999.

Because the rule creates a voluntary program and there is no federal counterpart regulation in existence at the present time, no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3(c), the Director 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:

The proposed rule was reviewed by the Advisory Council during its meeting on December 2, 1998. The Council recommended that the director proceed with rule-making.

DRAFT MINUTES

ENVIRONMENTAL PROTECTION ADVISORY COUNCIL

December 2, 1998, Director's Conference Room, Nitro

The fourteenth meeting of the DEP Advisory Council was held December 2, 1998 in the Director's Conference Room located in Nitro. Chairman Mike Miano called the meeting to order at 1:00 p.m.

ATTENDING:

Advisory Council Members:

Mike Miano, Chairman
Jacqueline Hallinan
Larry Harris
William Raney
Rick Roberts
William Samples

Environmental Protection:

Bill Adams
John Ailes
Dale Farley
Andy Gallagher
Randy Huffman
John Johnston
Mike Lewis
Pat Park
Pam Nixon
Cap Smith
Barbara Taylor
Karen Watson

1) **Introduction of Pam Nixon, DEP's Environmental Advocate**.

Chairman Miano introduced Pam Nixon, DEP's Environmental Advocate. Pam told the Council she is looking forward to working with DEP and the Council members. Council welcomed Pam to her new position in DEP.

2. Review and Approval of Minutes of July 22, 1998 Meeting.

The minutes of the July 22 meeting were approved with comment from one Council member. Bill Raney asked if there had been any resolution to the concerns Rick Roberts brought up in the last meeting concerning the Council's involvement in DEP's rule-making process. Mr. Miano asked if the new rule-making policy, implemented as a result of the Council's comments, had been distributed to the Council. Carrie Chambers stated that it was mailed to the Council the first of September and noted that she would send Mr. Raney (and any member that needed one) another copy of the policy.

3. 45CSR28 – "Air Pollutant Emissions Banking and Trading."

John Johnston, Karen Watson, and Dale Farley from DEP's Office of Air Quality briefed the Council on the new rule being proposed by OAQ and filed for public hearing later in the afternoon– "Air Pollutant Emissions Banking and Trading." It was first explained to Council why the rule was being filed several months after the filing deadline for proposed rules that would be addressed by the 1999 Session.

Karen Watson, OAQ Legal Counsel, explained that an amendment to WV Code §22-5-18 made during the 1998 session required the agency to propose a legislative rule for emissions banking and trading, and to do so within 180 days after the effective date of the amendment. She explained that this has been a monumental task, considering the complexity of the rule and also from the standpoint of treading on "unfamiliar territory."

Bill Raney asked about agency resources/funding required for implementation of the rule. Dale Farley, OAQ, explained that this program would be a new, additional activity to be staffed and funded. He then went on to explain briefly the credit registration fee provisions in the rule that could partially or perhaps fully fund this activity.

Jackie Hallinan asked how the emission credit baseline date is determined. Dale explained that the baseline could go back to 1991 depending on other rule restrictions and that this was also an area of uncertainty with respect to EPA approval of the proposed rule.

A brief discussion was then held on allowing interstate emission trades and Bill Raney asked whether the conditions in the rule for rule/implementation equivalency between states are realistic. Dale explained that rule equivalency is very important for both environmental and economic reasons and that DEP had provided that equivalency be assured "to the extent possible" in the rule.

At the conclusion of discussions on proposed 45CSR28, the Council recommended to the Director the filing of the proposed rule as drafted.

Office of Air Quality

John Johnston briefed the committee on the following three amendments.

AIR POLLUTION CONTROL ACT - WV Code §22-56(b)(1); WV Code §22-5-5; and WV Code §22-5-15(d)

Office of Waste Management

WV Code §22-19 - HAZARDOUS WASTE EMERGENCY RESPONSE FUND

Cap explained that this amendment removes the million dollar floor to be replaced with 1.5 million, with no more than a $3 million amount. Cap encouraged the Director to put this amendment on the list to the Governor. He also asked the committee to encourage the Manufacturers Association to go along with this amendment.

Jackie Hallinan commented to Cap that we almost HAVE to have this amendment, and Cap agreed. She also stated that although the amount would be increased, that didn't necessarily mean that we would get those monies from the companies. They could file bankruptcy, and we still would not get the money. The Director agreed that this was correct.

Bill Raney questioned whether this would be another million dollars by assessing "users"? Cap confirmed that this is correct. Cap stated further that we probably would assess these companies every few years. Basically, the money would be for emergency response.

The Committee questioned what the total assessment was last year and who was the largest contributor. Cap provided the information that he had available to him at the time. He went on to explain that with this amendment there would be a "cap" of $3 million.

Propose a New Statute to Deal with Waste Tire Management

Cap briefed the committee on this proposed statute dealing with existing illegal tire dumps, as well as used tires being collected currently by vendors.

Bill Raney questioned whether general revenue monies were requested each year to help OWM operate. He discussed the $3 charge per tire when you purchase tires and where this money actually goes.

The Director stressed what he is wanting is legislation for waste tires in the State.

Bill Raney questioned how many tires we generate per year. Cap responded with an approximate figure of 2.5 million. Bill Raney further asked who opposes this? Cap explained that Senator Craigo supports this proposed legislation, but that most see it as a tax increase and therefore no one wants to support it.

Jackie Hallinan stated that it really is a tax.

Bill Raney stated that he thought that the $3 everyone is charged when they buy tires came back to DEP. Cap explained that it does not.

Jackie Hallinan suggested that maybe an educational program or public agency might collect these tires.

Office of Water Resources

WV Code §22-11-10 - Amend statute to increase NPDES permit fees

Barbara Taylor briefed the Committee on the amendment.

Bill Raney asked if our intent was to get agreement from the stakeholders. Barbara confirmed that is correct. Bill asked for clarification that this amendment is not to allow investment of funds, but to allow interest to accrue. Barbara confirmed his statement.

WV Code §22-11-24 - Create statutory provisions for criminal felony to address persons that abandon facilities.

Jackie Hallinan asked for an explanation for a 'package plant'. Barbara explained.

WV Code §22-14-15, 16 & 17 - Amendment to increase civil penalties and certification fees in Dam Control Act.

Barbara Taylor briefed the committee on this amendment and stated she would provide exact figures that could be reflected in the minutes. (She did not have the figures with her at the time.) She believes the maximum would be $2500, instead of the current $200/day, with a maximum of $400.

Rick Roberts commended Barbara Taylor for working so hard on the stakeholders' process and for putting up with the different points of view. Bill Raney agreed.

(Note: Bill Raney had to leave at this time.)

Office of Oil and Gas

WV Code §22-21 - Coalbed Methane Law

Mike Lewis briefed the committee on this amendment. There was no comment.

WV Code §22-10 - Abandoned Wells Law

Mike Lewis briefed the committee on this proposed amendment. Larry Harris asked 'who' usually abandons wells, and how many are there? Mike stated that our approximate figure is 50,000 abandoned wells in the State.

WV Code §22-6 - Privatize the Bonding of Wells

Mike Lewis briefed the committee on this amendment. No comments by the committee were made.

DEP Legislation Affecting Environmental Programs

STATUTE OF LIMITATIONS - Possible rewrite of a one-year statute of limitations that the environmental programs are currently operating under to five years. The one-year limitation puts tremendous pressure on the agency to finalize enforcement actions within that time frame. It also puts the regulated community under the threat of federal enforcement if the statute expires on the state action.

Bill Adams briefed the committee on this statute. Jackie Hallinan questioned whether this would hamper the U.S. Attorneys' Office. Bill explained that it would not.

Cap Smith asked the Director if we could urge the Governor to put this in his package. The Director agreed that we could.

Open Discussion

Randy Huffman announced that the next meeting would be March 22, from 1-5 p.m., in the Nitro second floor conference room. This will be a week after the legislative session ends.

The Director gave the committee members his e-mail address, in case they would ever want to e-mail him their questions, concerns, or comments.

Larry Harris commented on the dredging of streams in West Virginia, giving examples of Dry Fork, Seneca Creek, Red Creek, North Fork, stating that there was "horrible" work being permitted, with violations of all types. He has been talking to the Soil Conservation Committee members and encouraged the Director to keep a watchful eye on this.

Barbara Taylor explained that most of these are coming under the 404 permit. We are trying to write certifications that do not allow things like Larry was describing. She explained that ultimate enforcement power lies with the Corps of Engineers.

Bill Samples asked if we anticipate doing the TMDLs, assuming that the funding goes through. He asked if we have 'given up' on TMDLs as a State function. Barbara confirmed that 'no' we have not given up, and went on to explain.

Bill Samples asked if EPA has 'backed off' on any of their threats? The Director stated that he finds EPA reasonable to deal with on the conflict of interest issue. He believes the permitting issue will soon be resolved (Hobet permit), although he is frustrated that it has taken so long to have something happen.

Bill Samples asked what kind of timetable we see happening on ozone? What do we think is going to happen on the appeal? What is the time frame on that? He requested a brief discussion on how that rule is being developed. Are we contemplating stakeholders' involvement? John Johnston gave a brief overview of this issue.

Bill Samples commented on a publication he recently came across on the northern upper Ohio River watershed program, and that he had never seen this before. Barbara Taylor stated that it had not been publicized very well until now. It is now on DEP's web page. She also stated that we should have 2-3 more publications coming out in the next 4-5 months. Bill Samples stated that he thought this was a good report and people need to know these publications are available.

Randy Huffman asked for a motion to be made to adjourn. Rick Roberts moved to adjourn the meeting at 3:30 p.m.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR28 "Air Pollutant Emissions Banking and Trading"

Type of Rule: X Legislative _____ Interpretive _____ Procedural

Agency: Division of Environmental Protection, Office of Air Quality

Address: 1558 Washington Street, East

Charleston, WV 25311-2599

1. Effect of Proposed Rule	Annual		Fiscal Year		
	Increase	Decrease	Current	Next	There-after
Estimated Total Cost	$78,000-127,000	$ —	$78,000	$122,000	$127,000
Personal Services	52,000-117,000	—	52,000	104,000	117,000
Current Expense	8,000-20,000	—	20,000	16,000	8,000
Repairs and Alterations	—	—	—		
Equipment	2,000-6,000	—	6,000	2,000	2,000
Other	—	—	—	—	—

2. Explanation of above estimates: The above estimates assume that 1 FTE of professional staff work will be necessary to develop the program documentation, registry system and other program elements during the current fiscal year. At a modest program activity level, 2 FTE of professional staff time would be required to implement the program in the following fiscal year and thereafter.

3. Objectives of these rules: To provide potential air pollution control cost savings to regulated facilities by providing a voluntary air pollutant emissions banking and trading

program. The program is intended to achieve overall air quality benefits through partial emission credit retirement provisions.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Program development and implementation costs are estimated to range from $78,000 in the current year to $127,000 in future years. These costs would be partially or totally funded by registration fees ranging from $2 to $6 per ton of emission reduction credits as provided by the proposed rule.

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

Minimal or no economic impact is anticipated for political subdivisions or specific citizen groups. Regulated industrial/commercial facilities that voluntarily use the emissions banking and trading program should realize air pollution control cost reductions relative to existing requirements.

C. Economic Impact on Citizens/Public at Large.

Minimal impact anticipated for citizens/public at large.

Date: December 1, 1998

Signature of Agency Head or Authorized Representative

John H. Elston

45CSR28

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

SERIES 28
AIR POLLUTANT EMISSIONS
BANKING AND TRADING

§45-28-1. General.

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

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

1.3. Filing Date. --

1.4. Effective Date --

§45-28-2. Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.18. "Geographic area" means any specific region designated by the director, considering the topography, air quality contribution of sources, and any air quality concerns relevant to that region. In designating a geographic area or determining completeness with respect to notices of proposed emission reduction credit use, the director shall assure that emission reduction credits to be used are generated at a source which contributes to the air pollutant concentration in the area of the source using such credits.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.33. "Responsible official" means one of the following:

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

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

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

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

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

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

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

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

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

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

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

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

§45-28-3. Applicability.

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

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

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

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

§45-28-4. Prohibitions and restrictions.

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

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

PM_{10}:	15 tons per year
SO_2:	40 tons per year
NO_2/NO_X:	40 tons per year
CO:	100 tons per year
VOC:	40 tons per year
Lead:	0.6 ton per year

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

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

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

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

4.3. The use of emission reduction credits shall not result in an actual emissions increase of any hazardous air pollutant at a particular facility nor shall one or more hazardous air pollutants be traded for a different group of hazardous air pollutants.

4.4. The director may prohibit the use of emission reduction credits if he or she determines that such use would be inconsistent with the Code, the federal clean air act or protection of the public health, safety or welfare.

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

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

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

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

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

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

4.11. Any source which participates in a regional nitrogen oxides trading program established pursuant to final rules promulgated by the United States Environmental Protection Agency at 63 FR 57536 (October 27, 1998) shall be prohibited from generating, trading or using nitrogen oxides emissions reduction credits under this rule.

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

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

§45-28-5. Ozone season restrictions.

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

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

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

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

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

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

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

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

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

Where:

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

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

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

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

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

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

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

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

emission credits generated from shutdown or curtailment shall so certify in the notice provided under section 12.

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

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

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

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

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

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

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

7.2.b. Modification of process or process equipment.

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

7.2.d. Implementation of energy conservation programs.

7.2.e. Implementation of operational changes.

7.2.f. Implementation of pollution prevention programs.

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

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

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

monitoring methods are approved by the director and the administrator of the United States Environmental Protection Agency.

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

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

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

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

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

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

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

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

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

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

8.2.a. An existing emission monitoring and quantification protocol which has been approved by the director and the United States Environmental Protection Agency for purposes of

demonstrating compliance with applicable requirements, provided such protocol meets the criteria specified in subsection 8.7, and, if applicable, subsection 8.8.

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

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

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

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

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

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

8.5.c. Mass-balance calculations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.8. Notwithstanding the provisions of subsection 8.7, emission monitoring and quantification protocols for use under this rule for the generation of emission reduction credits at mobile sources shall be consistent with the following, as applicable:

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

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

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

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

§45-28-9. Recordkeeping requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11.1.b. Emission reduction credits for all pollutants which are generated by source shutdowns may be transferred to the West Virginia Office of Economic Development or a public-interest group designated by the person generating the emission reduction credits. Shutdown emission reduction credits shall be subject to the air quality benefit discount and retirement provisions of this subsection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12.5. The notice and certification required under this rule shall be submitted electronically or by certified mail to the director for a determination of completeness. Within sixty (60) days of receipt of the notice and certification for emission reductions generated after the effective date of this rule, the director shall make a determination and provide a written response to the person submitting the notice and certification as to the completeness of the submittal. For emission reductions generated before the effective date of this rule, the director shall make such determination and provide a written response within one hundred and eighty (180) days of receipt of the notice and certification. A determination of completeness or incompleteness made by the director shall be considered a final agency decision subject to review by the air quality board pursuant to the Code and W.Va. Code §§22B-1-1 et seq. A determination of completeness does not constitute an approval by the director. The director shall notify the person requesting registration of emission reduction credits of the amount of registration fees required pursuant to subsection 14.6 within the notice of completeness provided under this subsection. Within five (5) business days of the date of receipt of payment of the required registration fee the director shall enter the information required by section 14 in the emission trading registry. Immediately upon entry in the emission trading registry, the information in the notice and certification shall be available to the public, except for information that is determined to be confidential under W.Va. Code §22-5-10 and 45CSR31. If the notice and certification are determined by the director to be incomplete, the proposed emission reductions are not eligible to generate emission reduction credits and no registration fee shall be assessed. A notice of incompleteness shall not preclude or prejudice a person from submitting a corrected or revised notice and certification.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13.6. The director shall not issue a notice of completeness for a proposed use of emission reduction credits until he or she determines that the air quality protection and maintenance provisions of subsection 4.1 are satisfied based upon the information contained in the notice required by subsection 13.2 and/or the director's independent analyses of air quality impacts and

attainment and maintenance plan requirements for the areas affected by the emission reduction credits use. The director shall send a written response to the person who submitted the notice of use and certification determined to be inconsistent with the provisions of subsection 4.1 explaining why the determination was made. A determination of inconsistency with the provisions of subsection 4.1 by the director shall not preclude or prejudice a person applying to use emission reduction credits from submitting a revised notice and certification to address the inconsistencies identified by the director.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§45-28-15. Enforcement.

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

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

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

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

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

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

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

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

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

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

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

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

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

15.3. If the director finds, without being provided a notice pursuant to subsection 15.2, that a person has registered emission reductions for the generation of emission reduction credits that are not real, surplus, enforceable, permanent, and quantifiable and the emission reduction credits have been or are being used or traded, then the person who generated and registered the insufficient emission reductions shall generate, or obtain, and donate emission reduction credits to the director in an amount not to exceed to treble the number of emission reductions or

emission reduction credits that were not real, surplus, enforceable, permanent, and quantifiable. If the director finds, after having been provided notice under subsection 15.2, that a person has registered emission reductions for the generation of emission reduction credits that are not real, surplus, enforceable, permanent, and quantifiable and the emission reduction credits have been or are being used or traded, the person who generated and registered the insufficient emission reductions may be required to generate, or obtain, and donate emission reduction credits to the director in an amount equal to treble the number of emission reductions or emission reduction credits that were not real, surplus, enforceable, permanent, and quantifiable. Reconciliation of emission reduction credits shall be on the same basis, either tons per year or tons per ozone season, as credits found not to be real, surplus, enforceable, permanent, and quantifiable. Emission reduction credits donated to the director under this subsection shall be retired to assure realization of an air quality benefit and maintenance and attainment of national ambient air quality standards. A donation of emission reduction credits under this subsection shall not be considered to be a civil or criminal penalty. In addition to providing a donation under this rule, a person may be subject to civil and criminal enforcement actions, penalties, and imprisonment as provided under the Code.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§45-28-17. Interstate trading.

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

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

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

17.3.a. The emission reduction credit generation system.

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

17.3.c. Appropriate geographic restrictions.

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

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

17.3.f. Record retention requirements.

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

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

17.3.i. Temporal requirements and definitions.

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

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

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

FORM #1

Do Not Mark In This Box

FILED

DEC 2 3 29 PM '98

OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

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

RULE TYPE: _____; 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 NEW RULE BEING PROPOSED: 28

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

DATE OF PUBLIC HEARING: January 5, 1999 TIME: 6:00 p.m.

LOCATION OF PUBLIC HEARING: Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311-2599

COMMENTS LIMITED TO: ORAL___, WRITTEN___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: John H. Johnston, Chief
Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311-2599

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

John H. Johnston

CECIL H. UNDERWOOD
GOVERNOR

BUREAU OF ENVIRONMENT
10 McJunkin Road
Nitro, WV 25143-2506

MICHAEL P. MIANO
COMMISSIONER

December 2, 1998

Ms. Judy Cooper
Director
Administrative Law Division
Capitol Complex
Charleston, WV 25305

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

Dear Ms. Cooper:

This is to advise that I am giving approval to file the above-referenced rule with your Office as Notice of Public Hearing and Comment Period.

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

Sincerely yours,

Michael P. Miano
Commissioner

MPM:cc

Attachment

cc: John Johnston
Karen Watson
Carrie Chambers

NOTICE OF PUBLIC HEARING AND PUBLIC COMMENT PERIOD

On **January 5, 1999**, beginning at 6:00 p.m., the West Virginia Division of Environmental Protection, Office of Air Quality will hold a public hearing on the following legislative rule:

45CSR28 "Air Pollutant Emissions Banking and Trading"

Upon authorization and promulgation of 45CSR28, the Office of Air Quality will seek federal approval of the rule by the U.S. Environmental Protection Agency for inclusion in the State Implementation Plan under the Federal Clean Air Act.

The hearing will be held in the Office of Air Quality's Conference Room located at 1558 Washington Street East, Charleston, West Virginia. The hearing is open to the public. Written and oral comments by the public will be accepted during the hearing on **January 5, 1999**, and will be made a part of the rulemaking record. The public may also submit written comments by mail or other delivery to the Office of Air Quality through **January 5, 1999**, for inclusion in the rulemaking record at the following address:

John H. Johnston, Chief
Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311-2599

Copies of the proposed legislative rule will be available for public review on or before **December 4, 1998** at the Office of Air Quality's Charleston office at the above address.

CHARLESTON NEWSPAPERS
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11/30	LEGF	GZ	PUBLIC HEARING 591729001	L458448	1X0488 4.88	6.19	30.21	
11/30	LEGF	DM	PUBLIC HEARING 591729001	L458448	1X0488 4.88	6.19	30.21	60.42
			TOTAL INVOICE AMOUNT					60.42

State of West Virginia, **AFFIDAVIT OF PUBLICATION**

I, Sandra Riggs of
THE CHARLESTON GAZETTE, A DAILY DEMOCRATIC NEWSPAPER,
THE DAILY MAIL, A DAILY REPUBLICAN NEWSPAPER,
published in the city of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of:
PUBLIC HEARING
was duly published in said paper(s) during the dates listed below, and was posted at the front door of the court house of said Kanawha County, West Virginia, on the 1ST day of DECEMBER 1998. Published during the following dates: 11/30/98-11/30/98
Subscribed and sworn to before me this 2 day of December.
Printers fee $ 60.42

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
My Commission Expires December 14, 2008

Notary Public of Kanawha County, West Virginia

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John H. Johnston, Chief
Office of Air Quality
1558 Washington St., E.
Charleston, WV 25311-2599

Copies of the proposed legislative rule will be available for public review on or before **December 4, 1998** at the Office of Air Quality's Charleston office at the above address.

(458448)

DEP

News Release

Division of Environmental Protection
West Virginia

Release: Dec. 3, 1998
For Information: (304) 759-0515

DEP seeks comments on emissions trading rule

CHARLESTON – A proposed rule aimed at cleaner air and to make more flexibile industry's ability to operate has been filed with the secretary of state's office by the Division of Environmental Protection, Office of Air Quality Chief John Johnston said Thursday.

The banking and trading rule is required under legislation adopted March 13. It is the first time West Virginia has had such a regulation, Johnston said.

A public hearing will be held at 6 p.m. Jan. 5 to accept written and verbal comments on the proposed rule, which was developed after extensive meetings with a number of interested parties. The hearing will be in the Office of Air Quality's conference room, 1558 Washington Street E., Charleston. The public comment period will end with the conclusion of the hearing.

The objective of the proposed rule is to provide potential air pollution control cost savings to regulated facilities. This would establish a voluntary air pollutant emission banking and trading program.

Industrial plants now must obtain permits to discharge a limited amount of certain pollutants in the air. If they provide greater controls on their emissions, they are allowed to obtain a credit for a portion of the pollutant space they do not use.

That credit can be used at another facility, or sold or purchased, Johnston said. This rule would regulate how that trading and banking takes effect, Johnston said.

A key enviornmental clean up provision is that a company, with limit exception, cannot save 100 percent of the credit space it builds up. The rule requires it to forego 10 percent of the proposed credit when it is put in the state bank.

"This rule should make for cleaner air and more flexibility in operations," Johnston said.

The rule sets fee schedules that industry must pay to enter into the program.

A work group comprised of representatives from the agency, the regulated community and the environmental community drafted the rule, along with input from the U.S. Environmental Protection Agency (EPA). Since there is no counterpart federal regulation at this time, approval of the rule and program by EPA is necessary for inclusion in the state implementation plan under the Federal Clean Air Act.

(More)

DEP

News Release

Division of Environmental Protection
West Virginia

Release: Dec. 3, 1998
For Information: (304) 759-0515

Air Rule 2-2-2

Provisions in the rule explain which sources may participate in the voluntary program and under what conditions they may participate. The rule prohibits the use of emission trading in situations that would cause a violation of a national ambient air quality standard or a significant deterioration in an area's air quality. The use of trading is also prohibited in place of installing air pollution control equipment required by various technology-based emission standards.

After the public hearing, the rule goes to the Legislature for its action.

A copy of the proposed rule is available from the Secretary of State's Office, 558-6000 or the Office of Air Quality, 558-4022.

The proposed legislative rule will be available for public review on Dec. 4 at OAQ's Charleston office at 1558 Washington Street E. during normal business hours. Additional information may be obtained by contacting Karen Watson or Dale Farley, at (304) 558-0885 or e-mail: **kwatson@mail.dep.state.wv.us** or dfarley@mail.dep.state.wv.us.

Comments for inclusion in the rulemaking record should be sent to John H. Johnston, Chief, Office of Air Quality, 1558 Washington Street, East, Charleston, WV 25311-2599.

30

Division of Environmental Protection

Receiving Comments on: 45 CSR 28 - "Air Pollutant Emissions Banking and Trading" **Time/Date:** January 5, 1999

	NAME	AFFILIATION	ADDRESS	PHONE	COMMENT YES	COMMENT NO
1.	Pamela Nixon	DEP	10 McJunkin Rd. Nitro WV	759-0570	✓	
2.	Denise Poole	OVEC	[illegible] Huntington WV	522-0246	✓	
3.	J L Worstell	UCC	UCC South Charleston Plant	747-3169	✓	[illegible]
4.	Elizabeth K. Appel	Robinson & McElwee-WVMA	[illegible] Virginia St E Charleston	347-8344		✓ [illegible]
5.	G.J. Wooten	AEP	1 Riverside Plaza Columbus Ohio	(614) 223-1262		✓
6.	Barbara Little	WVa Chamber of Commerce	[illegible] Charleston WVa	304 340-1355		✓
7.	Gary Gess	Capitol Cement	P.O. Box 885 Martinsburg WV	304 267 8966		✓
8.	Tim Mallan	AEP	301 Virginia St. E Charleston WV	304 348-4763	✓	
9.	Jim [illegible]	Va. Power	[illegible] Glen Allen VA 23060	804-273-3010		✓
10.	Norman H. Cloud Jr.	Morgantown Energy Associates	555 Beechurst Ave. Morgantown WV 26505	304 284 2531		✓
11.	Robert L Burns, Jr.	Bowles Rice McDavid Graff & Love PLLC	600 Quarrier Street, Charleston, WV 25301	304 347-1742		✓ [illegible]
12.	[illegible]	public	[illegible] SE	304 925 6123	✓	
13.	James Kotcon	WVEC	[illegible] Morgantown 2650[illegible]	594-3322	✓	
14.	Mary Ellen O'Farrell	WVEC / Green Cross	1010 Valley Rd. Chas. W.V. 25302	304 346 3303		X
15.	[illegible]	WVSC	1304 Camden Dr. Chas 25302	342-4351		
16.						
17.						

WEST VIRGINIA MANUFACTURERS ASSOCIATION
2001 Quarrier Street, Charleston, WV 25311
Telephone: (304) 342-2123
FAX: (304) 342-4552
wvma@wvma.com

January 5, 1999

John H. Johnston, Chief
Office of Air Quality
Division of Environmental Protection
1558 Washington Street, East
Charleston, WV 25311-2599

Re: 45 CSR 28 - "Air Pollutant Emissions Banking and Trading"

Dear Chief Johnston:

The West Virginia Manufacturers Association endorses and supports the adoption of an emissions banking and trading rule for West Virginia. We are mindful that the procedures and forms used to implement this rule will be important to the ease and usefulness of these rules, and therefore ask that the Office of Air Quality use either interpretive or procedural rules to develop the forms referred to in the rules that will be used for creating, transferring and tracking emissions credits. The WVMA appreciated the opportunity to serve on the work group which helped to develop this proposed rule.

Very truly yours,

John K. Pitner
Air Team Leader

JKP:paj
cc: Karen S. Price, President

AirBank

January 4, 1999

Mr. John H. Johnston
Chief, Office of Air Quality
WVA Division of Environmental Protection
1558 Washington Street, East
Charleston, WV 25311-2599

RE: **Comments on Proposed Rule: 45CSR28 "Air Pollutant Emissions Banking and Trading"**

Dear Mr. Johnston:

The AirBank appreciates this opportunity to contribute to the development of the State of West Virginia's Air Pollutant Emissions Banking and Trading Rule. Your efforts to date in developing the State's emissions banking and trading rule are to be commended. As individuals - and as an organization, you should take great pride in your success in effectively transforming a new and innovative air quality compliance concept into a viable and workable environmental management program for your State.

As a business designed specifically to provide air emission trading and brokerage services, The AirBank has a continuing interest in the long-term viability and growth of a robust trading marketplace. We are therefore committed to the success of the West Virginia program and, as such, will do all in our power to help ensure that this initiative is both a regulatory and a technical success.

By way of background, The AirBank is a leading emissions trading company offering air emission trading services to industry and government clients nationwide. With offices in Michigan, Massachusetts, New Jersey, New Hampshire and Texas, we provide cost-effective, innovative and flexible solutions to air quality compliance issues facing our clients through the application of market-based emission control alternatives.

Clearly, The AirBank has a strong and vested interest in West Virginia's development of a viable market-based emission reduction credit trading system. However, based on our extensive emission credit trading market experience in all of the open market emission trading states, we know that for such a system to succeed, it must provide a clear and measurable environmental benefit.

Any trading system that fails to provide positive environmental improvements, or which is perceived as affording some level of environmental harm, will not endure in the long run. Therefore, The AirBank will focus its comments on those aspects of the draft rule that we feel could potentially inhibit the timely development of the market - thus limiting the ability of that market to improve air quality.

3 Riverside Drive, Andover, MA 01810
Tel: 888-997-2265 Fax: 978-688-4513

We offer the following comments to assist your office in finalizing the draft rule:

Credit Uses

Unlike other environmental regulations, open market trading rules are "voluntary" regulations, which by their definition are only binding on those parties who *choose* to use them. This important distinction among regulations underscores what our experience tells us – i.e., in order for open market trading to grow and prosper, it must be presented in an engaging and positive light, emphasizing its attributes before discussing any prohibitions (Sect. 4.2). In this way, potential generators and users will be encouraged to explore it. The New Jersey open market trading rule clearly emphasizes uses, albeit limited. Michigan and Texas have had to develop guidance documents to assist in more appropriately highlighting credit uses. In fact, as Texas revisits its rule, it is expected that uses will be more prominently presented.

There are several potential uses for Emission Reduction Credits (ERC) that could appeal to a significant cross-section of WVA air pollution sources – uses that can be generally categorized as providing industry with enhanced facility operating flexibility. Such applications might be seriously considered by those sources that are in continuous compliance and wish to remain so during periods of accelerated production or in spite of process excursions or control device upsets.

Generally speaking, Stationary Source Facility Operating Flexibility can be defined as a broad use category incorporating several specific application scenarios including, but certainly not limited to …

- Compliance Margin
- Operational Margin
- Audit / Enforcement Margin
- R&D / Pilot Production Margin
- Monitoring Supplement
- Compliance Reporting Supplement

Attachment A provides a further description of these uses. We would like to emphasize that the potential environmental benefit to be derived from market trading is directly proportional to the allowable range credit uses. The more uses that are identified as acceptable to the WVA Office of Air Quality, the more demand for ERCs and thus the greater will be the effect of the 10% environmental discount.

The AirBank feels very strongly about the importance of identifying and promoting a wide range of credit uses to help ensure the development of a robust open market trading program. It is for this reason that The AirBank works with program participants at all stages of the emission trading process. We are the only emission broker that provides the

full range of credit management services, including: credit generation, use / retirement and transfer; certification; verification; and valuation.

Notice Processing Time

While perhaps more of a logistical issue, our experience in each of the open market trading states underscores the importance of timely processing of notices of generation, transfer and use / retirement on the part of the regulatory agency. Having performed all of the VOC open market transactions in the Michigan, we would encourage the WVA Division of Environmental Protection to discuss with the MI Division of Environmental Quality (MDEQ), their notice processing procedures.

Our experience with Michigan as well as other state environmental regulatory agencies tells us that a thirty (30) day processing time is more than sufficient for processing notices of generation and use. Notices of transfer are simply administrative processing and can usually be handled in far less time. Reference is made to Sect. 12.5 and Sect. 13.5.

Director Discretion

While we understand the need for the Director to preserve discretion in the ultimate validation of emission reduction credits under the program, we believe that "blanket" discretion in removing any credits from the registry without restriction (ref. Sect. 14.7) will not produce a workable, robust trading program. Once created and approved by the Division, removal of credits should be not allowed unless the open market trading rule was subsequently found to have been violated, due to nondisclosure of information or similar circumstance. Confidence in the trading program and the process will be well served when users who follow the Rule are rewarded with an undeniable business asset created for transaction in the open market.

Confidentiality

The types of information and the procedure for protecting business confidentiality should be addressed; generally in the Rule, and in more detailed terms in Division credit review and credit registration procedures. It has been The AirBank's experience that our clients—both credit generators and credit buyers—view credit pricing as business confidential information, and therefore important to their competitive position in the marketplace. Furthermore, disclosure of pricing information does not necessarily represent the "true" market value of emission reduction credit transactions. Many other factors, such as key contract terms and conditions, payment schedule and related consulting services, add considerable value to any transaction. In order to ensure the development of a robust trading program, therefore, these issues deserve appropriate consideration.

Interstate Trading

We agree with West Virginia's intent to allow interstate emissions reduction trading. An expanded geographical trading scope could help to further Regional trading dynamics. This would lead to even greater air quality improvements in West Virginia and in downwind locations resulting from the increased emission reduction credit generation potential bought by the expanded user demands of this more inclusive population.

The AirBank encourages the timely development of mutually beneficial Memorandum of Understanding with as many states as possible. We believe, however, that the "test of stringency" (ref. Sect. 17.5) relating to trading provisions of two states that are contemplating an interstate trade, must not be so rigid as to hinder the development of effective Memoranda of Understanding.

Such Agreements, considered in concert with the proposed trading Rule, would have the net effect of significantly enhancing the overall effectiveness, scope and applicability of the Rule. It might even encourage the development of compatible emission trading programs in other states throughout the Region.

- - - -

As a seasoned player in emissions trading and brokerage markets nationwide, we would be pleased to assist you and your staff in working through any market or policy issues that may arise in finalizing and implementing your Rule. We appreciate the opportunity to present our views on West Virginia's proposed Air Pollutant Emissions Banking and Trading Rule and to further the concept of emissions trading in the State of West Virginia.

Sincerely,

AirBank

Thomas G. Hopper, PE
President / General Manager

David V. Bubenick
National Open Market Trade Manager

- Attachment

Attachment A

of . . .

The AirBank

Regarding . . .

Comments on Proposed Rule: 45CSR28 "Air Pollutant Emissions Banking and Trading"

State of West Virginia
Division of Environmental Protection

January 4, 1999

Generally speaking, Stationary Source Operating Flexibility can be defined as a broad use category incorporating several specific application scenarios including, but not limited to . . . . .

- Compliance Margin
- Operational Margin
- Audit/ Enforcement Margin
- R&D/Pilot Production Margin
- Monitoring Supplement
- Compliance Reporting Supplement

The following descriptions should help to further characterize the above-listed Emission Reduction Credit (ERC) use applications:

Compliance Margin - Alternatively referred to as compliance insurance or compliance buffer, this application specifically refers to the use of ERC to compensate for unplanned emission excursions over permitted limits. Such unplanned emission exceedances can typically result from sudden process variations, inconsistencies in raw material or fuel makeup, unexpected changes in process operations, steam or electrical output requirements or malfunction of pollution control devices (bag breakage, loss of ESP field, etc.).

These emission excursions generally occur as a part of normal operations and therefore could be expected as a matter of course. The use of ERC as a compliance margin in these situations serves to ameliorate the attendant environmental "damage" caused by such

occurrences. While persistent exceedances are eventually dealt with via the enforcement route, occasional excursions over permitted limits are typically ignored. The use of ERC as a compliance margin in effect now answers the environmental damage caused by such unplanned process events.

The purchase of ERC to serve this purpose would, as with all other uses, be required in advance of their actual use with all appropriate notifications to the State regulatory authorities.

Operational Margin - This application refers to the use of ERC to offset planned emission excursions of limited duration over permitted limits. These situations, typical in day-to-day facility operations, result from temporary increases in production, accelerated manufacturing demands, enhanced scheduling needs, short term requirements for increased power or electrical demands, batch process transitions, startup and shutdown of operations resulting in emission spikes, soot blowing, etc. Manufacturing sources with fluctuating demand for several different products, each with distinct emission characteristics, could use ERC to accommodate emission increases resulting from changes in batch production runs without waiting for additional regulatory approval.

Audit/ Enforcement Margin - This use suggests the advance purchase of excess ERC to be used by a source if the ERC previously purchased for compliance purposes were found to be inadequate upon audit (e.g., improperly quantified). Sources using ERC as a compliance mechanism would simply buy extra ERC in addition to that required for compliance. The additional margin purchased would be determined by the buyer's tolerance for risk. If the ERC used is subjected to a downward adjustment as a result of a regulatory compliance review, the additional amount banked as the enforcement margin would be applied to cover the discrepancy. Again, such purchases would need to occur prior to their utilization.

R&D/Pilot Production Margin - Facilities with the occasional need to conduct limited, small-scale testing of new production processes or to run short-term pilot studies would purchase ERC in advance of such initiatives in an amount equal to or greater than the anticipated temporary increases in emissions. Previously, such pilot production activities required advance regulatory approval, with the possibility of a protracted permit modification process.

Monitoring Supplement - This use refers to ERC acquired to offset the higher level of uncertainty associated with certain continuous emission monitoring systems (CEMs) installed in lieu of more accurate (and typically far more expensive) monitoring systems. Alternatively, ERC could be purchased to compensate for the inability of a CEM system to achieve its minimum accuracy requirements as determined via an annual Relative Accuracy Test Audit (RATA).

Compliance Reporting Supplement - ERC could be purchased by sources seeking to reduce their reporting frequency or level of required reporting detail, thus providing assurance that the environment is not compromised as a result of the reduced administrative burden. The quantity of ERC required could be agreed upon in advance as part of permit negotiations.

State of New Jersey
Department of Environmental Protection &
Energy
Air Quality Management/ Rule Development
401 East State Street, 7th Floor(West), CN 418
Trenton, New Jersey 08625-0418

FAX Number (609) 633-6198

TO: KAREN WATSON

FAX NUMBER: 304-558-3287

DATE: 1/5/99

PAGE: 1 of 2

FROM: REGULATORY DEVELOPMENT SECTION

COMMENTS:
Hello Karen, Here is a brief and general comment on WV's rule proposal. We look forward to future contacts with you and Dale on Interstate Trading.

Allan Willinger, NJDEP

CONFIRMATION NUMBER: (609) 777 - 1345

State of New Jersey

Christine Todd Whitman
Governor

Department of Environmental Protection
Office of Environmental Planning and Science
401 East State Street
P.O. Box 418
Trenton, New Jersey 08625-0418
Phone: (609) 777-1345
Fax: (609) 633-6198

Robert C. Shinn, Jr.
Commissioner

January 5, 1999

Karen Watson, Esquire
West Virginia
Division of Environmental Protection
Office of Air Quality
1558 Washington Street East
Charleston, West Virginia 25311-2599

Re: Proposed 45CSR28 "Air Pollutant Emissions Banking and Trading"

We in New Jersey are pleased that West Virginia is proposing to establish a trading program for NOx emission reduction credits and wish to congradulate you on this initiative. It is New Jersey's experience that trading may afford more cost effective means for achieving air quality goals and it may also serve as a means for enhancing rule-effectiveness.

It is our belief that trading programs are most effective when implemented on a regional scale. Therefore we encourage you to join the Interstate Trading Workgroup recently established by the Ozone Transport Commission. We believe it will provide a forum where we can work together on regional trading issues so that we may develop consistent and complementary approaches to trading. The Workgroup's next meeting is on January 13-14, 1999 in Philadelphia.

Very truly yours,

John Elston, Administrator
Office of Air Quality Management

c: Sandra Chen, NJDEP
Allan Willinger, NJDEP

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MCDAVID GRAFF & LOVE, PLLC
ATTORNEYS AT LAW

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WRITER'S DIRECT DIAL NUMBERS
347-1742

E-MAIL
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January 5, 1999

VIA HAND DELIVERY

John H. Johnston, Chief
Office of Air Quality
1558 Washington Street, East
Charleston, West Virginia 25311-2599

Re: Comments on Proposed Rule 45 C.S.R. 28 "Air Pollutant Emission Banking and Trading"

Dear Mr. Johnston:

The Division of Environmental Protection, Office of Air Quality recently published a Notice of Public Hearing on a proposed rule, 45 C.S.R. § 28, "Air Pollutant Emissions Banking and Trading". Our firm represents Century Aluminum of West Virginia, Inc. ("Century Aluminum"), a producer of primary aluminum ingot, coiled and flat aluminum sheet, and heavy gauge aluminum plate in a variety of alloys, with operations located in Ravenswood, West Virginia. Pursuant to the Notice of Public Hearing, we submit the following comments on behalf of Century Aluminum regarding the proposed rule.

The statute requiring the Division of Environmental Protection, Office of Air Quality, to propose an Air Pollutant Emission Banking and Trading Rule, W.Va. Code § 22-5-18, provided that emission reduction credits could be generated for reductions and generation that occurred after January 1, 1991. The rule proposed by the Office of Air Quality addresses this requirement, however, the proposed rule does so in such a fashion as to severely limit the ability of larger companies and facilities to fairly generate and take advantage of such emission reduction credits as allowed under the statute.

Specifically, 45 C.S.R. § 28-12.2 provides that "emission reductions generated between January 1, 1991, and the effective date of this rule, the notice and certification required by subsection 12.1 shall be submitted within 180 days of the effective date of this rule." (Emphasis added). W.Va. Code § 22-5-18 did not provide any time limitation for companies to apply for and use previously generated credits based on emission reductions made prior to the applicability of the proposed rule. The time limitation currently proposed is much too short for larger facilities to fully and

fairly evaluate their previous emission reductions over a seven to eight year period to attempt to obtain emission reduction credits. As such, Century Aluminum is proposing that the deadline for submission of the notice and certification for the submission of notice and certification for the credits generated from early reductions be extended from 180 days to two years. This will allow larger facilities, such as the facilities operated by Century Aluminum, a fair and adequate amount of time to review the records of their previous emission reductions to determine whether any such reductions meet the criteria of the rule, and to submit notice and certification to the Division of Environmental Protection for such credits.

Additionally, the proposed rule is unclear as to whether facilities wishing to take advantage of emission reductions obtained after January 1, 1991, must submit their notice and certification within 180 days, or whether they must obtain a certification of completeness from the Director within the 180-day period. Further, the proposed rule does not address whether facilities may re-apply beyond the 180-day period if their application is determined to be incomplete by the Director. It does not appear that the Office of Air Quality is proposing to require a certification of completeness by the Chief within 180 days. Such a requirement would potentially create a very large workload for the Office of Air Quality in a very short time frame if numerous facilities submit applications for previously generated credits at the same time. However, the rule, as stated, is ambiguous with regard to the timing of the certification of completeness by the Director, and with regard to whether facilities may reapply beyond the 180-day period if their application is not certified as complete.

Accordingly, Century Aluminum of West Virginia, Inc., submits these comments and hopes they will be useful for the further development of a final rule for emission credit banking and trading in West Virginia.

Very truly yours,

Robert L. Burns, Jr.
Counsel for:
Century Aluminum of West Virginia, Inc.
Post Office Box 98
Ravenswood, West Virginia 26164-0098

RLBjr/trp
cc: Gail M. Graban, P.E.
Mr. David Altman
Leonard Knee, Esquire

Chuck Wyrostok

Clay Rt. Box 89-C
Spencer, WV 25276
304-927-~~1237~~ 2978

January 5, 1999

John Johnston, Chief
Office of Air Quality, DEP
1558 Washington St. E., Charleston, WV

Re: Comments on The Emissions
Trading Rule, 45CSR28

Dear Mr. Johnston:

Please accept my comments on the above issue:

1. The rule should be changed so that it complies with EPA policies requiring a 10% retirement of credits as an environmental benefit for all pollutants including NOx.
2. Reducing or shutting down operations to generate credits is bad for workers and the economy. It promotes layoffs and the US EPA prohibits it.
3. The OAQ rule allowing credits for emission reductions that occurred after 1991 is contrary to US EPA policy prohibiting granting credits prior to 1996. This would reduce incentives for companies to strive for greater emissions reductions.
4. The rule tends to inhibit public input. It needs better public notification requirements, especially where credits would be used in areas already experiencing high emissions.
5. Please keep intact the rule that currently prohibits use of credits in an area that would lead to an air quality violation, as a substitute for BACT, LAER, or New Source Reviews.
6. Please maintain the rule that currently requires monitoring data to verify that emissions reductions are "real, surplus, enforceable, permanent and quantifiable" before credits are authorized.
7. Please maintain the rule requiring that interstate trading for credits can occur only if a Memorandum of Understanding is signed between two states where the state with the more restrictive provisions applies its rules to emission credit generation and use. This is necessary and is designed to keep things in balance so that West Virginia does not become a dumping ground for emission credits generated in other states.

Thanks for considering these comments.

Sincerely,

Chuck Wyrostok

West Virginia
Chamber of Commerce

January 5, 1999

John H. Johnston, Chief
West Virginia Division of Environmental Protection
Office of Air Quality
1558 Washington Street, East
Charleston, West Virginia 25311-2599

RE: Comments of the West Virginia Chamber of Commerce on 45 CSR 28 Proposed Air Pollutant Emissions Banking and Trading

Dear Chief Johnston:

The West Virginia Chamber of Commerce (the "Chamber") has as its mission statement the goal of being an action-taking business organization that works for a favorable business climate for its membership and state. The Chamber Environmental Committee has the specific goal of protecting the environment while enhancing the growth of business in West Virginia. The Chamber works with local chambers of commerce and other associations to improve the environment and the economy of West Virginia by providing business leadership to solve state and regional problems. The Chamber is the voice of business in West Virginia.

General Comments:

First, the Chamber appreciates the opportunity afforded its members to participate in the work group drafting the proposed Air Pollutant Emissions Banking and Trading Rule ("emissions trading rule"). The statutory mandate in W.Va. Code § 22-5-18(a) for promulgating the proposed regulations within 180 days required expeditious action, and the OAQ staff exhibited an extraordinary effort in dealing with this complex subject and coordinating with the work group members.

The proposed rule is based on the Michigan emissions trading and banking rule, and primarily because of restrictions expressed by U.S. EPA on the "appropriate" scope of emissions trading both in the context of the Michigan rule and via direct comments on drafts of the proposed West Virginia emissions trading rule, the emissions trading rule appears to have very limited utility. Because of the complexity of emissions trading and banking in the context of the Clean Air Act programs under new source review and the various technology- based control programs — NSPS, BACT, RACT, NESHAP, and MACT — coupled with the 180-day time frame available for promulgation, there was not an adequate opportunity to examine the validity of EPA's stated restrictions on emission trading. Certainly, the EPA comments and referenced documents do not provide the statutory basis for imposition of most of the restrictions voiced by EPA on emissions trading. On the other hand, OAQ had as one of its purposes the promulgation of a rule which could be approved by EPA as part of the

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State Implementation Plan, and therefore accepted all of the EPA's restrictions. The Chamber urges, that since there was not enough time to appropriately analyze EPA's asserted restrictions on emissions trading which are reflected in the proposed emissions trading rule, that OAQ will consider reconvening the work group to analyze whether the rule, in fact, can be revised consistently with the Clean Air Act and implementing regulations to have broader applicability.

Specific Comments:

The Chamber does have the following comments on specific sections of the proposed emissions trading rule:

Section 4.2 provides:

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

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

While EPA has specifically stated[1] that emission reduction credits cannot be used in lieu of complying with NSPS § 111, NESHAP § 112 or MACT § 112, there is no such prohibition in regard to the BACT mandated by 45 CSR 27. In those few instances where the BACT would be different than a § 112 NESHAP or MACT, the opportunity for utilization of emission reduction credits should be allowed Revised § 4.2 should read:

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

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

[1]Although, as expressed in the general comments, the statutory validity of EPA's assertion needs to be established.

Section 4.3 provides:

4.3. The use of emission reduction credits shall not result in an actual emissions increase of any hazardous air pollutant at a particular facility nor shall one or more hazardous air pollutants be traded for a different group of hazardous air pollutants.

This prohibition is not required even by EPA guidance and discourages reductions in the toxicity of emissions which may be achieved by substituting the utilization of a feedstock or process material, such as a solvent, which has a lower toxicity. There has been a sufficient amount of information generated by EPA and others as to relative HAP toxicity which is in general use, to allow the Director to make determinations regarding the relative toxicity of many of the HAPs. The governing concept should be as expressed in 45 CSR 14 §2.34 D.(c) that: "*The decrease in actual emission must have approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.*" Although the Chamber recognizes that there was not sufficient time to set forth in the proposed emissions trading rule the hierarchy of acceptable HAP emissions trades, it is possible for the Director to make case-by-case determinations of HAP exchanges similar to the discretion provided in proposed § 4.1 for requiring air quality analyses.

Section 4.5 provides:

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

This blanket statement is contrary to the above-quoted provision of 45 CSR 14 § 2.34 D.(c) and could be construed as limiting netting otherwise currently available under 45 CSR 13 and 14. This language should be revised to be equivalent to that of 45 CSR 14 § 2.34 D.(c).

The Chamber trusts that its comments will be considered, and again compliments the OAQ on the considerable effort expended in promulgating this proposed rule and on involving and communicating with the regulated community.

Sincerely,

Stephen Roberts
President

Jackson-Kelly on behalf of Counsel to Chamber of Commerce

CHASFS2:166058

Rule Title: 45CSR28-"Air Pollutant Emissions Banking and Trading"

Pamela Nixon,
Environmental Advocate Office, WVDEP
Jan. 5, 1999

Thank you for allowing me to speak this evening. I complement you on your efforts to establish a rule for a voluntary air pollutant emissions banking and trading program for regulated facilities.

West Virginia is at present considered to be an attainment area in regards to Ozone (O_3). In order to remain in attainment it would be in our best interests to reduce the emission of all precursors to the formation of O_3. O_3 is a secondary pollutant, as you well know, and to be able to control it, we must curb the emissions of volatile organic compounds (VOCs) *and* nitrogen oxides (NOx).

I have concern about the exclusion of NOx from the retirement of 10% of all reduction, as stated in the Briefing Document, under Summary of Rule. It has been noted that VOCs, NOx, and the energy of the sun forms O_3 in the ambient air. EPA has identified the following 6 criteria pollutants: ground level O_3, particulates measuring less than 10 microns, NOx, sulfur dioxide, carbon monoxide, and lead.

There has been numerous studies comparing emergency room visits with ground level O3, and it has been found that there is a significant increase in respiratory related ER visits on days with elevated pollution. The National Institute of Chemical Studies and Harvard, conducted air quality monitoring and a health study of elementary school children in the Kanawha Valley, and concluded that there was an increase in the respiratory symptoms in children living in close proximity to chemical facilities and high auto traffic areas. Among the recommendations from the study was the call for a reduction in the emission of VOCs and acidic aerosols - and NOx is an acidic compound found ambient air. Those who are particularly vulnerable to the criteria pollutants are the young, the elderly, and people with chronic respiratory health problems. Even though we are in attainment, we have a population of individuals whose health is affected by lesser amounts of pollution, thus causing added medical costs to individual families.

If NOx is included in the emission reduction credits and are available for banking and trading, but not in the retirement of 10% of all reduction, in essence, we have done nothing to curb the emission of NOx. So I emphasize that we should include NOx as one of the pollutants to be retired. Then, we will truly be providing an air quality benefit.

I see a definite need to remove §45-28-7.2.g which states "Emission reductions for generation of emission reduction credits may be created using any of the following procedures: ...curtailment or shutdown of a source, process, or process equipment." Part of the mission of the DEP has been to attempt to balance the needs of business and the environment within the confines of the laws and regulations adopted by the WV Legislature and the United States Congress. If 7.2.g is included in this rule, this may lead to the elimination of jobs as a way to gain emission reduction credits that will be within the confines of the law. We should not allow a shutdown of a source, process, or process equipment to be justification for reduction credits at the expense of job-loss by loyal workers.

Industries should not be allowed to benefit financially, or otherwise, by selling emission reduction credits at the expense of job loss by loyal workers.

Again, I request that you consider adding NOx to the pollutants included in the retirement of credits, and to remove §45-28-7.2.g.

Thank you for considering my comments.

The West Virginia Environmental Council

1324 Virginia St. E.
Charleston WV 25301
Phone 304-346-5891
Fax 304-346-8981

Jan. 5, 1998

John Johnston, Chief
Office of Air Quality
1558 Washington St., East
Charleston, WV 25311-2599

Dear Mr. Johnston:

Please accept the following comments on the emissions trading rule (45CSR28) on behalf of the West Virginia Environmental Council. We are particularly concerned that, if done improperly, emissions trading programs will not achieve the environmental benefits envisioned by the Legislature and described in the purpose of the authorizing legislation 22-5-18 (a), to provide "incentives to make progress toward the attainment or maintenance of the national ambient air quality standards, the reduction or prevention of hazardous air contaminants or the protection of human health and welfare and the environment from air pollution." We believe that the rule, as currently proposed, has provisions that undermine the intent of the statute, that work against the very incentives that the law was intended to produce. The rule must be amended to achieve the goals stated by the Legislature as the purpose of this program.

The following provisions should be adopted.

1) **10 % NOx retirement**: The rule requires a 10 % retirement of credits as an environmental benefit for all pollutants EXCEPT nitrogen oxides. EPA policies require the 10 % retirement to apply to all pollutants, and language to address this concern had been adopted by the consensus working group that developed this rule. Unfortunately, DEP undermined the effectiveness of its own consensus process by unilaterally changing the language to which we had agreed. DEP arbitrarily reversed the clear consensus of the committee to resolve this issue in a manner satisfactory to all sides and revoked the 10 % retirement for nitrogen oxides. Without this, there is no environmental benefit from NOx trading, contrary to the purpose of the whole program.

I insist that the rule go back to the language we had agreed to as follows:

Delete the proposed section 11.1 and insert the following:

11.1 For air pollutants other than nitrogen oxides, ten per cent of emission reduction credits shall be credited as an air quality benefit to the state and retired from use. Emission reduction credits remaining in the registry after such discount shall remain in effect for ten years or until used and debited, whichever comes first.

11.2 For nitrogen oxides, emission reduction credits may either be registered in an approved regional or national trading program or may be registered and used in compliance with this rule.

11.3 For emission reduction credits generated from permanent shutdowns, ten percent of the credits shall be retired from future use. The remaining credits may be transferred by the depositor to the state office of economic development, or to a public interest group of the depositors designation.

(renumber the remaining sections 11.4 and 11.5)

This is the language that was originally agreed to by the working group. It meets the original intent to allow nitrogen oxides to be registered and traded in an approved national or regional program. It also meets EPA's requirement for a 10 % environmental benefit. And it is allowed under the language of the statute as stated in 22-5-18 (a) where the director is asked to promulgate this rule "to the full extent **allowed** by federal and state law" (emphasis added). It should be clear that if this rule produces no environmental benefit from nitrogen oxide trading, and will not be allowed by EPA, then DEP has failed in its duty to draft a rule to implement the program.

Because the issues has generated some confusion about what was originally intended, I further recommend that additional language be added to the end of section 11.2 above to read:

11.2 For nitrogen oxides, emission reduction credits may either be registered in an approved regional or national trading program or may be registered and used in compliance with this rule in which case they will be subject to the 10 % retirement as an air quality benefit to the state.

This language will clearly identify the air quality benefit and something like this will be essential to achieve the intent of the rule and to gain EPA approval.

2) **Shutdown credits**: The proposed rule allows credits to be generated by curtailing or shutting down operations at a facility. This is bad policy, both economically and environmentally. It requires the state to encourage job losses by providing credits for employers who eliminate jobs. Furthermore, EPA policy prohibits credits from shutdowns because it is so difficult to demonstrate that the emission reductions are real, rather than merely shifted to another company. At a minimum, the rule needs adequate safeguards against transferring the production and therefore the emissions, to another facility. I recommend that the following be added to sections 7.5:

7.5.a. The notice of emission reduction credit generation from curtailment (or shutdown) of operations shall identify the entities to which the curtailed production will be shifted or identify how previous markets for the product will be satisfied once the operations are curtailed.

3) **Starting Date**: The rule allows credits to be generated for any emission reductions that occurred after to 1991. EPA policy prohibits granting credits prior to 1996. Any credits granted for reductions prior to the enactment of the law undermines the effectiveness of the program. For the program to provide incentives for additional reductions, those credits should be as valuable as possible. If companies are able to flood the market with credits generated before the law even took effect, it would reduce the value of new emission reduction credits and undermine the incentive for companies to reduce further. I recommend that the starting date for emission reduction credit generation be set at the effective date of the act.

4) Public Notification: The rule needs expanded public notification requirements, particularly when credits would be used in areas already experiencing high emissions. I recommend that the following be added to section 13.2:

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

I also strongly support the following provisions and urge that they be retained in the final rule:

5) **Trading Prohibitions and Restrictions**: The rule currently prohibits use of credits in an area that would lead to an air quality violation, as a substitute for BACT, LAER, or New Source Reviews. These restrictions are essential to protect the health of nearby communities and must remain in the rule.

6) **Monitoring Requirements**: The rule currently requires extensive monitoring data to verify that emissions reductions are "real, surplus, enforceable, permanent and quantifiable" before credits are authorized. No credits should be granted without adequate monitoring data to verify that the reductions meet these criteria.

7) **Interstate Trading**: The rule currently requires that interstate trading for credits may only occur if a Memorandum of Understanding is signed between the two states requiring that the more restrictive provisions of either state apply to emission credit generation and use. This is critical to prevent West Virginia from becoming a dumping ground for emission credits generated in other states. Not only would it allow higher emissions in West Virginia, it would again undermine the incentives for West Virginia companies to reduce emissions by undercutting the market value of emissions credits.

Thank you for the opportunity to participate in this rule-making.

Sincerely,

James Kotcon

James Kotcon
412 Tyrone-Avery Road
Morgantown, WV 26508
304-594-3322 (home)
304-293-3911, ext. 2230 (office)

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

January 5, 1999

Mr. John H. Johnston, Chief
Office of Air Quality
Division of Environmental Protection
State of West Virginia
1558 Washington Street East
Charleston, WV 25311-2599

Dear Mr. Johnston:

EPA has reviewed the proposed West Virginia emissions banking and trading regulation that will be the subject of a public hearing on January 5, 1999. This letter is a supplement to the comments sent to you earlier but includes comments related to the air quality program. In general, the proposed West Virginia rule raises some major issues that must be resolved before this rule can be approved into the West Virginia State Implementation Plan (SIP). Please include this letter and our enclosed comments for the public hearing record on the West Virginia emissions banking and trading regulation.

If you have any questions about our comments or the issues raised by our comments, please contact me at 215-814-2104 or Linda Miller at 215-814-2068.

Sincerely,

Marcia

Marcia L. Spink, Associate Director
Office of Air Programs

Enclosure

Enclosure
EPA Region III's Comments on the January 6, 1999 West Virginia Public Hearing Proposal for Emissions Banking and Trading, 45CSR28

1. WVDEP proposes to allow area and mobile source, in addition to stationary sources, the option to generate and use emission reduction credits for banking and trading. Although the proposed rule (4.12) requires that these ERCs are surplus, enforceable, permanent and quantifiable, it does not address how this is to be reconciled with the fact that area and mobile source emissions are generally calculated by a general emission factor (non-specific to the particular area or mobile source). The specificity for actual operating hours, actual emissions and actual capacity are rarely known or determined for particular area or mobile sources. These are issues that many other states and EPA have attempted to resolve in the development of its state implementation plan (SIP) policies but without success. This WVDEP proposal also does not address these difficult concerns. Consequently, WVDEP should exclude area and mobile sources from its banking and trading rule until these issues are adequately addressed.

2. Although WVDEP may not have intended that the proposed allow for increases in emissions as a result of the emissions trade, the proposal for emissions trading appears to allow for net actual emission increases rather than a balance of emissions. Furthermore, the WVDEP proposal establishes emission thresholds, overwhich an air quality analysis can be required by the Director of WVDEP. Emission thresholds are established for PM_{10}, SO_2, NOx and NO_2, CO, VOC and Lead. These emission thresholds appear to be the same as those that define "significant" emissions in the Prevention of Significant Deterioration" regulations (40 CFR Part 51.166), which pertain to designated attainment areas. In contrast to the PSD regulations, however, the proposed WVDEP regulations do not require that an air quality analysis be conducted, only that the Director may choose to require one. WVDEP must remove the option to allow for actual emission increases of any kind as a result of emissions trading. EPA cannot support the net increase of any emissions in an emissions trading program.

3. EPA supports WVDEP's proposal to restrict pollutant emissions trading to single pollutants so that, for example, VOC emissions may not be traded with NOx emissions and vice versa.

4. The WVDEP proposal allows the use of ERCs to meet conformity. In order for WV to use ERCs to meet the conformity budget, the WVDEP SIP regulation must require specific procedures to be followed to ensure that the conformity budget will be met each time ERCs are used. Since lapses in conformity compliance have serious consequences that may take years to resolve, the proposed WV rule must contain the appropriate safeguards to ensure that conformity can be met. The conformity regulations at 40 CFR Part 93.124 require that "the implementation plan explicitly quantifies the amount by which motor vehicle emissions could be higher while still allowing a demonstration of compliance with the milestone, attainment or maintenance requirement..." These regulations further state that "A conformity demonstration shall not trade emissions among budgets which the applicable implementation plan (or implementation plan submission) allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, unless the implementation plan establishes appropriate mechanisms for such trades." Consequently, the proposed WV rule must be changed so that the use of non-

mobile ERCs to meet the conformity budget receives EPA review and approval prior to their use.

5. The proposed emission reduction credit baseline allows for the use of some other time period instead of the recommended most recent 2 year period, if that other time period is shown to be more representative of historical operations and is consistent with the state implementation plan. Both the federal PSD and new source review (NSR) requirements restrict the choice of the 2 year period to within the last 5 or 10 years of operation, but not to precede the most current SIP baseline (1990 in this case), and do not allow for a longer than 2 year period to be used to establish the baseline in those programs. Furthermore, the use of some other 2 year period other than the most recent 2 year period is allowed in these programs to accommodate the most recent and most representative operations, not necessarily to capture the highest historical emissions. Since the establishment of the trading baseline is critical to the integrity of the program, it is essential that a trading rule not reward facilities for inefficient, high polluting historical emissions.

6. The requirement for continuous emission monitoring or other direct emissions measurement, appears to be waived by the language in 6.2.b. that states that emissions can be calculated by a methodology specified in the proposal if these direct emissions measurement methods are "not practical and reasonable." WVDEP must change this language so as not to eliminate the existing requirements for CEMs or other direct measurements when emissions trading is involved.

7. For the calculation of baseline emissions for stationary sources, WVDEP must specify that in no case shall the baseline emissions exceed any applicable allowable emissions level. The proposed rule requires that the capacity utilization factor not exceed any applicable requirement but this restriction must also be included for those sources that may have emission caps as part of their applicable requirement.

8. The equations for the calculation of baseline emissions for area and mobile sources require the use of factors that are not currently available or used on a single area or mobile source basis since these emissions do not exist at this level of specificity in the emissions inventory or SIP. Issues pertaining to surplus, enforceable, permanent and quantifiable have not been adequately addressed. Consequently, area and mobile sources must be excluded from this trading rule. The WVDEP proposal appears to acknowledge the complicated issues related to area and mobile sources in its provision 7.2.i., which allows for emission reduction credits from area and mobile sources only if a baseline can be established. However, the provision only requires EPA approval "where applicable" for emission monitoring and quantification protocols, not for the establishment of the baseline itself. As an alternative to specifically excluding area and mobile sources from the WV proposal, WV may modify provision 7.2.i. to clearly require EPA approval for establishment of any area or mobile source baseline and move this modified provision to §45-28-6, Emission reduction credit baseline, so that it is clear that the methods to quantify the baseline for area and mobile sources and the establishment of the baseline itself must be approved by EPA.

9. Provision 7.1.b. states that emission reductions shall "not have been previously used to meet

emission offset requirement under section 173". This restriction is not complete because WVDEP must also prohibit the use of emission reduction credits that will be used in the future to meet those offset requirements. Therefore, this provision must be changed as follows: " The emission reductions shall have been generated on or after January 1, 1991 and not used to meet emission offset requirements under section 173....."

10. The proposed rule permits the use of a 30 day rolling average to calculate VOC and NOx emission reduction credits. Since the WV SIP contains reasonably available control technology (RACT) requirements that specify compliance on daily or shorter timeframes, WVDEP must change this proposal to be consistent with its SIP.

11. Provision 8.2.b. allows the use of an alternative monitoring and quantification protocol where an existing federally approved protocol does not exist. The proposal allows WV to approve this alternative protocol for use in trading without requiring federal approval. WVDEP must change this provision to require both WV and EPA approval for all new or alternative monitoring and quantification protocols, including those used for emissions trading and banking. Although Title V permits may be used to implement the SIP, they cannot be used to create requirements that do not already exist in the SIP, including alternative monitoring or quantification protocols were the criteria for approval are not explicitly described in the SIP approved regulations. Since the proposed WV regulations do not contain explicit criteria for approval of alternative monitoring and quantification protocols, Title V permits may not be used to implement this provision of the regulation.

12. Provision 8.7 lists emission calculation requirements and at 8.7.g. allows the calculation of VOC emissions to be based on propane where the emissions composition of the VOCs used is not known. WV must specify the use of Methods 18, 25 and 25a in determining VOC content and total VOC emissions. This will ensure that VOC emissions are calculated accurately using the molecular weight of the actual VOCs used at the facility rather than simply accounting for carbons in a surrogate compound such as propane.

13. The CEM and recordkeeping provisions of the proposed rule are incomplete and must reference the 40 CFR Parts 60 and 75 requirements pertaining to NOx and SOx.

14. The proposed rule at provision 10.3.b.A. requires that new sources obtain ERCs for a minimum 2.5 years of operation. The ERCs obtain for new source offsets must meet the NSR requirements.

15. Provision 10.5 allows VOC ERCs to be used in any attainment area in WV but there appears to be a restriction described in provision 10.6 that pertains to ozone nonattainment areas or maintenance areas. Since WV has maintenance areas that are designated attainment for ozone, provision 10.5 should be combined with 10.6 to clearly indicate that designated attainment areas that are maintenance areas have some restrictions applied to ERC use. Additionally, WV may not allow the use of VOC ERCs generated in one nonattainment area to be used in another nonattainment area unless it is being used within 100km of the nonattainment area where the ERCs were generated. Furthermore, contiguous nonattainment areas or contiguous attainment

areas may not be treated as a single nonattainment area or a single attainment as proposed in the WV rule.

16. Provision 10.8 allows, for all other criteria pollutants, ERCs to be used in any attainment area. This would allow the generation of ERCs in one county to be used across the state provided that other county was designated attainment. Given the local impact of pollutants like PM, SO2, and Lead, WV must modify their proposal to restrict the use of ERCs to those counties and smaller local areas of impact where the ERCs are generated.

17. The proposed WVDEP rule indicates that there will be a publically available emission trading registry. However, WV has not specifically stated how this registry will be made publically available. WV's proposal states that the registry will be updated continuously but depending on the amount of activity in banking and trading, it may be more efficient to state that the registry will be updated weekly or monthly or on some other regular basis. The registry information should be made available to the public in a manner that does not impose undue costs or process demands on the public inquiring about the registry.

18. Provision 13.7 states that the emission reduction credits are to be incorporated into a permit "if required by the Code...." WVDEP must modify this language to require that the conditions for use and generation of the emission reduction credits be included into a permit as required by the Code or federal clean air act.

19. The proposed WV rule establishes the option for interstate trading and requires that sources located in other states wishing to trade within WV must meet the requirements of the WV rule for trading and banking. Further, the WV proposal would allow the trading of emissions where emissions are to be traded under a cap or budget established for the region or as a part of a national air pollution control strategy without a memorandum of understanding (17.6). This provision does not require that WV participate in the national strategy but would allow for the possibility of states that participate in the national strategy to participate in WV's trading program. However, the national air pollution control strategy currently in existence is the final NOx budget promulgated on October 27, 1998 and this strategy requires that sources trading participate by having SIPs approved in accordance with this final rule. Therefore, the effect of the WV provision 17.6 is driven by the requirements of the federal clean air act (in accordance with WV's proposed provision 17.1). The federal rules pertaining to the NOx SIP call do not allow sources that are participating in the NOx SIP call trading program to trade with sources outside the program. Therefore, unless WV agrees to participate in the NOx SIP call trading program, its sources will not be able to trade with non-WV sources in the SIP call trading program.

Vivian Stockman
Concerned Citizens' Coalition
Otto Rt. Box 105A
Spencer WV 25276

January 5, 1999

John Johnston, Chief
Office of Air Quality, DEP
1558 Washington Street East, Charleston, WV 25311

Comment on The Emissions Trading Rule, 45CSR28

Dear Mr. Johnston:

Please do not let the Office of Air Quality's attempt to "modernize existing air rules" turn into a politically-driven, industry-backed attack on clean air.

I find it hard to believe that anything other than industry-funded politics is driving this so-called modernization. Why else would the OAQ want to fight US EPA's recommendations for nitrogen oxide reductions for utilities and for new standards for ozone and particulates? There may be some streamlining and modernization of rules proposed, but representatives for polluters have used the process as an opportunity to attack already weak permitting and enforcement provisions.

It is my understanding that the Emissions Trading rule, 45CSR28, is a new rule required by the Legislature to implement the new emissions trading statute passed last session. The intent of the rule is good for the air-breathing public, but the rule as written can't stand up to those good intentions.

For starters, the rule must be changed so that it complies with EPA policies requiring a 10 % retirement of credits as an environmental benefit for all pollutants **INCLUDING** Nox. If Nox is exempted the purpose of the whole emissions trading program is defeated.

Secondly, the idea of allowing credits to be generated by reducing or shutting down operations at a facility is ridiculous. It's a policy that promotes layoffs by providing credits for employers who cut jobs. The EPA prohibits credits from shutdowns because it is so difficult to demonstrate that the emission reductions are actually obtained, rather than shifted elsewhere.

Also, OAQ's rule allows credits for any emission reductions that occurred after 1991, whereas EPA's policy prohibits granting credits prior to 1996. To allow

credits to be generated for reductions prior to the law's enactment defeats the effectiveness of the program. This would enable companies to flood the market with credits generated before the law was enacted, which would reduce the value of new emission reduction credits and would destroy any incentives for companies to strive for greater emissions reductions.

In addition the rule as written tends to shut out the public. The rule needs better public notification requirements, especially where credits would be used in areas already experiencing high emissions.

There are some sections of the rule that must be kept in tact for it to truly safeguard public health. For instance, the rule currently prohibits use of credits in an area that would lead to an air quality violation, as a substitute for BACT, LAER, or New Source Reviews. These restrictions protect the health of citizens of nearby communities and must remain in the rule.

Wisely, the rule currently requires monitoring data to verify that emissions reductions are "real, surplus, enforceable, permanent and quantifiable" before credits are authorized. No credits should be granted without adequate monitoring data to verify that the reductions meet these criteria.

As written the rule now requires that interstate trading for credits can occur only if a Memorandum of Understanding is signed between two states where the state with the more restrictive provisions apply its rules to emission credit generation and use. This is crucial. West Virginia must not become a dumping ground for emission credits generated in other states. If this provision is abandoned, then we would see higher emissions in West Virginia, and a weakening of the incentives for West Virginia companies to reduce emissions due to an undermining of the market value of emissions credits.

Thank you for your consideration of these comments,

Vivian Stockman

Vivian Stockman

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

Mr. John H. Johnston, Chief
Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311-2599

JAN 0 4 1999

Dear Mr. Johnston:

Thank you for the opportunity to comment on your proposed legislation, "Air Pollutant Emissions Banking and Trading" (45CSR28). The Region would also like to thank the Office of Air Quality for requesting EPA guidance during the regulation development.

Unfortunately, the proposed regulation has several major deficiencies which would prohibit the approval of the trading regulation into the State Implementation Plan (SIP). An Economic Incentive Program (EIP), such as 45CSR28, must provide an environmental benefit. EPA requires 10% discount on emission credits in a trading program to ensure environmental benefit. This regulation does not require a discount on nitrogen oxide (NOx) emission credits. In addition, allowing shutdown credits for open market trades is not approvable under current EPA policy. This regulation allows shutdown credits for compliance purposes. Immunity provisions provided in the rule are not acceptable to EPA as written. A discretionary period of reconciliation may be approvable. Also, the public must have the ability to sue in objection of a trade. Clarification of legal standing is necessary for the rule to be approvable as a SIP revision.

Enclosed please find detailed comments on the regulation. Please note, comments provided during the public notice period do not prohibit additional EPA comments during the official SIP review period. Should you have any questions, please do not hesitate to call me at (215) 814-2104 or Linda Miller at (215) 814-2068.

Sincerely,

Marcia Spink, Associate Director
Office of Air Programs
Air Protection Division

Enclosure

EPA Comments for the West Virginia Office of Air Quality
"Air Pollutant Emissions Banking and Trading", 45CSR28
12/5/98 proposed regulation (copy attached)

General Comments

- The EIP does not describe the environmental benefit of the program. **In order to be approved, the EIP must demonstrate an environmental benefit for all pollutants.** EPA requires provisions for more rapid reductions, or increased emissions reductions (10% discount on emission credits). The discount provisions in section 11 of the regulation exempt NOx credits from discount. Retirement of NOx credits after 10 years if not used, does not meet EPA criteria for environmental benefit. Please note, EPA guidance requires a state program to provide assurance that intertemporal trading will not interfere with future attainment plans. Retirement of all "old credits" after 10 years is a recommended approach.

- Emission reduction credits generated by the shutdown of a source can only be used for offsets for New Source Review. The regulation allows (section 7.6) use of shutdown credits for compliance with an emission limitation for a period of five years. **Allowing shutdown credits for open market trades is not approvable under current EPA policy**. Please note, EPA requirements for voluntary EIP are currently being reviewed. This requirement may be revised in the next year. However, any SIP revision submitted now would be required to prohibit shut down credits for an open market trade such as described in this regulation.

- The rule appropriately provides public availability of information on trades. The regulation should, however, clarify that the public has legal standing on all trades. **If the public does not have the ability to appeal a trade, the rule is not approvable as a SIP revision.**

- Proposed regulation provide a 30 day reconciliation period in cases of good faith and self disclosure. (Section 15.2) **Required immunity is not acceptable to EPA.** Director discretion for reconciliation period may be acceptable. The EIP should require additional monetary penalties for non-compliance in addition to punitive emission offsets.

Additional comments

Section 2: Definitions

- Baseline: should be lower of actual or allowable emissions
- Definition of "geographic area" is very vague. Suggest adding or referencing distance requirements such as same attainment designation area.

Section 4: Prohibitions

- Discussion in 4.3 addresses toxic hot spots appropriately based on guidance currently available. Please note, new guidance is expected and may require future modifications to this section.
- Discussion in 4.5 is confusing. NOx/VOC trades may, in some cases be allowed, only if NOx increases are paired with VOC decreases. No other interpollutant trading is approvable at this time.

Section 7:

- Emission reductions must have been made after 1996 based on OMT guidance and current EPA policy. This is to ensure reductions made are attributable to this EIP not existing reductions flooding the current EIP. Please note future EPA guidance may restrict trades even more conservatively.

Section 12:

- 12.2 date should be changed to reflect 1996 or other date of eligible credits.

Section 14:

- The regulation must prohibit using a credit for any CAA requirement once it is used for an NSR offset.

Section 17:

- Future EPA guidance may assist implementation of this section to reflect how credit is taken by the states for this interstate trading.
- 17.3.d and e must ensure credits meet most stringent requirements of the states.

Previous EPA comments addressed by OAQ in proposed regulation dated 12/5/98

- The EIP needs to provide protection for pollutant increases to sensitive areas. Guidance on addressing environmental justice is being developed. **Without provisions to protect EJ areas, EIP will not be approvable.** *Provisions added in proposed regulation 45-28-4 allows modeling at the discretion of the director.*

- The EIP does not have protection against non-toxic (criteria pollutant) hot spots. It is suggested that use of any credits above PSD threshold levels (40tpy for SO2) require modeling to ensure no threat to area. *Provisions added in proposed regulation 45-28-4 requires modeling above PSD levels.*

- *Definition:* netting: add prohibition for trading to "net" out of NSR (internal nets only) EPA will not approve trading to net out of minor NSR *(45CSR13 and 14). Proposed regulation 4.8 addresses this requirement.*

- In section 3: Credits may not be used to meet mobile source requirements of the CAA, such as I and M, RVP and exhaust standards. *Proposed regulation includes this prohibition in section 3.3.*

- EPA will not approve any trading to avoid/delay BACT or LAER. *The proposed regulation has removed this reference from 4.2b.*

- The general provision in 7.2j may be enhanced by adding "conforms with the provisions of this rule and the Federal Clean Air Act. *Proposed regulation has included this citation.*

- In section 13, requirement to model criteria pollutants which will be used above PSD thresholds should be added. *Proposed regulation includes this reference in 13.2i.*

- Current EPA guidance requires notification of Federal Land Managers of Class I areas within 100km of trades 30 days in advance of use, this requirement may be placed on the user or the state may notify. *Proposed regulation includes this requirement in 13.10.*

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

In the matter of:

PUBLIC HEARING ON PROPOSED LEGISLATIVE RULE

45 CSR 28 "Air Pollutant Emissions Banking and Trading"

Transcript of proceedings had at a public hearing in the above-styled matter for the West Virginia Division of Environmental Protection, Office of Air Quality at the Conference Room, 1558 Washington Street, East, Charleston, West Virginia, 25305, commencing at 6:06 p.m. on the 5th day of January 1999, pursuant to notice.

P R O C E E D I N G S

MS. CHANDLER: This public hearing will now come to order on the 5th day of January, 1999, in the conference room of the West Virginia Division of Environmental Protection's Office of Air Quality at 1558 Washington Street, East in Charleston, West Virginia.

The purpose of the public hearing is to hear discussions on the proposed new legislative rule, 45 CSR 28, filed in the Secretary of State's Office on December 2, 1998 and noticed in the State Register on December 11, 1998. The rule was noticed in a Class I Legal Advertisement in both the Charleston Daily Mail and the Charleston Gazette. Notice was also sent to various individuals and organizations. This public hearing is being held pursuant to the provisions of 29A of the West Virginia Code and Section 110 of the Clean Air Act.

My name is Jeanne Chandler of the Public Information Office of the West Virginia Division of Environmental Protection. I will be the moderator of these proceedings.

Should you wish to make oral comments, a sign-up sheet has been placed here on this table at the right. Please sign up now, if you have not already done

so. Written comments may be submitted at the end of this public meeting. Your comments will be made a part of the rule-making procedure. I remind you that the comment period will end at the close of this meeting this evening.

The Court Reporter is Ms. Missy Young, Q&A Court Reporters, Incorporated. If anyone desires a transcript of this proceeding, please contact Ms. Young at 937-2555.

The purpose of this public hearing is to hear discussions on proposed legislative rule 45 CSR 28, "Air Pollutant Emissions Banking and Trading." The new legislative rule is required to be promulgated by West Virginia Code Section 22-5-18. The objective of the rule is to provide potential air pollution control cost savings to regulated facilities by providing a voluntary air pollutant emissions banking and trading program. The program is intended to achieve overall air quality benefits through partial emission credit retirement provisions.

West Virginia Code 22-5-18 requires the director to propose one or more legislative rules establishing a voluntary emissions trading and banking program within 180 days of the effective date of the

amendment. By filing the attached proposed rule on December 2, 1998 and allowing the public the opportunity to comment on the rule until January 5, 1999, the director is compliant with the mandatory provisions of House Bill No. 4578.

It should be noted that the director utilized a negotiated rule-making process in the drafting of the proposed rule. Members of the work group consisted of representatives from this agency, the regulated community and the environmental community. Input from the United States Environmental Protection Agency throughout the rule-drafting process was also obtained and incorporated into the rule to the extent possible in the interests of obtaining necessary United States Environmental Protection Agency approval of the rule and the program.

There is no direct counterpart federal regulation associated with the proposed rule. However, the US EPA has proposed a model regulation governing voluntary emissions trading programs for ozone precursors, has issued various guidance documents on the issue and should issue final guidance for open-market trading program of approvals in early 1999.

Because the rule creates a voluntary program and there is no federal counterpart regulation in existence at the present time, no determination of stringency is required.

In accordance with Section 22-1A-1 and 3(c), the Director 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.

The proposed rule was reviewed by Advisory Council during its meeting on December 2, 1998. Recommendations of the Council and the Director's response to Council's recommendations will be included in the Agency's filing with the Secretary of State's Office and Legislative Rule-Making Review Committee after consideration of all public comments received, both oral and written, during the public comment period.

The floor is now open for public comment. Please identify yourself and affiliation, if any, prior to making your comment. Has everyone signed in? If not, can you please do so afterwards? Pamela Nixon?

MS. PAMELA NIXON: As everyone knows, West Virginia right now at the present is considered to be

in an attainment area for ozone. In order for us to remain in attainment, it would be to our best interest to reduce the emissions of all precursors to ozone. Ozone is a secondary pollutant, as we all know. To be able to control it, we need to be able to curb the emissions of the volatile organic compounds and nitrous oxide. I won't read everything that I have here.

There are newer studies comparing emergency room visits with ground-level ozone. It has been found that there is a significant increase in respiratory-related visits on days of elevated pollution. The National Institute for Chemical Studies at Harvard had a study here in the Valley a few years ago, and they conducted air quality monitoring and health study on elementary school children and concluded that respiratory symptoms were increased in children living near chemical facilities and in high traffic areas. Among the recommendations from the study was the call for a reduction in emission of all organic compounds and acidic aerosols. Nitrous oxide is an acidic compound found in ambient air.

Those who are particularly vulnerable are the young, the elderly and people with chronic respiratory

health problems. When we don't have reduction of these, this population is vulnerable and it causes added medical costs to individual families.

NOx should be included in the emissions reduction credit and available for banking and trading. If it is not included, then we haven't done much to reduce the emissions of ozone.

There is also another concern that I have, and it's about the Section 7.2(g), generation of emission reduction credit may be credited using any of the following procedures. The one that I'm interested in is the curtailment or shut-down of a source process or process equipment.

We should not allow the shut-down of a source process or process equipment to be justification for reduction of credits at the expense of loss of jobs by loyal workers at chemical plants.

The rest of my comments are in here. Thank you for allowing me to speak.

MS. CHANDLER: Thank you, Ms. Nixon. Denise Poole?

MS. POOLE: I'm Denise Poole. I first came in contact with this in its bill form three years ago

when it was up before the legislative body. I didn't care much for the bill then, and I was glad that it didn't pass. Now as I read it in its form today as a rule and it's gotten this far, I don't really see many differences. When I look at the objections that I have mostly -- well, the whole bill or rules intend an objective that is to provide potential air cost savings to regulated industries facilities. That's fine. To achieve overall air quality benefits through partial emission credit requirement provisions. That's more my concern, the overall air quality that we have or lack thereof.

The purpose of the program to provide incentives is all well and good. I'm all for incentives and credits, but when you take those credits and you bank them and you're allowed to use them later, I just don't see where the real reduction comes in.

The intent is to reduce. We live in a polluted environment. We're talking about air pollution. When you shut down a whole facility and then a new one springs up, I just don't see -- I think there's this weird kind of balance that happens. I don't think we're getting there fast enough. It even allows for ten years for 90 percent of those credits that are banked before they're

permanently retired. I mean, they have to be ten whole years. I'm just real concerned with health problems, and I think there's a lot more that can be done. My concerns also -- even though there was a consensus attempt, there wasn't a consensus between the people who worked on this.

MS. CHANDLER: Thank you, Ms. Poole. Jack Worstell?

MR. JACK WORSTELL: I'm Jack Worstell of Union Carbide Corporation. I have just one fairly generic comment. I was involved in the group that drafted this up. I would like to make the comment that we found out that this is a fairly complex regulation to draft after we got into the process.

Speaking for myself at least, I think 180 days was a handicap. Of course, we had to comply with that, because it was statute. Plus, the EPA presented us with a very long list of very substantial issues in this process. I do think in view of that, this regulation ought to be revisited. I think more can be done with it. I think it should be revisited next year and perhaps improve it and make it more useful.

MS. CHANDLER: Thank you. Tim Mallan?

MR. TIM MALLAN: My name is Tim Mallan.

I'm the environmental affairs manager for the West Virginia state office of American Electric Power.

I would just like to make a comment or two on the process that led up to this. I think it was an excellent process. I would like to congratulate the OAQ staff on following this type of a process to put this regulation together. It was an interesting and long process. I think a lot of us involved in it learned some things.

I would like to recommend that the OAQ and other regulatory agencies follow the same process in developing new regulations and in revisiting the old ones. I'm taking part right now in the OAQ's regulatory review. I think that's also an excellent process. I think that what we've learned in the emissions banking and trading drafting, as far as getting people together to discuss and come up with new regulations, is the best process. I think West Virginia will be better off because of it.

I would like to mirror a little bit what Jack Worstell said. I don't think the emissions banking and trading bill is completely finished or the regulation is completely finished yet. I think everyone who took part realized there were areas that still need to be

visited, still need to be discussed. I look forward to working on it in the future. Thank you.

MS. CHANDLER: Thank you, Mr. Mallan. Connie Lewis?

MS. LEWIS: My name is Connie Gratop-Lewis. I am a resident of Charleston, and I'm also involved in the Office of Air Quality's regulatory re-write process. I have a few comments.

I think the whole concept of letting the market assume a role in reducing pollution is an excellent concept. I support the goal of the emissions trading to reduce the costs of cleaning the air with innovative approaches in the interest of protecting public health and the integrity of the ecosystem.

It was three years ago that the EPA first proposed the model rule that permits this sort of flexibility in improving our air quality, but I'm not sure that this regulation goes far enough in achieving the goal of either the model rule or of cleaning the air.

One of the understandings in this regulation is that NOx is not part of the reduction. We have a ten-year period in which to retire the credits. This is much too long. Five years, I think, is the limit

that Michigan used in retiring credits. I think that's a much more useful limit than the ten years.

I also understand that the language in the final rule is not the same language that was agreed to by all the stakeholders at the November 5th meeting. This concerns me because I am involved in the process to re-write the regulations of the OAQ. Once the language is agreed to, that should be the language of the proposed regulation. It should not be changed. It does not enhance the credibility of the process that we're going through now -- now that Tim and I and several other members of this group are struggling through if, in fact, the language we agreed to is not the final language. I'm sorry for repeating myself.

I am also not comfortable with the process for handling the credits when a facility closes down or reduces its production capability. I don't believe that this is in the best interest of the working people of West Virginia or, for that matter, the taxpayers of West Virginia. It's an encouragement to manufacturers and other facilities to shift production to other communities so that they can bank the emissions credit, perhaps for a later use, perhaps not.

Furthermore, I believe that the public notification requirements are not adequate in the proposed regulation. They do need to be strengthened. I would agree with Jack and Tim that the regulation needs revisited.

MS. CHANDLER: Thank you. James Kotcon?

MR. JAMES KOTCON: I'm going to take advantage of this podium since you so kindly provided it. I think I may be the last person on the list. So if you'll bear with me, I suspect I may go more than two or three minutes.

My name is James Kotcon. I'm representing the West Virginia Environmental Council. I believe it is probably fair to note that I was the only environmental representative in the negotiated rule-making process.

The bottom line that came out of this is that when we left our last meeting on November 5th, I was reasonably comfortable that we had a workable rule. We had agreed to a number of pieces of language that I think addressed a number of the major concerns. The bulk of that last meeting, November 5th, dealt with issues that EPA raised in some of their comments on earlier drafts of the rule.

Most specifically, they identified a number of points that they said that unless we fixed these points, EPA will not approve the rule. The largest and single most important issue, I believe, in that regard dealt with the retirement of credits for an environmental benefit. EPA's guidance very clearly suggests that at least ten percent of any emission reduction credits that are generated should be retired to benefit the environment.

We tried to come up with some language that tried to reconcile EPA's position with what was in the West Virginia statute that the Legislature, in their infinite wisdom, chose to pass. I think that to some extent we tried to address the provision that met the intent that is in the statute that, except for nitrous oxide, ten percent would be retired. It is my understanding that the intent of that was to allow for nitrous oxide trading to be applied to other kinds of either regional or national emissions trading rules.

In my comments, which I'm going to submit in writing, I am going to recommend that we reinsert the language that was agreed to at the November 5th meeting that allows nitrogen oxide credits be registered in the

West Virginia rule and be subject to a ten-percent emissions retirement provision or alternatively be registered in an approved regional or national program, whatever that might be, whenever EPA comes up with such a program.

The bottom line is we in West Virginia are in trouble. This last year, every ozone monitor in the state violated the new ozone standard. Unless West Virginia is able to come into compliance with ozone standards within the next year, West Virginia will have significant portions of the state, if not the entire state, declared a non-attainment area. Nitrous oxide and nitrogen oxide, the various kinds, contribute to ozone. Anything that we can do to reduce nitrogen oxide emissions and retire nitrogen oxide emissions credits is one of those things we can do that's going to benefit the air quality of the state and hopefully stave off that very significant adverse economic impact.

I think that unless some of these changes go into the rule, we can go all home. We're wasting our time here. This rule will not be approved by EPA and a very good faith effort on behalf of both the environmental community and the industry community will have been

wasted.

I have come up with a couple of other issues that I think are fairly significant. The EPA policy opposes the use of credits generated from shut-downs or curtailment of operations. The West Virginia statute clearly allows credits from shut-downs. I think that an appropriate way of reconciling that conflict would be to provide additional constraints on the use of credits that are generated from shut-downs, such that we can be sure that Company A who shuts down their production isn't simply transferring that production to Company B and getting a credit for it on the side.

I think the statement at the start of this was in error. The purpose of this rule is not to provide cost savings for companies. That is not stated anywhere in this statute. It is not stated anywhere in the rule. Cost savings has nothing to do with it, except that indirectly it can provide an incentive. The goal of the rule, the goal of the statute, as is clearly stated, is to provide incentives to reduce air pollution.

Yes, credits are allowed for shut-down of one facility and that production is transferred to another facility. That's going to boost emissions as a result.

The credits that are given to the company that are shut down are then transferred to Company C. We're going to actually see this rule through that process actually increase emissions, not provide incentives to reduce emissions. I think that's wrong. The EPA thinks that's wrong.

I think that, at a minimum, we need to provide additional language in the rule that will assure that operations that get its credits from shut-downs will identify where those new emissions are likely to occur, be it out-of-state or in some other market, and how those previous markets that were served by that company are going to be satisfied once these operations are curtailed.

A third point, EPA policy clearly prohibits granting any emissions credits after they were generated prior to 1996. The state statute sets the starting date as 1991. I personally believe that granting credits prior to the effective date of the Act undermines the effectiveness of the whole rule and the whole program. I think, at a minimum, we need to go with that starting date that EPA is proposing simply as a good-faith effort to make sure that these credits that we're providing remain as valuable as possible.

If companies are going to reduce emissions and if this incentive program is going to be effective at encouraging companies to reduce emissions, then these credits need to be as valuable as possible. Companies that were generating credits from emission reductions that occurred three, four, five, six, seven years ago, those credits flood the market, then those credits are going to be much less valuable to somebody who might be thinking about reducing future emissions. Credits should be reserved for those facilities that actually are going to meet the intent of the program to reduce emissions.

A fourth requirement dealt with the area of public involvement in environmental justice issues. I would agree with the Agency that EPA has raised an issue in which they have given very little actual guidance. I think the one thing that we can do in this rule to address EPA's concern in that area is to provide some additional public notification of when credits are going to be used. I recommend that the rule add that kind of a requirement.

There are a few things that I want to commend the Agency for, and I think that the working group did a fairly good job on that helped actually strengthen the rule. That was dealing with issues, specifically the

prohibitions and restrictions on use of credits as a substitute for best available control technologies and other kinds of new source reviews, restrictions that help protect the health of nearby communities. I support those.

The rule has very good language dealing with requirements for monitoring and data verification to insure that emissions reductions are real, enforceable, permanent, surplus and quantifiable. I think that those need to be retained, and I think those are very useful requirements.

Finally, the rule put in some very good language to address the issue of interstate trading. I am concerned that credits that are generated in some other state could very well flood the market here in West Virginia. We are a relatively small state. If West Virginia becomes a dumping ground for credits from other states, then our credits are relatively useless. So the language that's in the rule, I am very supportive of and I think that that needs to be retained as part of the interstate trading.

I will be submitting these in writing, and I hope that you will take them seriously and consider

incorporating these changes.

MS. CHANDLER: Thank you, Mr. Kotcon. Is there any additional oral comments? (No response.) Is there any additional written comments that I haven't received? Go ahead and time stamp these in so they will be made a part of the record.

If there's nothing further, the public hearing for 45 CSR 28 is now concluded.

(WHEREUPON, the public hearing was concluded at 6:34 p.m.)

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 6th day of January 1999.

Missy L. Young
Certified Court Reporter
Commissioner

My commission expires April 15, 2008.

45CSR28

AIR POLLUTANT EMISSIONS BANKING AND TRADING

RESPONSE TO COMMENTS

I. INTRODUCTION

At the public hearing on proposed new rule 45CSR28, conducted on January 5, 1999, several persons presented oral comments. In addition, the Division of Environmental Protection Office of Air Quality (OAQ) received several written comments on the rule. The OAQ has summarized these comments and the agency's responses following these general statements concerning special difficulties encountered in this rule development process.

45CSR28, as proposed, was developed by OAQ in response to passage of H.B. 4578 during the 1998 Legislative Session. H.B. 4578 amended the state's Air Pollution Control Act by creating a new section mandating the proposal (by the DEP director) of an open-market air pollutant emissions trading program rule or rules. The DEP director (OAQ) was charged with proposing this rule or rules within 180 days of the effective date of H.B. 4578. H.B. 4578 contained specific provisions for the design of an emissions trading rule but mandated that a voluntary program be established "to the full extent allowed by federal and state law." Any rule that allows emissions trading of criteria air pollutants which are extensively regulated under the federal Clean Air Act must receive approval by the United States Environmental Protection Agency (EPA) under, and as a part of, West Virginia's federally-required State Implementation Plan (SIP).

In seeking to develop a rule which meets the Legislature's directive to be as broad as allowed under federal law and hence approvable by EPA, OAQ extensively reviewed many relevant provisions of the federal Clean Air Act and federal rules under that Act and sought EPA comments and guidance throughout the rule development process. It is important to note, however, that specific and clear design provisions for voluntary open-market emissions trading programs are not set forth in the federal Clean Air Act or any final EPA rules or guidance documents at this time. Voluntary open-market trading programs are generally constructed as alternatives to the complex command-and-control-type regulatory provisions that are established under federal and states rules, but such trading programs must assure equivalent or superior environmental results to those traditional programs. As a consequence, the existing regulatory programs and Clean Air Act standards by their nature create major legal and technical hurdles and constraints that are contradictory to the general goal of creating a simple, flexible, workable and environmentally-sound alternative compliance program via emissions trading.

OAQ and a stakeholder group developed 45CSR28 by selecting, as a model, an existing rule that the group believed to be the most extensively developed and federally reviewed (not yet federally approved) state rule incorporating trading provisions for all criteria air pollutants -- Michigan's open-market trading rule. Some of the extensive comments received on 45CSR28

from EPA Region III concerned rule provisions that were exactly incorporated from the Michigan rule and apparently not previously questioned to any great extent in EPA's earlier review of the Michigan rule. Although this creates some uncertainty concerning EPA's comparative rule review process, the larger federal approvability issues raised in the EPA Region III comments on 45CSR28 related to problematic provisions OAQ staff included in the proposed rule as a result of the specific language and apparent directives in H.B. 4578.

In drafting the more substantive changes to the language and provisions in the original proposed version of 45CSR28, pursuant to EPA and public comment, OAQ has attempted to balance perhaps contradictory or unclear statutory directives against EPA's stated requirements for rule approval and practical rule implementation concerns. The rule being submitted for legislative consideration and potential authorization, therefore, presents special concerns as to whether it can meet statutory directives and legislative intent, can receive EPA approval, and can effect the kind of alternative regulatory program envisioned by the drafters and proponents of H.B. 4578.

II. GENERAL COMMENTS:

ISSUE 1: Emission Reduction Credit Discount

EPA, and several other commenters, have stated that the rule does not meet EPA's criteria for environmental benefit and that the rule must demonstrate an environmental benefit for all pollutants, including nitrogen oxides.

RESPONSE:

One of the major issues raised related to achieving emission trading program goals and EPA rule approval concerned the provisions in the rule for discounting or retirement of emissions credits for air quality benefit purposes in general and discounting of nitrogen oxides specifically.

EPA commented that the proposed rule did not contain provisions for nitrogen oxides credit discounts and would therefore be unapprovable with respect to the trading of nitrogen oxides. Comments from Mr. James Kotcon, Ms.Vivian Stockman, Ms. Connie Gratop-Lewis and Mr. Chuck Wyrostok mirrored EPA's comments and stated objection to the rule's failure to require nitrogen oxides discounts as was provided for other criteria air pollutants. James Kotcon's comments, reiterated by those of Connie Lewis, also protested the OAQ's failure to include draft language developed in one of the stakeholders meetings dealing with this issue.

EPA has, in unfinalized guidance to states, established that an acceptable air quality benefit mechanism in open-market emission trading rules is the application of a 10% discount and retirement of banked emission reduction credits. EPA guidance requires that any special economic incentive program such as open-market trading programs must have an air quality benefit feature or demonstration. Although these requirements are not specifically referenced to

federal law, OAQ believes that emission credit discounts for air quality benefits are certainly reasonable and appropriate given the potentially significant adverse environmental consequences which may be encountered in an open-market emission trading program.

In attempting to draft 45CSR28, however, OAQ staff appropriately attempted to conform the rule, to the extent possible, to the language and apparent intent of H.B. 4578. OAQ's pre-proposal draft of 45CSR28 presented to the rule's stakeholder group for its November 5, 1998 meeting provided that the 10% credit discount be applied to all pollutants except nitrogen oxides but only if such credits remain unused in the credit registry after ten years. This pre-proposal rule draft and the rule proposed for hearing provided for no discount of nitrogen oxides credits. Although OAQ staff recognized that such a credit discount scheme would not conform to the available EPA guidance, OAQ staff believed at that time that the rule draft conformed to the potentially unintended language of H.B. 4578.

At the November 5, 1998 stakeholders workgroup meeting the emission credit discount issue and closely related general nitrogen oxides trading issues were discussed at length and a rough draft of alternative language addressing emission credit discounts was offered by James Kotcon, slightly amended in the discussions and generally accepted as language that could be adapted to construct emission credit reductions provisions in general for the rule proposal. The group consensus as reflected in Mr. Kotcon's draft was that H.B. 4578 could or should be construed to allow a 10% emission reduction credit for all pollutants except nitrogen oxides at the time such emission credits were registered rather than deducting 10% of such unused credits ten years after registry. OAQ staff and some other work group participants did not believe that the group had concluded at the November 1998 work group meeting that a 10% credit discount could be applied to nitrogen oxides based upon the specific language on this point in H.B. 4578. The group's draft language produced on that date did not provide for nitrogen oxides discounts but did include the concept (addressed in a separate comment response) that nitrogen oxides might be traded in a regional or national program in lieu of being traded in the open-market program created by this proposed rule. This language was not included in the proposed rule for reasons that will be later noted.

In the interest of achieving federal rule approval, OAQ has amended the rule so as to require 10% discount of nitrogen oxides in the same manner as provided for other regulated pollutants. In doing so OAQ believes that the stated goals of the H.B. 4578 are better met and EPA rule disapproval as a result of this problem can be avoided. The possible conflict with the specific language and intent of H.B. 4578 cannot, however, be avoided.

ISSUE 2: Emission Reduction Credits From Source Shutdowns

EPA and other commenters have raised objection to the inclusion of provisions in the rule to allow credit for emission reductions resulting from facility shutdowns. EPA has stated that shutdown credit provisions in an open-market rule would be federally unapprovable. Mr. Kotcon

of the West Virginia Environmental Council further stated its belief that allowing shutdown credit was bad policy both economically and environmentally and suggested the inclusion of language requiring that if such credits were to be allowed at all, the credit generator should be required to submit an analysis showing to what extent emission increases could occur at other facilities as a result of production shifts from the shutdown facility.

RESPONSE:

H.B. 4578 specifically provided that this mandated open-market trading rule allow credit for permanent facility shutdowns. Agency experience and statements by representatives of regulated businesses indicate that exclusion of all emission reductions from shutdowns would very substantially reduce any pool of available emission credits particularly since the rule appropriately allows only actual, real emissions reductions to generate credits.

OAQ review of EPA's rationale and arguments concerning allowance of shutdown emission credits, the arguments of other commenters as well as agency experience, reveal that there are significant potential problems inherent in such policy. EPA and state rules, however, already establish provisions which allow, subject to certain limitations, credits from shutdowns to be used as emission offsets. A review of EPA's unfinalized guidance for its earlier draft model open-market trading rule reveals that EPA had not previously ruled out the possiblity of allowing open-market trading of shutdown credits. Provisions in proposed 45CSR28 include revised language developed by the Michigan air quality agency to satisfy shutdown credit concerns raised by EPA in comments on Michigan's initial emission trading rule.

In light of the specific directive on this matter contained within H.B. 4578 and OAQ's review of the issue to date, OAQ could not develop a very solid rationale to eliminate the shutdown credit provisions in the proposed rule.

With regard to Mr. Kotcon's suggestion for incorporating new language as subdivision 7.5.a., OAQ does not believe that it is appropriate to impose a requirement for analysis which a person may not be able to properly complete. A person registering credits from shutdowns or curtailments may not be able to assess whether another person can or will increase production or attempt to add new process units to capture a market given up as a result of the shutdown or curtailment period. Pursuant to Mr. Kotcon's comment, however, OAQ did revise subsection 6.5 and added new subdivision 12.4.f. to strengthen the rule such that a person registering shutdown or curtailment credits fully account for emission increases resulting from production shifts to process units under common control or that certification be made that such shifts shall occur.

ISSUE 3: Cut-Off Date For Pre-Rule Emission Reduction Credits

EPA, as well as other commenters, have stated that the date for determining eligibility of emission reduction credits should be 1996, rather than the 1991 date in the rule.

RESPONSE:

Although OAQ understands the commenters' arguments and EPA's rationale for suggesting a 1996 or later cut-off date, the agency has not found clear justification based upon the agency's review or understanding of federal and state law and existing requirements and practice in other states to invalidate all emission reductions based upon an apparently arbitrary 1996 cut- off date. Therefore, since H.B. 4578 provided a January 1, 1991 cut-off date, OAQ has not changed that date. OAQ acknowledges that failure to revise the rule as suggested by EPA and other commenters may result in full or partial federal disapproval of the rule and could also have adverse impacts upon the rule's purpose as stated in H.B. 4578.

ISSUE 4: Completeness and Viability of the Proposed Rule

Several commenters suggested that the rule as proposed was incomplete, unfinished or failed to meet its stated objectives and should be revisited or further developed.

RESPONSE:

Although OAQ has attempted to appropriately address comments as addressed herein and believes that a good faith effort was made by the Office and stakeholder group to develop 45CSR28, there is no question that many complex issues must be addressed by the rule and rule implementation procedures to make the emissions trading program federally approvable and environmentally and economically beneficial. OAQ believes that the rule as submitted for authorization can provide at least a limited voluntary emissions trading program to the extent it can receive approval by EPA. However, OAQ recognizes that further development of the rule could result in an improved emissions trading program and it is certainly willing to reconvene the stakeholders group to work on the rule, should it not be authorized by the 1999 Legislature.

III. INDIVIDUAL COMMENTS:

Commenter: U.S. Environmental Protection Agency, Region III (EPA)

EPA submitted two sets of written comments regarding this rule, one dated January 4, 1999, and one dated January 5, 1999. This section will address EPA's specific comments in its January 4 and 5, 1999 letters, to the extent they are not addressed in the General Comments section above, beginning first with the January 4th letter and then responding to the January 5th letter.

COMMENT: *EPA stated the rule should clarify that the public has legal standing to appeal a trade.*

RESPONSE: OAQ believes the rule provides the public with the opportunity to appeal a trade to the same extent as any other person who meets the general

requirements for "standing" under the State Code. Subsections 12.5 and 13.5 of the rule provide that a determination of completeness is a final agency action subject to review by the air quality board pursuant to the Code. In addition, the agency is revising the rule to provide for public notice of the proposed use of emission reduction credits in response to other comments; this will assist members of the public in exercising their respective appeal rights in this program.

COMMENT: *EPA stated that the 30-day reconciliation period provided in subsection 15.2 of the rule is unacceptable, but a discretionary period may be acceptable. EPA also stated that the rule should provide additional monetary penalties.*

RESPONSE: OAQ believes a reconciliation period is a desirable feature in the enforcement of an emissions trading rule, but agrees that such a factor is but one of several the agency should consider in how it enforces the rule. Therefore, the rule has been changed to make the granting of a reconciliation period discretionary, as opposed to mandatory, and to clarify that the granting of such a period may be considered as a mitigating factor in an enforcement action. Regarding additional monetary penalties, the existing language in subsection 15.3 is clear that the civil and criminal penalties available under the Code will apply to any situation where a person has registered reductions for the generation of credits which are not real, surplus, enforceable, permanent, and quantifiable and the credits have been or are being used or traded. These civil and criminal penalties are in addition to the treble amount of credits which are required to be donated in the event of noncompliance with the rule. Subsection 15.6 of the rule also refers to the agency's ability to take appropriate enforcement action under the Code for any violation of the rule; such enforcement includes civil and criminal penalties.

COMMENT: *EPA stated that the definition of the term "baseline" should be the lower of actual or allowable emissions and stated that the term "geographic area" is vague.*

RESPONSE: The definition of baseline at subsection 2.6 has been revised to provide the clarity that EPA believes appropriate. The term "geographic area" has been revised as further discussed in a separate response to comment.

COMMENT: *EPA stated that the rule appropriately addresses toxic hot spots. EPA further stated that subsection 4.5 is confusing regarding NOx/VOC trades. EPA stated that such trades are allowed only if NOx increases are paired with VOC decreases.*

RESPONSE: Although H.B. 4578 clearly provided for NOx/VOC trading, federal conditions or criteria for such trades are not fully clear at this time. To meet the general intent of the federal Clean Air Act and that stated in H.B. 4578, NOx/VOC trades would need to be beneficial in reducing ambient ozone concentrations. OAQ, therefore, provided that NOx/VOC trades could only be acceptable when the SIP (containing appropriate procedures and demonstrations for ozone benefits) specifically provided for such trades.

COMMENT: *EPA stated that, regarding section 14 of the rule, it must prohibit using a credit for any CAA requirement once it is used for an NSR offset.*

RESPONSE: OAQ believes that the rule contains, in sections other than 14, adequate restrictions against using emission reduction credits that have been used as NSR offsets or otherwise "double-counting."

COMMENT: *EPA stated that future guidance may assist implementation of section 17 regarding interstate trading and that subdivisions 17.3.d. and e must ensure credits meet the most stringent requirements of the states.*

RESPONSE: Although the subdivisions referred to do not directly speak to the stringency issue, subsection 17.5 clearly requires that the most stringent provisions apply.

COMMENT: *EPA's next comment (beginning now with the January 5th letter) concerned the rule's inclusion of area and mobile sources in addition to stationary sources, and stated that the rule should exclude such sources for the time being due to the complexity of calculating emissions with respect to these sources. In addition, EPA commented that the rule must contain appropriate safeguards to ensure that conformity can be met and must be changed so that the use of non-mobile emission reduction credits to meet the conformity budget receives EPA review and approval prior to their use. EPA's last comment pertaining to mobile sources was that the calculation of baseline emissions for area and mobile sources requires the use of factors that are not currently available or used and stated that such sources should be removed from the rule altogether or the rule should be modified to require EPA approval for establishment of any area or mobile source baseline.*

RESPONSE: Provisions throughout the proposed rule for potential generation and use of mobile and area source emission credits originated in Michigan's emission trading rule which West Virginia used as a model. After considerable review of EPA's comments relating to baseline, quantification and

conformity analysis, OAQ agrees with EPA that the potential for significant problems in these areas exists in relation to the proposed provisions and most alternative provisions which could be drafted at this time. OAQ does not believe that intersector emissions trading (mobile-area-stationary source) will be a significant practical issue for the foreseeable future due to the scope of current regulatory programs, currently limited nonattainment areas and tremendous complexity in generating quantifiable, surplus emission credits from mobile and area sources. Accordingly, language in subsections 2.38, 3.3, 4.4, and 10.2 and in subdivisions 6.2.b. and 7.2.i. was revised and subsections 4.11 and paragraph 6.2.b.3. was omitted in order to address EPA's comments. The effects of these changes are to generally provide additional constraints on the creation and use of emission reduction credits for mobile and area sources; eliminate essentially duplicative language restricting mobile source credit use to conformity only; to require approval by both the director and EPA of procedures to calculate baseline emissions and emissions reductions from mobile and area sources; and to omit potentially problematic formulae and criteria for calculating baseline emissions and emissions reductions from the rule.

COMMENT: *EPA stated that the rule appears to allow for net actual emission increases rather than a balance of emissions and further commented on the emission thresholds over which an air quality analysis can be required.*

RESPONSE: OAQ does not believe that the rule allows overall actual emission increases when emission credits from one source are used by another and the rule specifically disallows actual emission increases at a particular source when the same source generates and uses emission reduction credits. The rule may allow a source using emission reduction credits to increase actual emissions when credits are used as offsets and perhaps in other emissions "overage" scenarios. Such results, however, are inevitable under an emissions trading program. OAQ has required air quality analyses by user sources and has established other restrictions, including geographic generation/use provisions which are intended to prevent unacceptable air quality impacts to result from credit use.

COMMENT: *EPA stated that it supported the rule's restriction of pollutant emissions trading to single pollutants.*

RESPONSE: The rule allows the interpollutant trading of NOx and VOC's only to the extent that the SIP clearly provides for such trades.

COMMENT: *EPA stated that the rule allows for the use of some other time period instead of the recommended most recent 2-year period, if the other time period is shown to be more representative of historical operations and is consistent with the State Implementation Plan. EPA further stated that the PSD and NSR programs restrict this choice to within the last 5 or 10 years of operation, but not to precede the most current SIP baseline, and state other restrictions regarding baseline.*

RESPONSE: The provisions for determining the actual emissions baseline in 45CSR28 are essentially identical to the federal NSR provisions for determining actual emissions. The NSR provisions do not, at this time, specifically restrict the time period chosen as most representative of actual operations. OAQ does not believe that a more restrictive provision is necessarily justified by law, but recognizes that rule implementation procedures must be established to prevent improper representations of baseline emissions.

COMMENT: *EPA stated that the rule in subdivision 6.2.b. appears to waive the requirement for continuous emission monitoring or other direct emissions measurement and suggested that this language be changed.*

RESPONSE: OAQ has revised subdivision 6.2.b. for reasons otherwise addressed, but believes that the language EPA cites here in 6.2.b. does not require change when read in context with all of subsection 6.2. and the provisions of section 8.

COMMENT: *EPA stated that the rule must specify that in no case shall the baseline emissions for stationary sources exceed any applicable allowable emissions level.*

RESPONSE: OAQ agrees and has clarified this by amending the definition of "baseline" at subsection 2.6.

COMMENT: *EPA stated that subdivision 7.1.b. of the rule needs to be revised to prohibit the use of emission reduction credits that will be used in the future to meet offset requirements, as well as prohibiting those which have been previously used.*

RESPONSE: OAQ agrees that this is clearly the intent of subdivision 7.1.b. and has slightly revised the language for clarity.

COMMENT: *EPA pointed out that the rule allows the use of a 30-day rolling average to calculate VOC and NOx emission reduction credits and that since the State SIP specifies compliance with RACT requirements on daily or shorter time frames,the rule must be changed to be consistent with the SIP.*

RESPONSE: OAQ agrees and has revised subsection 6.3. accordingly.

COMMENT: *EPA stated that subdivision 8.2.b. of the rule allows the use of an alternative monitoring and quantification protocol where an existing federally approved protocol does not exist and stated that federal approval, as well as State approval, is necessary.*

RESPONSE: OAQ has otherwise provided for EPA approval of quantification protocols in the rule and has revised 8.2.b. accordingly.

COMMENT: *EPA stated that subsection 8.7 of the rule allows the calculation of VOCs to be based on propane where the emissions composition of the VOCs used is not known, and that this is inadequate to ensure that VOCs are calculated accurately.*

RESPONSE: OAQ has revised the rule by striking the last sentence of subsection 8.7.

COMMENT: *EPA stated that the CEM and record keeping provisions of the rule are incomplete and must reference the 40 CFR Parts 60 and 75 requirements pertaining to NOx and SOx.*

RESPONSE: OAQ agrees that this EPA suggestion is acceptable given the context of subdivision 8.7.h. and has amended the language accordingly.

COMMENT: *EPA stated that the rule must provide that emission reduction credits obtained for new source offsets must meet the NSR requirements, instead of the 2.5 years of operation in the rule.*

RESPONSE: OAQ believes that the rule makes clear that state and federal NSR rules must be satisfied for offset credit use. OAQ staff believes that permanent offsets are preferable, however, existing emissions trading rules in other states and prior unfinalized EPA guidance have led OAQ staff to include rule provisions which allow procurement of emission offsets for limited time frames governed by NSR/Title V permit requirements.

COMMENT: *EPA pointed out that since West Virginia has maintenance areas that are designated attainment for ozone, subsection 10.5 should be combined with 10.6 to clearly indicate that designated attainment areas that are maintenance areas have some restrictions applied to credit use. Further, EPA stated that the rule may not allow the use of VOC credits generated in one nonattainment area to be used in another nonattainment area unless it is being used within 100 km of the nonattainment area where the credits were generated. Lastly, EPA stated that contiguous nonattainment areas or contiguous attainment areas may not be treated as a single nonattainment area or a single attainment area.*

RESPONSE: Pursuant to OAQ's review of these comments, subdivision 10.6.b. was revised to restrict VOC emission reduction credit use by a source in a nonattainment or maintenance area so as to require the generator source to be located within 100 kilometers of the nonattainment or maintenance area boundary. Subsection 10.7 was omitted to address the last EPA comment above.

COMMENT: *EPA stated that the rule would allow the generation of emission reduction credits in one county to be used across the state, and that given the local impact of pollutants like PM, SO2, and lead, the rule must be modified to restrict the use of credits to those counties and smaller local areas of impact.*

RESPONSE: OAQ recognizes that the problem raised by EPA is of special concern for these pollutants and has amended the original subdivision 10.8.b. (now 10.7.b.) and the definition of "geographic area" at subsection 2.18. to mitigate potential emissions trading problems for these pollutants.

COMMENT: *EPA questioned how the emission trading registry will be made publicly available and stated that it may be more efficient to provide that the registry will be updated on a weekly or monthly or some regular basis. EPA also stated that the registry should be made available in a manner that does not impose undue costs or process demands on the public.*

RESPONSE: OAQ believes the rule is specific enough regarding the requirement that the registry be made publicly available; however, the agency anticipates providing more detail in implementation procedures on this point. Regarding the point that the rule be modified to state some particular frequency for updating the information, OAQ believes the rule is sufficiently stringent in requiring the Director to update the information on a continuous basis, and further points out that the rule states that the Director shall include the information in the registry within 5 business days of the receipt of the registration fee or a determination of completeness. See subsections 12.5 and 13.5.

COMMENT: *EPA stated that the rule must be modified at subsection 13.7 to provide that the conditions for use and generation of credits be included into a permit as required by the Code or federal clean air act.*

RESPONSE: OAQ has clarified the language to address this concern.

COMMENT: *EPA raised issues concerning interstate trading of nitrogen oxides emission reductions under this rule versus nitrogen oxides emissions trading under a regional cap-and-trade or budget program as contemplated in EPA's promulgation of nitrogen oxides control program requirements in the October 27, 1998 Federal Register.*

RESPONSE: One of the problems faced by OAQ and stakeholders in developing 45CSR28 was constructing the rule in a manner that would be consistent with and could properly interface with currently undeveloped nitrogen oxides control programs mandated for submission to EPA by states, including West Virginia, during 1999. Since the federal requirements for these programs were not promulgated until late October 1998 and are still being reviewed there has been considerable uncertainty as to the form West Virginia's nitrogen oxides control program, including trading provisions, will take. Placing language in 45CSR28 that references this prospective program is therefore awkward and was an issue when OAQ was determining how to incorporate the language drafted by Mr. Kotcon in a November 5, 1998, stakeholders' meeting which referenced a national nitrogen oxides program. Pursuant to EPA's comments, those earlier stakeholder discussions, and suggestion of OAQ's staff working on the mandated national program, OAQ has incorporated an additional open-market trading program restriction in 45CSR28 at subsection 4.11. This additional restriction will preclude any source participating in a nitrogen oxides trading program developed pursuant to the federal mandate from participating in the voluntary program created by 45CSR28. OAQ believes that this language is sufficient to assure the trading program segregation contemplated in EPA's comments and to interface between two trading programs more effectively than the language which had been drafted on November 5, 1998.

Commenter: West Virginia Environmental Council

COMMENT: *In addition to the four subjects discussed in the General Comments section above, Mr. James Kotcon for the Council made several additional comments which will be addressed in this section. The first comment concerned public notification requirements in the rule and recommended that expanded notification requirements be added to the rule, especially where credits would be used in areas already experiencing high emissions.*

RESPONSE: OAQ agrees with this comment and has revised the rule by including language in subsection 13.2, basically in accord with this comment.

COMMENT: *Mr. Kotcon stated that the rule's current inclusion of prohibitions and restrictions for credit use in an area that would lead to an air quality violation, and as a substitute for BACT, LAER, or New Source Reviews should be retained.*

RESPONSE: OAQ has retained these provisions in the rule.

COMMENT: *Mr. Kotcon stated that the rule currently contains extensive monitoring data to verify that emissions reductions are "real, surplus, enforceable, permanent and quantifiable" before credits are authorized. His comment affirms the importance of such a requirement.*

RESPONSE: OAQ has retained these provisions in the rule.

COMMENT: Mr. *Kotcon stated that the rule's language pertaining to interstate trading is critical in that it requires the more restrictive provisions of a state to apply.*

RESPONSE: OAQ has retained these provisions in the rule, with minor clarification of language.

Commenter: Chuck Wyrostok

COMMENT: *Mr. Wyrostok's comments were essentially the same comments which the West Virginia Environmental Council made.*

RESPONSE: See above responses to the Council's comments as well as the responses in the General Comments section above.

Commenter: Concerned Citizens' Coalition

COMMENT: *Ms. Vivian Stockman commented for the Coalition that the rule's intent is good, but the rule as written cannot "stand up to those good intentions." Ms. Stockman's specific comments were essentially the same comments which the West Virginia Environmental Council made.*

RESPONSE: See above responses to the Council's comments as well as the responses in the General Comments section above.

Commenter: Pamela Nixon, Environmental Advocate, WVDEP

COMMENT: *Ms. Nixon for the Environmental Advocate's Office of the DEP stated that the rule should include an environmental benefit discount for NOx consistent with the comments of the U.S. EPA, the Environmental Council and other commenters mentioned above. In addition, Ms. Nixon commented regarding the permanent shutdown provisions of the rule, again consistent with the Council and others mentioned above.*

RESPONSE: See above responses in the General Comments section of this document.

Commenter: Denise Poole

COMMENT: *Ms. Poole commented that the rule's objective is good, but that she is concerned it does not achieve overall air quality benefits. She specifically addressed the subject of shutdowns and also the issue raised by Mr. Kotcon in his oral comments regarding the consensus process utilized by the OAQ.*

RESPONSE: See above responses in the General Comments section regarding Ms. Poole's comments.

Commenter: Conni Gratop-Lewis

COMMENT: *Ms. Gratop-Lewis stated that she agreed with the concept behind the rule, but that she was not sure the rule went far enough in achieving the goal of EPA's model rule or of cleaning the air. She specifically commented concerning the lack of NOx credit discounts and that the ten-year period in which to retire credits is much too long. She stated that five years is more useful.*

RESPONSE: See above responses in the General Comments section. With respect to the issue raised about credit life, the OAQ offers the following response. In drafting this rule, OAQ and its stakeholder group concluded that H.B. 4578 envisioned a ten-year life for emission reduction credits and this provision for credit retirement in section 11 was apparently not questioned or contested in public comments other than those of Ms. Gratop-Lewis. Unfinalized guidance from EPA does not generally support a further restriction of emission credit life. Accordingly, the ten-year credit life provision in the rule was not changed.

COMMENT: *Ms. Gratop-Lewis also commented that she was concerned that the language in the proposed rule was not what was agreed to by all the stakeholders at the November 5th meeting.*

RESPONSE: This issue is addressed in the General Comments section, Issue 1, and in the response to EPA's last comment concerning interstate trading.

COMMENT: *Ms. Gratop-Lewis stated she was not comfortable with the process concerning facility shutdowns and believed public notification requirements need strengthening. She also stated that the rule needs revisited.*

RESPONSE: See above responses in the General Comments section, Issue 2, and the response to Mr. Kotcon's comment regarding public notification requirements. Regarding the need to revisit the rule, see General Comments, Issue 4, above.

Commenter: American Electric Power

COMMENT: *Mr. Tim Mallan, Environmental Affairs Manager for American Electric Power's West Virginia office, stated that the process that led up to the hearing was excellent and that he recommended it for other rules. He also stated that he did not think the rule is completely finished and there are still areas that need to be discussed.*

RESPONSE: Regarding Mr. Mallan's comment that the rule needs to be revisited, see General Comments, Issue 4, above.

Commenter: Union Carbide Corporation

COMMENT: *Mr. Jack Worstell of Union Carbide Corporation stated that the rule is a fairly complex rule and that the180 days from the statute to draft the rule was a handicap. In addition, EPA presented the State with a long list of very substantial issues. For these reasons, the rule ought to be revisited.*

RESPONSE: Regarding Mr. Worstell's comment that the rule needs to be revisited, see General Comments, Issue 4, above.

Commenter: Air Bank

COMMENT: *Air Bank commented that for an open market emissions system to succeed, it must provide a clear and measurable environmental benefit, and a system which fails to provide positive environmental improvements or is perceived as such will not endure in the long run. Air Bank's comments focused therefore on the aspects of the rule which it believes could inhibit the timely development of the market, thus limiting the ability of the market to improve air quality. The first specific comment concerned credit uses and suggested the rule should more clearly emphasize what are the allowable uses of credits under the program.*

RESPONSE: OAQ does not believe it is necessary to reorganize the parts of the rule as suggested by Air Bank. A rule by its very nature must carefully prescribe and limit the credit uses allowed under the program, and placing the "Prohibitions and Restrictions" section in an early portion of the rule, such as section 4, is entirely appropriate.

COMMENT: *Air Bank commented that the rule should be changed to provide that the agency will have 30 days to process notices of generation and use, rather than the rule's 60-day time frame. It stated that 30 days, in its experience, is sufficient.*

RESPONSE: OAQ believes that 60 days may be necessary to adequately process the notices of generation and use under this program. Much information is required in the notices and the information may consist of complex emissions data requiring sufficient agency review time.

COMMENT: *Air Bank commented that the director may have "blanket" discretion under subsection 14.7 of the rule to invalidate or remove credits from the registry, and that this would not produce a workable, robust trading program.*

RESPONSE: OAQ does not believe the rule as written permits unbridled discretion in this regard but rather includes the factors which would cause the director to invalidate or remove credits.

COMMENT: *Air Bank commented that the types of information and the procedure for protecting business confidentiality should be addressed generally in the rule, as well as in more detailed terms in agency procedures. It stated that both credit generators and credit buyers view credit pricing as business confidential information and that disclosure of pricing information does not necessarily represent the "true" market value of emission reduction credit transactions.*

RESPONSE: The rule at subsections 12.5 and 13.5 states that information in the notice and certification shall be available to the public, except for information determined to be confidential under the Code and 45CSR31 (OAQ's rule pertaining to the procedures for claiming and justifying information as confidential); this could include credit pricing information if properly justified. OAQ believes that agency knowledge of emissions credit costs may be very important in completing periodic trading program assessments as required by the rule and EPA and for judging the success and effectiveness, or lack thereof, of the program in meeting its goals.

COMMENT: *Air Bank commented that with regard to interstate trading, the "test of stringency" in subsection 17.5 of the rule must not be so rigid as to hinder the development of effective Memoranda of Understanding.*

RESPONSE: OAQ believes that it is appropriate for environmental and economic reasons that interstate agreements ensure equitable trades and a " level playing field" in such transactions. EPA's comments reinforce the position that the most restrictive provisions for credit generation and use should be ensured within interstate trading agreements.

Commenter: West Virginia Chamber of Commerce

COMMENT: *The West Virginia Chamber of Commerce commented generally that the rule appears to have very limited utility because of restrictions required or suggested by EPA and that due to the complexity of the program and the 180-day time frame for proposal, there was not an adequate opportunity to examine the validity of EPA's stated restrictions on emissions trading. The Chamber further stated that EPA has not stated a statutory basis for its positions but the rule must be approved by EPA as part of the SIP. The Chamber requested the agency reconvene the stakeholders' group to continue work on the rule.*

RESPONSE: See General Comments, Issue 4 above.

COMMENT: *The Chamber specifically commented that the rule at subsection 4.2 should be changed to permit the use of credits to meet the technology-based standard under 45CSR27.*

RESPONSE: OAQ believes that despite the fact that the State's air toxics rule at 45CSR27 is a State-only program, the same rationale applies for prohibiting the use of credits to comply with BAT emission standards as it does for the other technology-based emission standards established pursuant to the federal Clean Air Act. Furthermore, the implementation of BAT has been closely interlaced with the federal MACT standards for many regulated emission units.

COMMENT: *The Chamber commented that subsection 4.3 of the rule is not required by EPA guidance and discourages reductions in the toxicity of emissions which may be achieved by substituting the utilization of a feedstock or process material which has a lower toxicity. The Chamber stated that there is a sufficient amount of information regarding relative HAP toxicity to allow the director to make case-by-case determinations regarding the relative toxicity of many of the HAPs.*

RESPONSE: In the absence of a system to assure overall HAP prevention or reductions, OAQ believes that trades involving HAPs should at least be limited under this rule so as not to allow any actual increases of HAPs into the environment from any facility. After consideration of the constraints in the Code and the complexity of this issue, OAQ and the stakeholders could not within the time period for the proposal of this rule develop rule language to reconcile potentially conflicting language in the Code and develop a viable system which allows flexible trades while protecting public health. Consequently, OAQ and the stakeholders developed provisions which would at least assure that trades are not permitted which would allow any actual increases in HAPs.

COMMENT: *The Chamber commented that subsection 4.5, relating to interpollutant trading, could be construed as limiting netting otherwise currently available under 45CSR13 and 14 and recommended revising the language to be consistent with 45CSR14-2.34D(c).*

RESPONSE: OAQ recognizes that the provision in the rule setting constraints on HAP emissions trading may have to be revisited when the rule is further developed or revised. OAQ does not believe, however, that the rule constrains emissions netting for major NSR purposes (including 45CSR14) because netting is a process occurring only within a single facility and does not have to involve emissions trading as provided under this rule. Since internal netting involves at least minor NSR permitting processes and involves air pollutant levels only at one facility, it does not create the type of potential environmental justice and other pollutant transfer concerns that can occur as a result of trading between different sources.

Commenter: Bowles Rice McDavid Graff & Love

COMMENT: *Mr. Robert L. Burns, Jr. of Bowles Rice McDavid Graff & Love commented for Century Aluminum of West Virginia, Inc. Mr. Burns stated that the rule, although allowing credits to be generated for reductions occurring after January 1, 1991, severely limits the ability of larger companies to take advantage of such credits by requiring the notice and certification under subsection 12.1 to be submitted within 180 days of the effective date of the rule. He suggested that the 180 days be revised to two years and stated this would allow larger companies a fair and adequate amount of time to review the records of their previous emission reductions to determine whether the reductions meet the criteria of the rule.*

RESPONSE: OAQ believes that for the practical implementation of this program and considering EPA guidance on this issue, there must be a time limit in the rule by which generators of credit reductions occurring prior to the effective date of the rule must claim or "perfect" their credits in accordance with the rule. However, in order to provide adequate time to these sources, the rule has been revised at subsection 12.2 to require that such notices be submitted within one year.

COMMENT: *Mr. Burns stated the rule is unclear as to whether facilities wishing to take advantage of emission reductions obtained after January 1, 1991, must submit their notification within 180 days or whether they must obtain a certification of completeness from the director within 180 days.*

RESPONSE: OAQ believes the rule is clear with respect to this issue--subsection 12.2 imposes a 180-day period, triggering from the effective date of the rule, which applies to the facility's submission of the notification and certification and subsection 12.5 imposes a 180-day period, triggering from receipt of the facility's notification, which applies to the director and his or her determination of completeness.

COMMENT: *Mr. Burns also commented that the rule is unclear with respect to whether a facility may reapply beyond the 180-day period if their application is determined to be incomplete by the director.*

RESPONSE: The rule at subsection 12.5 states that a notice of incompleteness shall not preclude or prejudice a person from submitting a revised notice. OAQ believes this would apply to a facility which is required to submit its notice within 180 days from the effective date of the rule, as well as a facility which is not subject to this requirement.

Commenter: West Virginia Manufacturers Association

COMMENT: *Mr. John Pitner for the West Virginia Manufacturers Association commented that the Association endorses and supports the adoption of an emissions banking and trading rule for West Virginia. He requested that the OAQ use interpretive or procedural rules to develop the forms referred to in the rule.*

RESPONSE: Regarding the request to use interpretive or procedural rules to develop the forms referred to in the rules, it is difficult to commit to any particular approach for developing forms at this point in time, but the OAQ will certainly give consideration to this suggestion at the appropriate time.

Commenter: State of New Jersey

COMMENT: *The State of New Jersey commented that it is pleased West Virginia is proposing to establish a trading program for NOx emission reduction credits and encouraged the State to join the Interstate Trading Workgroup recently established by the Ozone Transport Commission.*

RESPONSE: OAQ appreciates the State of New Jersey's interest in its proposed rule and emissions trading program.