

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #3

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: WV Dept. of Environmental Protection Division of Air Quality TITLE NUMBER: 45

CITE AUTHORITY: W.V. Code §22-5-4

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 37

TITLE OF RULE BEING PROPOSED: Mercury Budget Trading Program to Reduce Mercury Emissions

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.

Stephanie R. Truener
Authorized Signature

QUESTIONNAIRE

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

DATE: July 29, 2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV Department of Environmental Protection
Division of Air Quality
601 57th Street, S.E.

Charleston, West Virginia 25304
Phone: 304-926-0499 ext. 1237

LEGISLATIVE RULE TITLE: 45CSR37 - Mercury Budget Trading Program to Reduce
Mercury Emissions

1. Authorizing statute(s) citation W.Va. Code §22-5-4

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

June 15, 2005

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

Published notice on June 17th and 21st in the Charleston Newspapers; The Charleston Daily
Mail and The Charleston Gazette. Sent Public Hearing Notice via e-mail to an
extensive Division of Air Quality mailing list and posted on the Department of Environmental
Protection's web site under "Calendar of Events".

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

July 18, 2005

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

Attached X No comments received

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

July 29, 2005

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

John A. Benedict, Director
601 57th Street, S.E.
Charleston, WV 25304

Tamra Mowrer, Administrative Secretary
601 57th Street, S.E.
Charleston, WV 25304

Phone: 304 926-0499
Fax: 304 926-0488
e-mail: jbenedict@wvdep.org

Phone: 304 926-0499
Fax: 304 926-0488
e-mail: tmowrer@wvdep.org

- 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)

Laura M. Crowder, Technical Analyst II
601 57th Street, S.E.
Charleston, WV 25304

Phone: 304 926-0499 ext. 1247
Fax: 304 926-0479

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

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

N/A

b. Date of hearing or comment period:

_____ N/A _____

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

_____ N/A _____

d. Attach findings and determinations and reasons:

Attached _____ N/A _____

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY**

BRIEFING DOCUMENT

Rule Title: 45CSR37 - "Mercury Budget Trading Program to Reduce Mercury Emissions"

A. AUTHORITY: W.Va. Code §22-5-4

B. SUMMARY OF RULE:

 This rule establishes the general provisions and designated representative, permitting, allowance and monitoring provisions for the Mercury (Hg) Budget Trading Program, as a means of reducing national mercury emissions, pursuant to the federal Clean Air Mercury Rule (CAMR) established under Section 111 of the Clean Air Act (CAA) and 40 CFR 60, Subpart HHHH.

 This rule partially fulfills the State's obligations in response to the United States Environmental Protection Agency's (U.S. EPA) final rule, *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units* (18 May 2005, at FR 28606). The federal rule establishes standards of performance for mercury (Hg) for new and existing coal-fired electric utility steam generating units (utility units). This rule establishes a mechanism by which Hg emissions from new and existing coal-fired utility units are capped at specific nation-wide levels. U.S. EPA has specified that annual Hg emission reductions be implemented in two phases. The first phase of Hg reductions starts in 2010 and the second phase begins in 2018, and continues thereafter. Flexibility is built in through market-based "cap and trade" provisions which allow sources to buy or sell Hg emission allowances from or to other program participants. West Virginia will withhold 5% of the annual state Hg budget and sell these allowances.

 45CSR37 applies to coal-fired electric utility steam generating units that have greater than 25 MW_e generating capacity.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

 Under the structure of the CAA, once U.S. EPA establishes New Source Performance Standards (NSPS) for new sources under section 111(b), they must, with respect to designated pollutants, establish 111(d) standards for existing sources. Specifically, section 111(d) provides that the Administrator "shall prescribe regulations which establish a procedure under which each State shall submit . . . a plan which establishes standards of performance for any existing source for any air pollutant . . . to which a standard of

performance under this section would apply if such existing source were a new source.” Therefore, since U.S. EPA deemed it appropriate to establish an NSPS for Hg emissions from new sources, U.S. EPA was obligated to establish Hg performance standards for existing sources as well. Therefore, all states, including West Virginia, are required to submit a plan in accordance with Section 111(d) of the CAA, implementing CAMR, by September 14, 2006.

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

A federal counterpart to this proposed rule exists. To the extent practicable, the proposed rule emulates the model rule contained in the final CAMR rule. Because the proposed rule follows the presumptive federal rules for the source categories to which it applies, the Secretary has determined that the proposed rule is no more or less stringent than the applicable federal counterpart regulations.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

At its June 8, 2005 meeting, the Environmental Protection Advisory Council reviewed and discussed this proposed rule. The Council’s comments are contained in the attached minutes.

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Wednesday - June 8, 2005

601 57th Street, SE, Charleston, WV

Dolly Sods Conference Room – 1st Floor

ATTENDEES:

Advisory Council Members:

Larry Harris

Jackie Hallinan

Rick Roberts

Lisa Dooley

Bill Raney

Karen Price

DEP:

Stephanie R. Timmermeyer, Cabinet Secretary

Karen G. Watson, Assistant General Counsel

Ken Ellison, Director - Division of Land Restoration

Lisa McClung, Director – Division of Water and Waste Management

John Benedict, Director – Division of Air Quality

Mike Zeto, WVDEP

Charlie Sturey, WVDEP

Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office

James Martin, Chief, WVDEP - Office of Oil & Gas

Brett Loflin, WV Oil and Gas Conservation Commission

Dave Bassage- WVDEP

Greg Adolpson – WVDEP

Jim Mason – WVDEP

Fred Durham – WVDEP

Jim Mason – WVDEP

Mike Johnson – WVDEP

VISITORS:

Linda Tennant, Spilman, Thomas, Battle

Don Garvin – WVEC

Bob Asplund - Dominion

Karen Watson, WVDEP – Assistant General Counsel, called the meeting to order at 10:00 a.m.

Proposed rules for the 2006 legislative session are as follows:

- **45CSR1 “Control and Reduction of Nitrogen Oxides from Non-Electric Generating Units as a Means to Mitigate Transport of Ozone Precursors”**

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

45CSR1 applies to large fossil fuel-fired stationary sources (large industrial boilers) with heat inputs greater than 250 mmBtu/hr. The Department of Environmental Protection, Division of Air Quality (DAQ) addresses Electric Generation Units (EGUs) in a separate rulemaking, 45CSR26. 45CSR1 also applies to large cement kilns and internal combustion engines which emitted more than one ton per day of NO_x from May 1 through September 30, 1995, although these sources are not subject to the NO_x Budget Trading Program.

Comments:

How will this relate to the new rule 40?

Rule 40 will repeal Rule 1 in 2009.

Are these kinds of trading effective in lowering NO_x emission?

Yes, West Virginia has dropped from one of the highest to one of the lowest states.

If one is testing, how do you see which sources account for improvement?

Have CEMS on stacks so we can analyze data.

- **45CSR15 – “Emission Standards for Hazardous Air Pollutants Pursuant to 40CFR Part 61”**

This rule establishes and adopts national emission standards for hazardous air pollutant (NESHAP) and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) pursuant to 40CFR part 61 and section 112 of the federal clean Air Act, as amended (CAA). This rule codifies general procedures and

criteria to implement emission standards for stationary sources that emit (or have the potential to emit) one or more to the eight substances listed as hazardous air pollutants in 40 CFR §61.01(a). The rule incorporated by reference the NESHAP standards of 40 CFR Parts 61 and 65 (consolidated Federal Air Rule), to the extent referenced in 40CFR part 61, promulgated as of June 1, 2005. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 CSR parts 61 and 65. Any person who constructs, reconstructs, modifies or operates any source subject to the provisions of 40 CFR Part 61 must comply with the applicable NESHAPS and this rule.

45CSR15, in conjunction with 45CSR34, establishes general provisions for emission standards for hazardous air pollutants (NESHAP) and other regulatory requirements promulgated by USEPA pursuant to section 112 of the federal Clean Air Act, as amended. 45CSR34 incorporates hazardous air pollutant standards codified by USEPA under 40CFR part 63 whereas 45CSR15, incorporates hazardous air pollutant standards promulgated by USEPA under 40 CFR Part 61.

This revised rule incorporates by reference the following new or revised NESHAP standards promulgated as of June 1, 2005: National Emission Standards for Hazardous Air Pollutants for Asbestos.

No Comments

- **45CSR16 – “Standards of Performance for New Stationary Sources Pursuant to 40CFR Part 60”**

This rule establishes and adopts national standards of performance for new stationary sources and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) pursuant to section 111(b) of the federal Clean Air Act, as amended (CAA). This rule codifies general procedures and criteria to implement standards of performance for new stationary sources set forth in 40 CFR Part 60. The rule incorporates by reference New Sources Performance Standards (NSPS) promulgated as of June 1, 2005. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to such standards. Any person who constructs, modifies, reconstructs or operates an affected facility after the effective date of any NSPS under 40 CFR Part 60 must comply with the applicable NSPS and this rule.

This revised rule incorporates by reference the following new or revised NSPS standards promulgated as of July 1, 2005: Standards of performance for Industrial-Commercial-Institutional Steam Generating units; Stationary Gas Turbines; Steel Plants; and new and Existing Stationary Sources: Electric Utility Steam Generating Units (CAMR).

No Comments

- **45CSR25 – “To Prevent and Control Air Pollution from Hazardous Waste Treatment Storage or Disposal Facilities.”**

This rule establishes and adopts national standards of performance for new stationary sources and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) pursuant to the Resource Conservation and Recovery Act, as amended (RCRA). This rule codifies general procedures and criteria to implement emission standards set forth in the Code of Federal Regulations as listed in Table 25-A of the rule. The rule also adopts associated appendices, reference methods, performance specifications and other test methods, which are appended to these standards. Any person, who constructs, reconstructs, modifies or operates any hazardous waste treatment, storage, or disposal facility must comply with the West Virginia Hazardous Waste management Program, the codified federal emission standards, and this rule.

45CSR25 establishes a program of regulation over the treatment, storage, and disposal of hazardous wastes in order to achieve and maintain such levels of air quality as will protect the public health and safety and the environment from the effects of improper, inadequate, or unsound treatment, storage, or disposal of hazardous wastes.

This revised rule incorporates by reference the following provisions of 40 CFR Part 262 promulgated as of June 1, 2005: National Environmental Performance Track Program.

Comments:

What does the term “constituents” mean and how does one decide whether a source has prevented emissions that would cause harm under section 1.1.b of the rule?

Look at the definition of “hazardous waste” and prevention language is meant to set forth overall purpose of the rule.

Does the agency consult with DHHR or other public health officials?

No, the agency uses a risk-based approach and has a toxicologist employed. It also looks to EPA.

- **45CSR33 – “Acid Rain Provisions and Permits”**

This rule establishes and adopts the general provisions and operating permit program requirements for affected sources under the Acid Rain Program promulgated by the United States Environmental Protection Agency (USEPA) under title IV of the Clean Air Act, as amended (CAA). The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these provisions. Under the Acid Rain Program and 45CSR33, no person may construct, modify, or operate or

cause to be constructed, modified, or operated, an Acid Rain Source in violation of 40CFR Parts 72 through 77.

Title IV of the CAA requires each state to implement an operating permit system conforming to Title IV and Title V of the CAA, as amended. 45CSR33 incorporates by reference the federal counterpart regulation 40 CFR Parts 72 through 77. USEPA approved West Virginia's Acid Rain Program with its approval of the state's Title V Operating Permit Program on December 15, 1995.

This revised rule incorporates by reference the following revisions to 40CFR Parts 72 through 77 promulgated as of June 1, 2005: Permits Regulation, Sulfur Dioxide Allowance System, Sulfur Dioxide Opt-Ins, continuous Emission Monitoring, Excess Emissions (CAIR & CAMR).

No Comments

- **45CSR34 – “Emission Standards for Hazardous Air Pollutants For Source Categories Pursuant to 40 CFR Part 63**

This rule establishes and adopts national emission standards for hazardous air pollutants (NESHAP) and other regulatory requirements promulgated by the United States Environmental Protection Agency (U.S. EPA) pursuant to section 112 of the federal Clean Air Act, as amended (CAA). This rule codifies general procedures and criteria to implement emission standards for stationary sources that emit, or have the potential to emit, one or more of the hazardous air pollutants set forth in section 112(b) of the CAA. The rule incorporates by reference the NESHAP standards of 40 CFR Parts 63 and 65 (Consolidated Federal Air Rule), to the extent referenced in 40 CFR Part 63, promulgated as of June 1, 2005. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 CFR Parts 63 and 65. Any person who constructs, reconstructs, modifies or operates any source subject to the provisions of 40 CFR Part 63 must comply with the applicable NESHAPS and this rule.

45CSR34, in conjunction with 45CSR15, establishes general provisions for emission standards for hazardous air pollutants and other regulatory requirements promulgated by U.S. EPA pursuant to section 112 of the federal Clean Air Act, as amended. 45CSR34 incorporates hazardous air pollutant standards codified by U.S. EPA under 40 CFR Part 63 whereas 45CSR15 incorporates hazardous air pollutant standards promulgated by U.S. EPA under 40 CFR Part 61.

This revised rule incorporates by reference the following new or revised NESHAP standards promulgated as of June 1, 2005: National Environmental Performance Track Program, National Emission Standards for Hazardous Air Pollutants for Source Categories, Chromium Emissions From Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, Plywood & Composite Wood Products; Effluent Limitations Guidelines and Standards for Timber Products Point Source Category; List of HAPs, Lesser Quantity Designations, Source Category List, Printing, Coating & Dyeing of Fabrics and Other Textiles, Stationary Combustion Turbines, Solvent Extraction for Vegetable Oil Production, Industrial,

Commercial, Institutional Boilers and Process Heaters, Secondary Aluminum Production, Coke Ovens: Pushing, Quenching, and Battery Stacks, List of Hazardous Air Pollutants, Petition Process, Lesser Quantity Designations, Source Category List; Petition to Delist of Ethylene Glycol Monobutyl Ether, Organic Hazardous Air Pollutants from Synthetic Organic Chemical Manufacturing Industry and Other Processes Subject to the Negotiated Regulation for Equipments Leaks, Coke Ovens: Pushing, Quenching, and Battery Stacks, Leather Finishing Operations, Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units, Revision of December 2000 Regulatory Finding on the Emissions of HAPs from Electric Utility Steam Generating Units & Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from Section 112(c) List, Generic MACT; Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations, Coke Oven Batteries, Miscellaneous Coating Manufacturing, Pharmaceuticals Production, Asphalt Processing & Asphalt Roofing Manufacturing and Iron and Steel Foundries.

No Comments

- **45CSR37 – “Mercury Budget Trading Program to Reduce Mercury Emissions”**

This rule establishes the general provisions and designated representative, permitting, allowance and monitoring provisions for the Mercury (Hg) Budget Trading Program, as a means of reducing national mercury emissions, pursuant to the federal Clean Air Mercury Rule (CAMR) established under Section 111 of the Clean Air Act (CAA) and 40 CFR 60, Subpart HHHH.

This rule partially fulfills the State's obligations in response to the United States Environmental Protection Agency's (U.S. EPA) final rule, *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units* (15 March 2005, at FR XXXXX). The federal rule establishes standards of performance for mercury (Hg) for new and existing coal-fired electric utility steam generating units (utility units). This rule establishes a mechanism by which Hg emissions from new and existing coal-fired utility units are capped at specific nation-wide levels. U.S. EPA has specified that annual Hg emission reductions be implemented in two phases. The first phase of Hg reductions starts in 2010 and the second phase begins in 2018, and continues thereafter. Flexibility is built in through market-based “cap and trade” provisions which allow sources to buy or sell Hg emission allowances from or to other program participants.

45CSR37 applies to coal-fired electric utility steam generating units that have greater than 25 MW_e generating capacity.

Comments:

How will this affect Industrial boilers?

The rule does not cover these sources.

What kind of monitoring is required?

Have to install CEMS.

What happens when there is litigation?

If court remands, we would withdraw the rule.

Does the rule apply to natural gas-fired units?

No, only coal-fired.

Does the rule establish new fees?

No.

John Benedict informed the Council of the following reductions:

Nationally

2010 – 22%

2018 – 69%

WV:

2010 – 43%

2018 – 77%

- **45CSR39 – “Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides”**

This rule establishes general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR NO_x Annual Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AA through II, and 40 CFR §51.123 for state implementation plans as a means of mitigating interstate transport of fine particulates and nitrogen oxides (NO_x).

This rule partially fulfills the State’s obligations in response to the United States Environmental Protection Agency’s (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of NO_x reduce annual emissions through the constraint of set

budgets. U.S. EPA is specifying that annual NO_x emission reductions be implemented in two phases. The first phase of NO_x reductions starts in 2009; the second phase starts in 2015, and continues thereafter. The NO_x emission reduction requirements are based on controls that are known to be highly cost effective for electric generating units. Flexibility is built in through market-based "cap and trade" provisions which allow sources to buy or sell NO_x emission allowances from or to other program participants. Reducing upwind NO_x emissions will assist downwind PM_{2.5} and 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

45CSR39 applies to large fossil fuel-fired electric generating units that have greater than 25 MW_e generating capacity. The CAIR NO_x Ozone Season Trading Program requirements are set forth in 45CSR40.

Comments:

How will this affect industrial boilers?

It will not. It only affects electric utilities.

Is there a set-aside provision?

Yes.

Agency should consider using the money to clean up streams impacted by acid rain.

- **45CSR40 – "Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides"**

This rule establishes the general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR NO_x Ozone Season Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AAAA through IIII, and 40 CFR §51.123 for state implementation plans as a means of mitigating interstate transport of ozone and nitrogen oxides (NO_x).

This rule partially fulfills the State's obligations in response to the United States Environmental Protection Agency's (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of NO_x reduce ozone season emissions through the constraint of set budgets. U.S. EPA is specifying that ozone season NO_x emission reductions be implemented in two phases. The first phase of ozone season NO_x reductions starts in 2009; the second phase starts in 2015, and continues thereafter. The NO_x emission reduction requirements are based on controls that are known to be highly cost effective for electric generating units and large industrial boilers. Flexibility is built in through market-

based “cap and trade” provisions which allow sources to buy or sell NO_x emission allowances from or to other program participants. Reducing upwind ozone season NO_x emissions will assist downwind 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

Because CAIR subsumes the ozone season NO_x SIP Call trading program, existing NO_x SIP Call rules 45CSR1 and 45CSR26 and their ozone season NO_x reduction provisions must be “sunsetting” by January 1, 2009. Therefore, 45CSR40 contains a repeal clause which effectively “sunset” these rules, meeting the approvability requirement for implementing CAIR.

45CSR40 applies to large fossil fuel-fired electric generating units that have greater than 25 MW_e generating capacity and large fossil fuel-fired industrial boilers with a heat input greater than 250 mmBtu/hr. This rule also applies to affected cement kilns and internal combustion engines, by retaining the NO_x SIP Call ozone season NO_x emission reduction requirements for these sources from 45CSR1. These existing requirements do not provide for inclusion in any cap and trade program for cement kilns and internal combustion engines. The CAIR NO_x Annual Trading Program requirements are set forth in 45CSR39.

No Comments.

- **33CSR41 – “Control of Annual Sulfur Dioxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Sulfur Dioxide”**

This rule establishes general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR SO₂ Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AAA through III, and 40 CFR §51.124 for state implementation plans as a means of mitigating interstate transport of fine particulates and sulfur dioxide (SO₂).

This rule partially fulfills the State’s obligations in response to the United States Environmental Protection Agency’s (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of SO₂ reduce annual emissions based upon the implementation of retirement ratios for SO₂ allowances allocated under the Acid Rain Program. U.S. EPA is specifying that annual SO₂ emission reductions be implemented in two phases. The first phase of SO₂ reductions starts in 2010 and requires retiring SO₂ allowances at a 2:1 ratio; the second phase starts in 2015 and requires retiring SO₂ allowances at a 2.86:1 ratio, and continues thereafter. The SO₂ emissions reductions requirements are based on controls that are known to be highly cost effective for electric generating units. Flexibility is built in through market-based “cap and trade” provisions which allow sources to buy or sell SO₂ emission allowances from or to other program participants. Reducing upwind SO₂ emissions will assist downwind PM_{2.5} and 8-hour ozone nonattainment

areas in achieving the National Ambient Air Quality Standards (NAAQS).

45CSR41 applies to large fossil fuel-fired electric generating units that have greater than 25 MW generating capacity.

How was the fiscal note derived?

It is based on how many persons will be necessary to implement the rule.

When will these rules be filed with EPA?

September of 2006 for the CAIR rules and November 2006 for the mercury rule.

- **33CSR1 – “Solid Waste Management Rule”**

This legislative rule establishes requirements for the siting (including location standards), financial assurance, installation, establishment, construction, design, groundwater monitoring, modification, operation, permitting, closure and post-closure care of any solid waste facility that processes, recycles, composts, transfers or disposes of solid waste pursuant to W. Va. Code §22-15-1 et seq.

The rule revision will clarify that the State Division of Highways is subject to an exemption from permitting for its construction/demolition wastes associated with highway construction. The rule will also clarify that the beneficial reuse of clean bituminous concrete (asphalt) is not subject to permitting requirements, just as the beneficial reuse of Portland cement is not subject to permitting.

Comments:

Has the agency worked with the Division of Highways on the rule?

Yes.

- **33-CSR20 – “Hazardous Waste Management”**

The purpose of this rule is to provide for the regulation of the generation, treatment, storage, and disposal of hazardous waste to the extent necessary for the protection of the public health and safety and the environment. The rule changes pick up two new federal regulations.

No Comments.

- **35CSR3 – “Coalbed Methane Wells Rule”**

This rule applies to coalbed methane wells. The rule changes are necessary to conform to recent statutory revisions related to spacing. The changes also address new technology allowing for the horizontal drilling of wells.

Comments:

Are operators required to sample both water quality and quantity?

Just quality.

A question was raised about the 100' and 1000' distance requirements from water wells and the agency explained how these provisions work.

A comment was made that landowners are confused by the rule's requirements and some further explanations would be helpful.

- **39CSR1 – “Rules of the Commission”**

The rule is designed to prevent waste, protect correlative rights and to conserve oil and gas in the State of West Virginia and is applicable to all activities subject to the jurisdiction of the Oil and Gas Conservation Commission. Where special field rules apply, the special field rules shall govern to the extent of any conflict. The rule changes are to clarify the agency can enter consent agreements and establish escrow accounts.

No comments.

- **60CSR8 “Environmental Excellence Program Rule”**

This legislative rule establishes the eligibility, procedures, standards and legal documents required for establishing a voluntary environmental excellence program, consisting of incentives to reward facilities that go beyond regulatory requirements.

Comments:

Will the reports that are filed be shared with the public?

Yes, they will be posted on the internet.

Will people pay the \$1000 fee?

From pre-comments, most are willing to pay some amount. The administrative fund will cover the agency's operating costs.

A comment was made that there should be more programs like this, where companies are rewarded for good performance.

Lisa McClung, Director of DWWM, presented several rules under the water program that will be filed in the future. One was the concentrated animal feeding operation (CAFO) rule that was withdrawn by the agency in the 2005 session. As soon as EPA repromulgates its rule, the State will need to do so, perhaps by an emergency rule.

Then the new law transferring the authority to adopt water quality standards to the DEP was discussed. A question was raised concerning the public's involvement in the process. Ms. McClung responded that the process would be somewhat different from the agency's normal rulemaking.

Karen Watson then presented a list of bills passed by the Legislature during the 2005 regular session and signed by the Governor as follows:

1. SB 428. Creating the Revitalization Environmental Action Plan.

This legislation transfers the litter control and recycling programs from DNR to DEP and transfers the waste tire remediation program from DOH to DEP. The legislation was amended by the House to require the excess funds to be transferred to the state road fund rather than the solid waste reclamation and environmental response fund. SB 428 bill also incorporates the provisions of Senate Bill 42 at 22-15A-12(f) and (k). These provisions provide liability protection on waste tire remediation to bona fide purchasers of property containing waste tires.

2. SB 603. Higher Education Bill – Brownfield Assistance Centers.

This legislation creates a provision in W.Va. Code § 18B11-7 that authorizes Marshall University and West Virginia University to each create Brownfield Assistance Centers for the purpose of acquiring and developing property; seeking federal brownfield assistance funds; and providing assistance to municipalities and local governments for brownfields development.

Comments:

The Council discussed the funding mechanisms under the new law.

3. HB 3354. Oil and Gas Permit Fee Increase.

This legislation increases the permit fees for shallow wells from \$250 to \$400; the permit fees for deep wells from \$250 to \$650; and the reclamation fees for all well activity from \$100 to \$150. This legislation also includes some technical amendments to the statutes governing oil and gas and coal bed methane drilling and production. As introduced, the legislation increased the permit fees for coal bed methane wells from \$250 to \$650 but the legislation was amended by the Senate to eliminate this permit fee increase. In total, this legislation will generate approximately \$350,000 for the Office of Oil and Gas.

4. SB 406. Uniform Environmental Covenant Act.

This legislation clarifies that environmental covenants containing affirmative obligations issued pursuant to the Voluntary Remediation and Redevelopment Act or other federal or state response actions are enforceable and perpetual; provides notice requirements for those placing environmental covenants on real property; and authorizes the department and local governments to enforce environmental covenants.

Comments:

A question was raised as to local governments.

The agency responded that they are included and have authority under the new law.

5. HB 2723. Environmental Rules Bundle.

This legislation consolidates the rules proposed by DEP and EQB. The DEP rules include revisions to the air, waste, water and mining programs. The EQB's rule relates to water quality standards. The EQB's rule was amended to eliminate Fill Hollow Creek in Preston County that the Board recommended to be included on the Tier 2.5 list. Tier 2.5 waters are waters of special concern and include naturally reproducing trout streams.

6. HB 3236. Thin Seam Coal Tax Applicability.

This legislation clarifies that the special tax on coal production and the special reclamation tax apply to coal produced from thin seams.

7. HB 2333. Environmental Good Samaritan Act.

This legislation protect landowners, groups and individuals who volunteer to reclaim abandoned mineral extraction lands and abate water pollution caused by abandoned mine lands from civil and environmental liability provided such activities are approved by the department and implemented in accordance with the plans approved by the department.

8. HB 3033. Continuation of Special Reclamation Tax.

This legislation extends the temporary special reclamation tax of seven cents for an additional eighteen months thereby maintaining the total special reclamation tax at fourteen cents per ton of coal produced. The legislation also requires the Secretary to evaluate and consider additional bonding mechanisms, such as full cost bonding and the creation of a water quality trust fund.

9. SB 154. Beneficial Reuse of Water Treatment Plant Sludge.

This legislation authorizes the beneficial reuse of water treatment plant sludge and requires the department to develop rules establishing criteria for the beneficial reuse of water treatment plant sludge.

10. SB 287. Transfer of Rulemaking Authority for Water Quality Standards.

This legislation transfers the authority to promulgate water quality standards and the authority to grant remining variances from the Environmental Quality Board to the department.

11. SB 748. Credit for Mitigation.

This legislation authorizes the secretary to grant credit for mitigation required by the Corps of Engineers pursuant to permit issued under Section 404 of the Clean Water Act when such mitigation satisfies mitigation required by the West Virginia Water Pollution Control Act.

12. SB 700. Creation of the Community Infrastructure Investment Program.

This legislation authorizes department to grant approval for the construction of privately financed water and sewage treatment facilities without the requirement of a certificate of need and convenience from the Public Service Commission provided that the project results in economic development and improvement of water quality. This legislation also authorizes municipal utilities and public service districts to enter into community service agreements with private developers for the purpose of constructing or expanding public utilities. This legislation also requires the secretary to promulgate emergency rules to implement the program.

Comments:

Two members expressed interest in the future rulemaking efforts and any stakeholders group.

13. HB 3356. Increasing authority of the Solid Waste Management.

This legislation requires the SWMB to conduct biannual performance reviews of county and regional solid waste authorities and grants the SWMB with the authority to supersede or exercise the powers granted to county or regional solid waste authorities that operate a solid waste facility

14. SB 455. Financing of Environmental Control Activities.

This Legislation authorizes the public service commission to review and approve the use of environmental control bonds for environmental control activities by certain qualified electric utilities.

The next meeting date was scheduled for September 15, 2005 – 1:00 p.m. – 3:00 p.m. – Trish will contact everyone with room location and agenda.

Karen Watson adjourned meeting.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR37 - "Mercury Budget Trading Program to Reduce Mercury Emissions"

Type of Rule: X Legislative Interpretive Procedural

Agency: Division of Air Quality

Address: 601 57th Street SE
Charleston, WV 25304

Phone Number: 926-0475

Email: tmowrer@wvdep.org

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The rule will increase the resources required for implementation compared to current regulations. Initial implementation costs may be significant beginning in FY 2007, but should mostly be offset by fee income.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR

Effect of Proposal	2006 Increase/Decrease (use "-")	2007 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	\$ 0	\$ 0	\$ 0
Personal Services	\$ 12,400	\$ 80,680	\$ 12,400
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Equipment	\$ 625	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	\$ 4,400,00

Rule Title: 45CSR37 - "Mercury Budget Trading Program to Reduce Mercury Emissions"

3. **Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

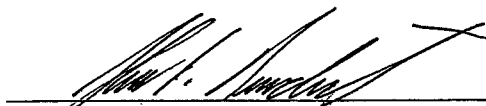
Costs anticipated to be incurred during implementation of this rule in FY 2006 are approximately 16.7% of 1 FTE plus benefits, office and equipment costs. In fiscal years 2007, personal costs for compliance certification increase to 50% of 2 FTE's plus an initial agency allocation responsibility of 8.3% of 1 FTE. Upon full implementation, personal costs decrease to 16.7% of 1 FTE due to annual agency allocation and sale responsibility under the program. Also upon full implementation, in 2010 through 2017 are \$4.4 million, in 2018 and thereafter approximate revenues are \$1.76 million, based on the market value of mercury allowances. EPA projects that mercury allowances will sell for approximately \$2000 per ounce.

MEMORANDUM

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

Date: June 15, 2005

Signature of Agency Head or Authorized Representative



John A. Benedict, Director

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

SERIES 37
MERCURY BUDGET TRADING PROGRAM
TO REDUCE MERCURY EMISSIONS

FILED
2005 JUL 29 P 2:29
OFFICE WEST VIRGINIA
SECRETARY OF STATE

§45-37-1. General.

1.1. Scope. -- This rule establishes the general provisions and the designated representative, permitting, allowance and monitoring provisions for the Mercury (Hg) Budget Trading Program, as a means of reducing mercury emissions, pursuant to the federal Clean Air Mercury Rule (CAMR) established under Section 111 of the Clean Air Act (CAA) and 40 CFR 60, Subpart HHHH. The Secretary of the Department of Environmental Protection authorizes the Administrator of the United States Environmental Protection Agency to assist the Secretary in implementing the multi-state Hg Budget Trading Program in West Virginia by carrying out the functions set forth for the Administrator in the requirements of this rule and 40 CFR §60.24(h)(6).

1.2. Numbering and text breakdown. -- This rule generally meets the numbering, indentation and text breakdown requirements set forth in 153CSR6. However, its numbering structure intentionally follows the numbering structure of 40 CFR 60, Subpart HHHH, resulting in several minor areas of nonconformity with 153CSR6.

1.3. Authority. -- W. Va. Code §22-5-4.

1.4. Filing Date. --

1.5. Effective Date. --

§45-37-2. Definitions.

2.1. "Account number" means the identification number given by the Administrator

to each Hg Allowance Tracking System account.

2.2. "Acid Rain emissions limitation" means a limitation on emissions of sulfur dioxide or nitrogen oxides under the Acid Rain Program.

2.3. "Acid Rain Program" means a multi-state sulfur dioxide and nitrogen oxides air pollution control and emission reduction program established by the Administrator under Title IV of the CAA and 40 CFR Parts 72 through 78.

2.4. "Administrator" means the Administrator of the United States Environmental Protection Agency (U.S. EPA) or the Administrator's duly authorized representative.

2.5. "Allocate" or "allocation" means the determination by the Secretary or the Administrator of the amount of Hg allowances to be initially credited to a Hg Budget unit or a new unit set-aside under sections 40 through 42.

2.6. "Allowance transfer deadline" means, for a control period, midnight of March 1, if it is a business day or, if March 1 is not a business day, midnight of the first business day thereafter immediately following the control period and is the deadline by which a Hg allowance transfer must be submitted for recordation in a Hg Budget source's compliance account in order to be used to meet the source's Hg Budget emissions limitation for such control period in accordance with section 54.

2.7. "Alternate Hg designated representative" means, for a Hg Budget source and each Hg

Budget unit at the source, the natural person who is authorized by the owners and operators of the source and all such units at the source in accordance with sections 10 through 14, to act on behalf of the Hg designated representative in matters pertaining to the Hg Budget Trading Program.

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

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

2.10. "Bottoming-cycle cogeneration unit" means a cogeneration unit in which the energy input to the unit is first used to produce useful thermal energy and at least some of the reject heat from the useful thermal energy application or process is then used for electricity production.

2.11. "CAIR NO_x Annual Trading Program" means a multi-state nitrogen oxides air pollution control and emission reduction program approved and administered by the Administrator in accordance with Subparts AA through II of 40 CFR Part 96 and 40 CFR §51.123, as a means of mitigating interstate transport of fine particulates and nitrogen oxides.

2.12. "CAIR NO_x Ozone Season Trading Program" means a multistate nitrogen oxides air pollution control and emission reduction program approved and administered by the Administrator

in accordance with Subparts AAAA through IIII of 40 CFR Part 96 and 40 CFR §51.123, as a means of mitigating interstate transport of ozone and nitrogen oxides.

2.13. "CAIR SO₂ Trading Program" means a multi-state sulfur dioxide air pollution control and emission reduction program approved and administered by the Administrator in accordance with Subparts AAA through III of 40 CFR Part 96 and §51.124, as a means of mitigating interstate transport of fine particulates and sulfur dioxide.

2.14. "Clean Air Act" or "CAA" means the Clean Air Act, 42 U.S.C. 7401, et seq.

2.15. "Coal" means any solid fuel classified as anthracite, bituminous, subbituminous or lignite by the American Society of Testing and Materials (ASTM) Standard Specification for Classification of Coals by Rank D388-77, 90, 91, 95, 98a or 99 (Reapproved 2004).

2.16. "Coal-derived fuel" means any fuel (whether in a solid, liquid or gaseous state) produced by the mechanical, thermal or chemical processing of coal.

2.17. "Coal-fired" means combusting any amount of coal or coal derived fuel, alone or in combination with any amount of any other fuel, during any year.

2.18. "Cogeneration unit" means a stationary, coal-fired boiler or stationary, coal-fired combustion turbine:

2.18.a. Having equipment used to produce electricity and useful thermal energy for industrial, commercial, heating or cooling purposes through the sequential use of energy; and

2.18.b. Producing during the 12-month period starting on the date the unit first produces electricity and during any calendar year after

which the unit first produces electricity:

2.18.b.1. For a topping-cycle cogeneration unit,

2.18.b.1.A. Useful thermal energy not less than 5 percent of total energy output; and

2.18.b.1.B. Useful power that, when added to one-half of useful thermal energy produced, is not less than 42.5 percent of total energy input, if useful thermal energy produced is 15 percent or more of total energy output or not less than 45 percent of total energy input, if useful thermal energy produced is less than 15 percent of total energy output.

2.18.b.2. For a bottoming-cycle cogeneration unit, useful power not less than 45 percent of total energy input.

2.19. "Combustion turbine" means:

2.19.a. An enclosed device comprising a compressor, a combustor and a turbine and in which the flue gas resulting from the combustion of fuel in the combustor passes through the turbine, rotating the turbine; and

2.19.b. If the enclosed device under subdivision 2.19.a is combined cycle, any associated heat recovery steam generator and steam turbine.

2.20. "Commence commercial operation" means, with regard to a unit serving a generator:

2.20.a. To have begun to produce steam, gas or other heated medium used to generate electricity for sale or use, including test generation, except as provided in section 5;

2.20.a.1. For a unit that is a Hg Budget unit under section 4 on the date the unit commences commercial operation as defined in subdivision 2.20.a and that subsequently undergoes a physical

change (other than replacement of the unit by a unit at the same source), such date will remain the unit's date of commencement of commercial operation.

2.20.a.2. For a unit that is a Hg Budget unit under section 4 on the date the unit commences commercial operation as defined in subdivision 2.20.a and that is subsequently replaced by a unit at the same source (e.g., repowered), the replacement unit will be treated as a separate unit with a separate date for commencement of commercial operation as defined in subdivision 2.20.a or 2.20.b as appropriate.

2.20.b. Notwithstanding subdivision 2.20.a and except as provided in section 5, for a unit that is not a Hg Budget unit under section 4 on the date the unit commences commercial operation as defined in subdivision 2.20.a, the unit's date for commencement of commercial operation will be the date on which the unit becomes a Hg Budget unit under section 4.

2.20.b.1. For a unit with a date for commencement of commercial operation as defined in subdivision 2.20.b and that subsequently undergoes a physical change (other than replacement of the unit by a unit at the same source), such date will remain the unit's date of commencement of commercial operation.

2.20.b.2. For a unit with a date for commencement of commercial operation as defined in subdivision 2.20.b and that is subsequently replaced by a unit at the same source (e.g., repowered), the replacement unit will be treated as a separate unit with a separate date for commencement of commercial operation as defined in subdivision 2.20.a or 2.20.b as appropriate.

2.21. "Commence operation" means:

2.21.a. To have begun any mechanical, chemical or electronic process, including, with

regard to a unit, startup of a unit's combustion chamber, except as provided in section 5.

2.21.a.1. For a unit that is a Hg Budget unit under section 4 on the date the unit commences operation as defined in subdivision 2.21.a and that subsequently undergoes a physical change (other than replacement of the unit by a unit at the same source), such date will remain the unit's date of commencement of operation.

2.21.a.2. For a unit that is a Hg Budget unit under section 4 on the date the unit commences operation as defined in subdivision 2.21.a and that is subsequently replaced by a unit at the same source (e.g., repowered), the replacement unit will be treated as a separate unit with a separate date for commencement of operation as defined in subdivision 2.21.a or 2.21.b as appropriate.

2.21.b. Notwithstanding subdivision 2.21.a and except as provided in section 5, for a unit that is not a Hg Budget unit under section 4 on the date the unit commences operation as defined in subdivision 2.21.a, the unit's date for commencement of operation will be the date on which the unit becomes a Hg Budget unit under section 4.

2.21.b.1. For a unit with a date for commencement of operation as defined in subdivision 2.21.b and that subsequently undergoes a physical change (other than replacement of the unit by a unit at the same source), such date will remain the unit's date of commencement of operation.

2.21.b.2. For a unit with a date for commencement of operation as defined in subdivision 2.21.b and that is subsequently replaced by a unit at the same source (e.g., repowered), the replacement unit will be treated as a separate unit with a separate date for commencement of operation as defined in subdivision 2.21.a or 2.21.b as appropriate.

2.22. "Common stack" means a single flue through which emissions from two (2) or more units are exhausted.

2.23. "Compliance account" means a Hg Allowance Tracking System account, established by the Administrator for a Hg Budget source under sections 51 through 57, in which any Hg allowance allocations for the Hg Budget units at the source are initially recorded and in which are held any Hg allowances available for use for a control period in order to meet the source's Hg Budget emissions limitation in accordance with section 54.

2.24. "Continuous emission monitoring system" or "CEMS" means the equipment required under sections 70 through 76 to sample, analyze, measure and provide, by means of readings recorded at least once every 15 minutes (using an automated data acquisition and handling system (DAHS)), a permanent record of Hg emissions, stack gas volumetric flow rate, stack gas moisture content and oxygen or carbon dioxide concentration (as applicable), in a manner consistent with 40 CFR Part 75. The following systems are the principal types of CEMS required under sections 70 through 76:

2.24.a. A flow monitoring system, consisting of a stack flow rate monitor and an automated data acquisition and handling system and providing a permanent, continuous record of stack gas volumetric flow rate, in units of standard cubic feet per hour (scfh); and

2.24.b. A Hg concentration monitoring system, consisting of a Hg pollutant concentration monitor and an automated data acquisition and handling system and providing a permanent, continuous record of Hg emissions in units of micrograms per dry standard cubic meter ($\mu\text{g}/\text{dscm}$); and

2.24.c. A moisture monitoring system, as defined in 40 CFR §75.11(b)(2) and providing a

permanent, continuous record of the stack gas moisture content, in percent H_2O ; and

2.24.d. A carbon dioxide monitoring system, consisting of a CO_2 concentration monitor (or an oxygen monitor plus suitable mathematical equations from which the CO_2 concentration is derived) and an automated data acquisition and handling system and providing a permanent, continuous record of CO_2 emissions, in percent CO_2 ; or

2.24.e. An oxygen monitoring system, consisting of an O_2 concentration monitor and an automated data acquisition and handling system and providing a permanent, continuous record of O_2 , in percent O_2 .

2.25. "Control period" means the period beginning January 1 of a calendar year, except as provided in subdivision 6.3.b, and ending on December 31 of the same year, inclusive.

2.26. "Department of Environmental Protection" or "DEP" means the West Virginia Department of Environmental Protection created by the provisions of W. Va. Code §22-1-1, et seq.

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

2.28. "Excess emissions" means any ounce of mercury emitted by the Hg Budget units at a Hg Budget source during a control period that exceeds the Hg Budget emissions limitation for the source.

2.29. "General account" means a Hg Allowance Tracking System account, established under section 51, that is not a compliance account.

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

2.31. "Gross electrical output" means, with regard to a cogeneration unit, electricity made available for use, including any such electricity used in the power production process (which process includes, but is not limited to, any on-site processing or treatment of fuel combusted at the unit and any on-site emission controls).

2.32. "Heat input" means, with regard to a specified period of time, the product (in mmBtu/time) of the gross calorific value of the fuel (in Btu/lb) divided by 1,000,000 Btu/mmBtu and multiplied by the fuel feed rate into a combustion device (in lb of fuel/time), as measured, recorded and reported to the Administrator by the Hg designated representative and determined by the Administrator in accordance with sections 70 through 76 and excluding the heat derived from preheated combustion air, recirculated flue gases or exhaust from other sources.

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

2.34. "Hg authorized account representative" means, with regard to a general account, a responsible natural person who is authorized, in accordance with section 52, to transfer and otherwise dispose of Hg allowances held in the general account and, with regard to a compliance account, the Hg designated representative of the source.

2.35. "Hg allowance" means a limited authorization issued by the Secretary or the Administrator under sections 40 through 42 to emit one ounce of mercury during a control period of the specified calendar year for which the

authorization is allocated or of any calendar year thereafter under the Hg Budget Trading Program. An authorization to emit mercury that is not issued under the provisions of a state plan that adopts the requirements of 40 CFR Part 60, Subpart HHHH and is approved by the Administrator in accordance with 40 CFR §60.24(h)(6) will not be a "Hg allowance."

2.36. "Hg allowance deduction" or "deduct Hg allowances" means the permanent withdrawal of Hg allowances by the Administrator from a compliance account in order to account for a specified number of ounces of total mercury emissions from all Hg Budget units at a Hg Budget source for a control period, determined in accordance with sections 51 through 57 and sections 70 through 76 or to account for excess emissions.

2.37. "Hg allowances held" or "hold Hg allowances" means the Hg allowances recorded by the Administrator or submitted to the Administrator for recordation, in accordance with sections 51 through 62, in a Hg Allowance Tracking System account.

2.38. "Hg Allowance Tracking System" means the system by which the Administrator records allocations, deductions and transfers of Hg allowances under the Hg Budget Trading Program. Such allowances will be allocated, held, deducted or transferred only as whole allowances.

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

2.40. "Hg Budget emissions limitation" means, for a Hg Budget source, the equivalent in ounces of the Hg allowances available for deduction for the source under subsections 54.1 and 54.2 for a control period.

2.41. "Hg Budget permit" means the legally binding and federally enforceable written document or portion of such document, issued by the Secretary under sections 20 through 24, including any permit revisions, specifying the Hg Budget Trading Program requirements applicable to a Hg Budget source, to each Hg Budget unit at the source and to the owners and operators and the Hg designated representative of the source and each such unit.

2.42. "Hg Budget source" means a source that includes one or more Hg Budget units.

2.43. "Hg Budget Trading Program" means a multi-state Hg air pollution control and emission reduction program approved and administered by the Administrator in accordance with 40 CFR §60.24(h)(6), as a means of reducing national Hg emissions.

2.44. "Hg Budget unit" means a unit that is subject to the Hg Budget Trading Program under section 4.

2.45. "Hg designated representative" means, for a Hg Budget source and each Hg Budget unit at the source, the natural person who is authorized by the owners and operators of the source and all such units at the source, in accordance with sections 10 through 14, to represent and legally bind each owner and operator in matters pertaining to the Hg Budget Trading Program.

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

2.46.a. For the life of the unit;

2.46.b. For a cumulative term of no less than

30 years, including contracts that permit an election for early termination; or

2.46.c. For a period no less than 25 years or 70 percent of the economic useful life of the unit determined as of the time the unit is built, with option rights to purchase or release some portion of the nameplate capacity and associated energy generated by the unit at the end of the period.

2.47. Reserved.

2.48. "Maximum design heat input" means, starting from the initial installation of a unit, the maximum amount of fuel per hour (in Btu/hr) that a unit is capable of combusting on a steady-state basis as specified by the manufacturer of the unit or, starting from the completion of any subsequent physical change in the unit resulting in a decrease in the maximum amount of fuel per hour (in Btu/hr) that a unit is capable of combusting on a steady-state basis, such decreased maximum amount as specified by the person conducting the physical change.

2.49. "Monitoring system" means any monitoring system that meets the requirements of sections 70 through 76, including a continuous emissions monitoring system, an alternative monitoring system or an excepted monitoring system under 40 CFR Part 75.

2.50. "Nameplate capacity" means, starting from the initial installation of a generator, the maximum electrical generating output (in MW_e) that the generator is capable of producing on a steady-state basis and during continuous operation (when not restricted by seasonal or other deratings) as specified by the manufacturer of the generator or, starting from the completion of any subsequent physical change in the generator resulting in an increase in the maximum electrical generating output (in MW_e) that the generator is capable of producing on a steady-state basis and during continuous operation (when not restricted by seasonal or other deratings), such increased

maximum amount as specified by the person conducting the physical change.

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

2.52. "Ounce" means 2.84×10^7 micrograms. For the purpose of determining compliance with the Hg Budget emissions limitation, total ounces of mercury emissions for a control period will be calculated as the sum of all recorded hourly emissions (or the mass equivalent of the recorded hourly emission rates) in accordance with sections 70 through 76, but with any remaining fraction of an ounce equal to or greater than 0.50 ounces deemed to equal one ounce and any remaining fraction of an ounce less than 0.50 ounces deemed to equal zero ounces.

2.53 "Owner" means any of the following persons:

2.53.a. With regard to a Hg Budget source or a Hg Budget unit at a source, respectively:

2.53.a.1. Any holder of any portion of the legal or equitable title in a Hg Budget unit at the source or the Hg Budget unit;

2.53.a.2. Any holder of a leasehold interest in a Hg Budget unit at the source or the Hg Budget unit; or

2.53.a.3. Any purchaser of power from a Hg Budget unit at the source or the Hg Budget unit under a life-of-the-unit, firm power contractual arrangement; provided that, unless expressly provided for in a leasehold agreement, owner will not include a passive lessor or a person who has an equitable interest through such lessor, whose rental payments are not based (either directly or indirectly) on the revenues or income from such Hg Budget unit; or

2.53.b. With regard to any general account, any person who has an ownership interest with respect to the Hg allowances held in the general account and who is subject to the binding agreement for the Hg authorized account representative to represent the person's ownership interest with respect to Hg allowances.

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

2.55. "Potential electrical output capacity" means 33 percent of a unit's maximum design heat input, divided by 3,413 Btu/kWh, divided by 1,000 kWh/MWh and multiplied by 8,760 hr/yr.

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

2.57. "Recordation", "record" or "recorded" means, with regard to Hg allowances, the movement of Hg allowances by the Administrator into or between Hg Allowance Tracking System accounts, for purposes of allocation, transfer or deduction.

2.58. "Reference method" means any direct test method of sampling and analyzing for an air pollutant as specified in 40 CFR §75.22.

2.59. "Repowered" means, with regard to a unit, replacement of a coal-fired boiler with one of the following coal-fired technologies at the same

source as the coal-fired boiler:

2.59.a. Atmospheric or pressurized fluidized bed combustion;

2.59.b. Integrated gasification combined cycle;

2.59.c. Magnetohydrodynamics;

2.59.d. Direct and indirect coal-fired turbines;

2.59.e. Integrated gasification fuel cells; or

2.59.f. As determined by the Administrator in consultation with the Secretary of Energy, a derivative of one or more of the technologies under subdivisions 2.59.a through 2.59.e and any other coal-fired technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of January 1, 2005.

2.60. "Secretary" means the Secretary of the Department of Environmental Protection or such other person to whom the Secretary has delegated authority or duties pursuant to W.Va. Code §§22-1-6 or 22-1-8.

2.61. "Serial number" means, for a Hg allowance, the unique identification number assigned to each Hg allowance by the Administrator.

2.62. "Sequential use of energy" means:

2.62.a. For a topping-cycle cogeneration unit, the use of reject heat from electricity production in a useful thermal energy application or process; or

2.62.b. For a bottoming-cycle cogeneration unit, the use of reject heat from useful thermal

energy application or process in electricity production.

2.63. "Source" means all buildings, structures or installations located in one or more contiguous or adjacent properties under common control of the same person or persons. For purposes of section 502(c) of the CAA, a "source," including a "source" with multiple units, will be considered a single "facility."

2.64. "State" means:

2.64.a. For purposes of referring to a governing entity, one of the States in the United States, the District of Columbia or, if approved for treatment as a State under 40 CFR Part 49, the Navajo Nation or Ute Indian Tribe that adopts the Hg Budget Trading Program pursuant to 40 CFR §60.24(h)(6); or

2.64.b. For purposes of referring to geographic areas, one of the States in the United State, the District of Columbia, the Navajo Nation Indian country or the Ute Tribe Indian country.

2.65. Reserved.

2.66. "Submit" or "serve" means to send or transmit a document, information or correspondence to the person specified in accordance with the applicable regulation:

2.66.a. In person;

2.66.b. By United States Postal Service; or

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

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

2.68. Reserved.

2.69. "Topping-cycle cogeneration unit" means a cogeneration unit in which the energy input to the unit is first used to produce useful power, including electricity and at least some of the reject heat from the electricity production is then used to provide useful thermal energy.

2.70. "Total energy input" means, with regard to a cogeneration unit, total energy of all forms supplied to the cogeneration unit, excluding energy produced by the cogeneration unit itself.

2.71. "Total energy output" means, with regard to a cogeneration unit, the sum of useful power and useful thermal energy produced by the cogeneration unit.

2.72. "Unit" means a stationary coal-fired boiler or a stationary coal-fired combustion turbine.

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

2.74. "Unit operating hour" or "hour of unit operation" means an hour in which a unit combusts any fuel.

2.75. "Useful power" means, with regard to a cogeneration unit, electricity or mechanical energy made available for use, excluding any such energy used in the power production process (which process includes, but is not limited to, any on-site processing or treatment of fuel combusted at the unit and any on-site emission controls).

2.76. "Useful thermal energy" means, with regard to a cogeneration unit, thermal energy that is:

2.76.a. Made available to an industrial or commercial process (not a power production process), excluding any heat contained in condensate return or makeup water;

2.76.b. Used in a heat application (e.g., space heating or domestic hot water heating); or

2.76.c. Used in a space cooling application (i.e., thermal energy used by an absorption chiller).

2.77. "Utility power distribution system" means the portion of an electricity grid owned or operated by a utility and dedicated to delivering electricity to customers.

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

§45-37-3. Measurements, Abbreviations and Acronyms.

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

Btu - British thermal unit.

CO₂ - carbon dioxide.

Hg - mercury.

hr - hour.

kW - kilowatt electrical.

kWh - kilowatt hour.

mmBtu - million Btu.

MW_e - megawatt electrical.

MWh - megawatt hour.

NO_x - nitrogen oxides.

O₂ - oxygen.

ppm - parts per million.

lb - pound.

scfh - standard cubic feet per hour.

SO₂ - sulfur dioxide.

H₂O - water.

yr - year.

§45-37-4. Applicability.

4.1. The following units in West Virginia will be Hg Budget units, and any source that includes one or more such units will be a Hg Budget source, subject to the requirements of sections 5 through 76:

4.1.a. Except as provided in subdivision 4.1.b, a unit serving at any time, since the start-up of the unit's combustion chamber, a generator with nameplate capacity of more than 25 MW_e producing electricity for sale; and

4.1.b. For a unit that qualifies as a cogeneration unit during the 12-month period starting on the date the unit first produces electricity and continues to qualify as a cogeneration unit, a cogeneration unit serving at any time a generator with nameplate capacity of more than 25 MW_e and supplying in any calendar year more than one-third of the unit's potential electric output capacity or 219,000 MWh, whichever is greater, to any utility power distribution system for sale. If a unit that qualifies as a cogeneration unit during the 12-month period starting on the date the unit first produces electricity but subsequently no longer qualifies as a cogeneration unit, the unit will be subject to subdivision 4.1.a starting on the day on which the unit first no longer qualifies as a cogeneration unit.

§45-37-5. Retired Unit Exemption.

5.1.a. Any Hg Budget unit that is permanently

retired will be exempt from the Hg Budget Trading Program, except for the provisions of this section, sections 2, 3, 4, subdivisions 6.3.d through 6.3.g, section 7, and sections 51 through 62.

5.1.b. The exemption under subdivision 5.1.a will become effective the day on which the Hg Budget unit is permanently retired. Within 30 days of the unit's permanent retirement, the Hg designated representative must submit a statement to the Secretary otherwise responsible for administering any Hg Budget permit for the unit and must submit a copy of the statement to the Administrator. The statement must state, in a format prescribed by the Secretary, that the unit was permanently retired on a specific date and will comply with the requirements of subsection 5.2.

5.1.c. After receipt of the statement under subdivision 5.1.b, the Secretary will amend any permit under sections 20 through 24 covering the source at which the unit is located to add the provisions and requirements of the exemption under subdivision 5.1.a and subsection 5.2.

5.2. Special provisions.

5.2.a. A unit exempt under subsection 5.1 must not emit any mercury, starting on the date that the exemption takes effect.

5.2.b. The Secretary will allocate Hg allowances under sections 40 through 42 to a unit exempt under subsection 5.1.

5.2.c. For a period of 5 years from the date the records are created, the owners and operators of a unit exempt under subsection 5.1 must retain, at the source that includes the unit, records demonstrating that the unit is permanently retired. The 5-year period for keeping records may be extended for cause, at any time before the end of the period, in writing by the Secretary or the Administrator. The owners and operators bear the

burden of proof that the unit is permanently retired.

5.2.d. The owners and operators and, to the extent applicable, the Hg designated representative of a unit exempt under subsection 5.1 must comply with the requirements of the Hg Budget Trading Program concerning all periods for which the exemption is not in effect, even if such requirements arise or must be complied with, after the exemption takes effect.

5.2.e. A unit exempt under subsection 5.1 and located at a source that is required, or but for this exemption would be required, to have a Title V operating permit must not resume operation unless the Hg designated representative of the source submits a complete Hg Budget permit application under section 22 for the unit not less than 18 months (or such lesser time provided by the Secretary) before the later of January 1, 2010 or the date on which the unit resumes operation.

5.2.f. On the earlier of the following dates, a unit exempt under subsection 5.1 will lose its exemption:

5.2.f.1. The date on which the Hg designated representative submits a Hg Budget permit application for the unit under subdivision 5.2.e;

5.2.f.2. The date on which the Hg designated representative is required under subdivision 5.2.e to submit a Hg Budget permit application for the unit; or

5.2.f.3. The date on which the unit resumes operation, if the Hg designated representative is not required to submit a Hg Budget permit application for the unit.

5.2.g. For the purpose of applying monitoring, reporting and recordkeeping requirements under sections 70 through 76, a unit that loses its exemption under subsection 5.1 will

be treated as a unit that commences operation and commercial operation on the first date on which the unit resumes operation.

§45-37-6. Standard Requirements.

6.1. Permit requirements.

6.1.a. The Hg designated representative of each Hg Budget source required to have a Title V operating permit and each Hg Budget unit required to have a Title V operating permit at the source must:

6.1.a.1. Submit to the Secretary a complete Hg Budget permit application under section 22 in accordance with the deadlines specified in subsections 21.1 and 21.2; and

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

6.1.b. The owners and operators of each Hg Budget source required to have a Title V operating permit and each Hg Budget unit required to have a Title V operating permit at the source must have a Hg Budget permit issued by the Secretary under sections 20 through 24 for the source and operate the source and the unit in compliance with such Hg Budget permit; and

6.1.c. The owners and operators of a Hg Budget source that is not required to have a Title V operating permit and each Hg Budget unit that is not required to have a Title V operating permit are not required to submit a Hg Budget permit application, and to have a Hg Budget permit, under sections 20 through 24 for such Hg Budget source and such Hg Budget unit.

6.2. Monitoring, reporting and recordkeeping requirements.

6.2.a. The owners and operators, and the Hg designated representative, of each Hg Budget source and each Hg Budget unit at the source must comply with the monitoring, reporting and recordkeeping requirements of sections 70 through 76.

6.2.b. The emissions measurements recorded and reported in accordance with sections 70 through 76 will be used to determine compliance by each Hg Budget source with the Hg Budget emissions limitation under subsection 6.3.

6.3. Mercury emission requirements.

6.3.a. As of the allowance transfer deadline for a control period, the owners and operators of each Hg Budget source and each Hg Budget unit at the source must hold, in the source's compliance account, Hg allowances available for compliance deductions for the control period under subsection 54.1 in an amount not less than the ounces of total mercury emissions for the control period from all Hg Budget units at the source, as determined in accordance with sections 70 through 76.

6.3.b. A Hg Budget unit will be subject to the requirements under subdivision 6.3.a for the control period starting on the later of January 1, 2010 or the deadline for meeting the unit's monitor certification requirements under subdivision 70.3.a or 70.3.b and for each control period thereafter.

6.3.c. A Hg allowance will not be deducted, for compliance with the requirements under subdivision 6.3.a, for a control period in a calendar year before the year for which the Hg allowance was allocated.

6.3.d. Hg allowances must be held in, deducted from or transferred into or among Hg Allowance Tracking System accounts in accordance with sections 60 through 62.

6.3.e. A Hg allowance is a limited authorization to emit one ounce of mercury in accordance with the Hg Budget Trading Program. No provision of the Hg Budget Trading Program, the Hg Budget permit application, the Hg Budget permit or an exemption under section 5 and no provision of law will be construed to limit the authority of the State or the United States to terminate or limit such authorization.

6.3.f. A Hg allowance does not constitute a property right.

6.3.g. Upon recordation by the Administrator under sections 51 through 62, every allocation, transfer or deduction of a Hg allowance to or from a Hg Budget unit's compliance account is incorporated automatically in any Hg Budget permit of the source that includes the Hg Budget unit.

6.4. Excess emissions requirements.

6.4.a. If a Hg Budget source emits mercury during any control period in excess of the Hg Budget emissions limitation, then:

6.4.a.1. The owners and operators of the source and each Hg Budget unit at the source must surrender the Hg allowances required for deduction under subdivision 54.4.a and pay any fine, penalty or assessment or comply with any other remedy imposed, for the same violations, under the Clean Air Act or applicable State law; and

6.4.a.2. Each ounce of such excess emissions and each day of such control period will constitute a separate violation of this rule, the Clean Air Act, and W. Va. Code §22-5-1 et seq.

6.5. Recordkeeping and reporting requirements.

6.5.a. Unless otherwise provided, the owners and operators of the Hg Budget source and

each Hg Budget unit at the source must keep on site at the source each of the following documents for a period of 5 years from the date the document is created. This period may be extended for cause, at any time before the end of 5 years, in writing by the Secretary or the Administrator.

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

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

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

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

6.5.b. The Hg designated representative of a Hg Budget source and each Hg Budget unit at the source must submit the reports required under the Hg Budget Trading Program, including those under sections 70 through 76.

6.6. Liability.

6.6.a. Each Hg Budget source and each Hg Budget unit must meet the requirements of the Hg Budget Trading Program.

6.6.b. Any provision of the Hg Budget Trading Program that applies to a Hg Budget source or the Hg designated representative of a Hg Budget source will also apply to the owners and operators of such source and of the Hg Budget units at the source.

6.6.c. Any provision of the Hg Budget Trading Program that applies to a Hg Budget unit or the Hg designated representative of a Hg Budget unit will also apply to the owners and operators of such unit.

6.7. Effect on other authorities. -- No provision of the Hg Budget Trading Program, a Hg Budget permit application, a Hg Budget permit or an exemption under section 5 will be construed as exempting or excluding the owners and operators, or the Hg designated representative of a Hg Budget source or Hg Budget unit from compliance with any other provision of the applicable, approved state implementation plan, a state or federally enforceable permit, order, or the CAA.

§45-37-7. Computation of Time.

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

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

7.3. Unless otherwise stated, if the final day of any time period, under the Hg Budget Trading Program, falls on a weekend or a State or Federal holiday, the time period will be extended to the

next business day.

§45-37-8. Appeal Procedures.

8.1. The appeal procedures for decisions of the Administrator under the Hg Budget Trading Program will be the procedures set forth in 40 CFR Part 78, applied by replacing the terms "Subparts AA through II of Part 96 of this chapter," "§96.141(b)(2) or (c)(2)," "§96.154," "§96.156," "§96.161," "§96.175," "CAIR NO_x allowances," "CAIR NO_x Allowance Tracking System account," "CAIR designated representative," "CAIR authorized account representative," and "§96.106" by the terms "45CSR37," "45CSR37§41.2.b or 3.b," "45CSR37§54," "45CSR37§56," "45CSR37§61," "45CSR37§75," "Hg allowances," "Hg Allowance Tracking System Account," "Hg designated representative," "Hg authorized account representative," and "45CSR37§6."

§45-37-10. Authorization and Responsibilities of Hg Designated Representatives.

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

10.2. The Hg designated representative of the Hg Budget source must be selected by an agreement binding on the owners and operators of the source and all Hg Budget units at the source and must act in accordance with the certification statement in paragraph 13.1.d.4.

10.3. Upon receipt by the Administrator of a complete certificate of representation under section 13, the Hg designated representative of the source must represent and, by his or her representations, actions, inactions or submissions, legally bind each owner and operator of the Hg

Budget source represented and each Hg Budget unit at the source in all matters pertaining to the Hg Budget Trading Program, notwithstanding any agreement between the Hg designated representative and such owners and operators. The owners and operators will be bound by any decision or order issued to the Hg designated representative by the Secretary, the Administrator or a court regarding the source or unit.

10.4. No Hg Budget permit will be issued, no emissions data reports will be accepted, and no Hg Allowance Tracking System account will be established for a Hg Budget unit at a source, until the Administrator has received a complete certificate of representation under section 13 for a Hg designated representative of the source and the Hg Budget units at the source.

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

10.5.b. The Secretary and the Administrator will accept or act on a submission made on behalf of owner or operators of a Hg Budget source or a Hg Budget unit only if the submission has been

made, signed, and certified in accordance with subdivision 10.5.a.

§45-37-11. Alternate Hg Designated Representative.

11.1. A certificate of representation under section 13 may designate one and only one alternate Hg designated representative, who may act on behalf of the Hg designated representative. The agreement by which the alternate Hg designated representative is selected must include a procedure for authorizing the alternate Hg designated representative to act in lieu of the Hg designated representative.

11.2. Upon receipt by the Administrator of a complete certificate of representation under section 13, any representation, action, inaction or submission by the alternate Hg designated representative will be deemed to be a representation, action, inaction or submission by the Hg designated representative.

11.3. Except in this section and section 2, subsections 10.1 and 10.4, sections 12, 13, 51 and 74, whenever the term "Hg designated representative" is used, the term will be construed to include the Hg designated representative or any alternate Hg designated representative.

§45-37-12. Changing Hg Designated Representative and Alternate Hg Designated Representative; Changes in Owners and Operators.

12.1. Changing Hg designated representative. -- The Hg designated representative may be changed at any time upon receipt by the Administrator of a superseding complete certificate of representation under section 13. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous Hg designated representative before the time and date when the Administrator receives the superseding certificate of representation will be binding on the

new Hg designated representative and the owners and operators of the Hg Budget source and the Hg Budget units at the source.

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

12.3. Changes in owners and operators.

12.3.a. In the event a new owner or operator of a Hg Budget source or a Hg Budget unit is not included in the list of owners and operators in the certificate of representation under section 13, such new owner or operator will be deemed to be subject to and bound by the certificate of representation, the representations, actions, inactions, and submissions of the Hg designated representative and any alternate Hg designated representative of the source or unit, and the decisions and orders of the Secretary, the Administrator or a court, as if the new owner or operator were included in such list.

12.3.b. Within 30 days following any change in the owners and operators of a Hg Budget source or a Hg Budget unit, including the addition of a new owner or operator, the Hg designated representative or any alternate Hg designated representative must submit a revision to the certificate of representation under section 13 amending the list of owners and operators to include the change.

§45-37-13. Certificate of Representation.

13.1. A complete certificate of representation for a Hg designated representative or an alternate Hg designated representative must include the following elements in a format prescribed by the Administrator:

13.1.a. Identification of the Hg Budget source, and each Hg Budget unit at the source, for which the certificate of representation is submitted;

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

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

13.1.d. The following certification statements by the Hg designated representative and any alternate Hg designated representative:

13.1.d.1. "I certify that I was selected as the Hg designated representative or alternate Hg designated representative, as applicable, by an agreement binding on the owners and operators of the source and each Hg Budget unit at the source.";

13.1.d.2. "I certify that I have all the necessary authority to carry out my duties and responsibilities under the Hg Budget Trading Program on behalf of the owners and operators of the source and of each Hg Budget unit at the source and that each such owner and operator will be fully bound by my representations, actions, inactions or submissions.";

13.1.d.3. "I certify that the owners and operators of the source and of each Hg Budget unit at the source will be bound by any order issued to me by the Administrator, the Secretary or a court regarding the source or unit.";

13.1.d.4. Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, a Hg Budget unit, or where a customer purchases power from a Hg Budget unit under a life-of-the-unit, firm power contractual arrangement, "I certify that: I have given a written notice of my selection as the 'Hg designated representative' or 'alternate Hg designated representative,' as applicable, and of the agreement by which I was selected to each owner and operator of the source and of each Hg Budget unit at the source; and Hg allowances and proceeds of transactions involving Hg allowances will be deemed to be held or distributed in proportion to each holder's legal, equitable, leasehold or contractual reservation or entitlement, except that, if such multiple holders have expressly provided for a different distribution of Hg allowances by contract, Hg allowances and proceeds of transactions involving Hg allowances will be deemed to be held or distributed in accordance with the contract."; and

13.1.e. The signature of the Hg designated representative and any alternate Hg designated representative and the dates signed.

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

§45-37-14. Objections Concerning the Hg Designated Representative.

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

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

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

§45-37-20. General Hg Budget Trading Program Permit Requirements.

20.1. For each Hg Budget source required to have a Title V operating permit, such permit must include a Hg Budget permit administered by the Secretary. The Hg Budget portion of the Title V permit will be administered in accordance with 45CSR30, except as provided otherwise by this section and sections 21 through 24.

20.2. Each Hg Budget permit must contain, with regard to the Hg Budget source and the Hg Budget units at the source covered by the Hg Budget permit, all applicable Hg Budget Trading Program requirements and must be a complete and separable portion of the Title V operating permit.

§45-37-21. Submission of Hg Budget Permit Applications.

21.1. Duty to apply. -- The Hg designated representative of any Hg Budget source required to have a Title V operating permit must submit to the Secretary a complete Hg Budget permit application under section 22 for the source

covering each Hg Budget unit at the source at least 18 months (or such lesser time provided by the Secretary) before the later of January 1, 2010 or the date on which the Hg Budget unit commences operation.

21.2. Duty to reapply. -- For a Hg Budget source required to have a Title V operating permit, the Hg designated representative must submit a complete Hg Budget permit application under section 22 for the source covering each Hg Budget unit at the source to renew the Hg Budget permit in accordance with the Title V provisions addressing permit renewal.

§45-37-22. Information Requirements for Hg Budget Permit Applications.

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

22.1.a. Identification of the Hg Budget source;

22.1.b. Identification of each Hg Budget unit at the Hg Budget source; and

22.1.c. The standard requirements under section 6.

22.1.d. A copy of the certificate of representation submitted to the Administrator in accordance with section 13.

§45-37-23. Hg Budget Permit Contents and Term.

23.1. Each Hg Budget permit will contain, in a format prescribed by the Secretary, all elements required for a complete Hg Budget permit application under section 22.

23.2. Each Hg Budget permit is deemed to incorporate automatically the definitions of terms

under section 2 and, upon recordation by the Administrator under sections 51 through 62, every allocation, transfer or deduction of a Hg allowance to or from the compliance account of the Hg Budget source covered by the permit.

23.3. The term of the Hg Budget permit will be set by the Secretary, as necessary to facilitate coordination of the renewal of the Hg Budget permit with issuance, revision or renewal of the Hg Budget source's Title V operating permit.

§45-37-24. Hg Budget Permit Revisions.

24.1. Except as provided in subsection 23.2, the Secretary will revise the Hg Budget permit, as necessary, in accordance with the provisions of 45CSR 30 addressing permit revisions.

§45-37-30. Reserved.

§45-37-40. Hg Trading Budget.

40.1. The West Virginia trading budget for annual allocations of Hg allowances for the control periods in 2010 through 2017 and in 2018 and thereafter are, respectively, as follows:

	2010 - 2017	2018 and thereafter
Hg Trading Budget (tons)	1.394	0.55

§45-37-41. Timing Requirements for Hg Allowance Allocations.

41.1. By October 31, 2006, the Secretary will submit to the Administrator the Hg allowance allocations, in a format prescribed by the Administrator and in accordance with subsections 42.1, 42.2 and 42.3, for the control periods in 2010, 2011, 2012, 2013, and 2014.

41.2. By October 31, 2009 and October 31 of each year thereafter, the Secretary will submit to

the Administrator the Hg allowance allocations, in a format prescribed by the Administrator and in accordance with subsections 42.1, 42.2 and 42.3, for the control period in the sixth year after the year of the applicable deadline for submission under this subsection.

41.2.a. If the Secretary fails to submit to the Administrator the Hg allowance allocations in accordance with subdivision 41.2, the Administrator will assume that the allocations of Hg allowances for the applicable control period are the same as for the control period that immediately precedes the applicable control period, except that, if the applicable control period is in 2018, the Administrator will assume that the allocations equal the allocations for the control period in 2017, multiplied by the amount of ounces (i.e., tons multiplied by 32,000 ounces/ton) of Hg emissions in the applicable trading budget under section 40 for 2018 and thereafter and divided by such amount of ounces of Hg emissions for 2010 through 2017.

§45-37-42. Methodology for the Allocation and Sale of Hg Allowances.

42.1. The baseline heat input (in mmBtu) used with respect to Hg allowance allocations under subsections 42.2 and 42.3 for each Hg Budget unit will be:

42.1.a. For units commencing operation before January 1, 2001, the average of the three highest amounts of the unit's adjusted control period heat input for 2000 through 2004;

42.1.b. For units commencing operation on or after January 1, 2001 and operating each calendar year during a period of 5 or more consecutive calendar years, the average of the 3 highest amounts of the unit's total converted control period heat input over the first such 5 years;

42.1.c. A unit's control period heat input for

a calendar year under paragraph 42.1.a will be determined in accordance with 40 CFR Part 75, to the extent the unit was otherwise subject to the requirements of 40 CFR Part 75 for the year or will be based on the best available data reported to the Secretary for the unit, to the extent the unit was not otherwise subject to the requirements of 40 CFR Part 75 for the year;

42.1.d. A unit's converted control period heat input for a calendar year specified under subdivision 42.1.b equals:

42.1.d.1. Except as provided in paragraph 42.1.d.2 or 42.1.d.3, the control period gross electrical output of the generator or generators served by the unit multiplied by 7,900 Btu/kWh and divided by 1,000,000 Btu/mmBtu, provided that if a generator is served by two (2) or more units, then the gross electrical output of the generator will be attributed to each unit in proportion to the unit's share of the total control period heat input of such units for the year;

42.1.d.2. For a unit that is a boiler and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating or cooling purposes through the sequential use of energy, the total heat energy (in Btu) of the steam produced by the boiler during the control period, divided by 0.8 and by 1,000,000 Btu/mmBtu; or

42.1.d.3. For a unit that is a combustion turbine and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating or cooling purposes through the sequential use of energy, the control period gross electrical output of the enclosed device comprising the compressor, combustor, and turbine multiplied by 3,413 Btu/kWh, plus the total heat energy (in Btu) of the steam produced by any associated heat recovery steam generator during the control period divided by 0.8, and with the sum divided by 1,000,000 Btu/mmBtu.

42.2. For each control period in 2010 and thereafter, the Secretary will allocate to all Hg Budget units that have a baseline heat input (as determined under subsection 42.1) a total amount of Hg allowances equal to 95 percent of the amount of ounces (i.e., tons multiplied by 32,000 ounces/ton) of Hg emissions in the applicable State trading budget under section 40.

42.3. The Secretary will allocate Hg allowances to each Hg Budget unit under subdivision 42.2 in an amount determined by multiplying the total amount of Hg allowances allocated under subdivision 42.2 by the ratio of the baseline heat input of such Hg Budget unit to the total amount of baseline heat input of all such Hg Budget units in the State and rounding to the nearest whole allowance as appropriate.

42.4. The Secretary will establish a separate pool of allowances for each control period for sale by the State of West Virginia. Each pool will be allocated Hg allowances equal to 5 percent for a control period in 2010 and thereafter, of the amount of ounces (i.e., tons multiplied by 32,000 ounces/ton) of Hg emissions in the applicable trading budget under section 40;

42.4.a. The State of West Virginia shall establish an account pursuant to subsection 51.2 for the purpose of selling the Hg allowances specified in subsection 42.4. The proceeds from the sale of Hg allowances shall be deposited in a fund of the State of West Virginia to be established by legislation.

§45-37-50. Reserved.

§45-37-51. Establishment of Accounts.

51.1. Compliance accounts. -- Upon receipt of a complete certificate of representation under section 13, the Administrator will establish a compliance account for the Hg Budget source for which the certificate of representation was submitted unless the source already has a

compliance account.

51.2. General accounts.

51.2.a. Application for general account.

51.2.a.1. Any person may apply to open a general account for the purpose of holding and transferring Hg allowances. An application for a general account may designate one and only one Hg authorized account representative and one and only one alternate Hg authorized account representative who may act on behalf of the Hg authorized account representative. The agreement by which the alternate Hg authorized account representative is selected must include a procedure for authorizing the alternate Hg authorized account representative to act in lieu of the Hg authorized account representative.

51.2.a.2. A complete application for a general account must be submitted to the Administrator and must include the following elements in a format prescribed by the Administrator:

51.2.a.2.A. Name, mailing address, e-mail address (if any), telephone number, and facsimile transmission number (if any) of the Hg authorized account representative and any alternate Hg authorized account representative;

51.2.a.2.B. Organization name and type of organization, if applicable;

51.2.a.2.C. A list of all persons subject to a binding agreement for the Hg authorized account representative and any alternate Hg authorized account representative to represent their ownership interest with respect to the allowances held in the general account;

51.2.a.2.D. The following certification statement by the Hg authorized account representative and any alternate Hg authorized account representative: "I certify that I was

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

51.2.a.2.E. The signature of the Hg authorized account representative and any alternate Hg authorized account representative and the dates signed.

51.2.a.3. Unless otherwise required by the Secretary or the Administrator, documents of agreement referred to in the application for a general account will not be submitted to the Secretary or the Administrator. Neither the Secretary nor the Administrator will be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

51.2.b. Authorization of Hg authorized account representative.

51.2.b.1. Upon receipt by the Administrator of a complete application for a general account subdivision 51.2.a:

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

51.2.b.1.B. The Hg authorized account representative and any alternate Hg authorized account representative for the general account will represent and, by his or her representations, actions, inactions or submissions, legally bind each person who has an ownership

interest with respect to Hg allowances held in the general account in all matters pertaining to the Hg Budget Trading Program, notwithstanding any agreement between the Hg authorized account representative or any alternate Hg authorized account representative and such person. Any such person will be bound by any order or decision issued to the Hg authorized account representative or any alternate Hg authorized account representative by the Administrator or a court regarding the general account.

51.2.b.1.C. Any representation, action, inaction or submission by any alternate Hg authorized account representative will be deemed to be a representation, action, inaction or submission by the Hg authorized account representative.

51.2.b.2. Each submission concerning the general account must be submitted, signed, and certified by the Hg authorized account representative or any alternate Hg authorized account representative for the persons having an ownership interest with respect to Hg allowances held in the general account. Each such submission must include the following certification statement by the Hg authorized account representative or any alternate Hg authorized account representative: "I am authorized to make this submission on behalf of the persons having an ownership interest with respect to the Hg allowances held in the general account. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."

51.2.b.3. The Administrator will accept or act on a submission concerning the general account only if the submission has been made, signed, and certified in accordance with paragraph 51.2.b.2.

51.2.c. Changing Hg authorized account representative and alternate Hg authorized account representative; changes in persons with ownership interest.

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

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

51.2.c.3.A. In the event a new person having an ownership interest with respect to Hg allowances in the general account is not included

in the list of such persons in the application for a general account, such new person will be deemed to be subject to and bound by the application for a general account, the representation, actions, inactions, and submissions of the Hg authorized account representative and any alternate Hg authorized account representative of the account, and the decisions and orders of the Administrator or a court, as if the new person were included in such list.

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

51.2.d. Objections concerning Hg authorized account representative.

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

51.2.d.2. Except as provided in paragraph 51.2.c.1 or 51.2.c.2, no objection or other communication submitted to the Administrator concerning the authorization or any representation, action, inaction or submission of the Hg authorized account representative or any alternative Hg authorized account representative for a general account will affect any representation, action, inaction or submission of the Hg authorized account representative or any alternative Hg authorized account representative or the finality of any decision or order by the

Administrator under the Hg Budget Trading Program.

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

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

§45-37-52. Responsibilities of Hg Authorized Account Representative.

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

§45-37-53. Recordation of Hg Allowance Allocations.

53.1. The Administrator will record in the Hg Budget source's compliance account the Hg allowances allocated for the Hg Budget units at a source, as submitted by the Secretary in accordance with subsection 41.1, for the control periods in 2010, 2011, 2012, 2013 and 2014.

53.2. By December 1, 2008, the Administrator will record in the Hg Budget source's compliance account the Hg allowances allocated for the Hg Budget units at the source, as submitted by the Secretary or as determined by the Administrator in accordance with subsection 41.2, for the control

period in 2015.

53.3. In 2011 and each year thereafter, after the Administrator has made all deductions (if any) from a Hg Budget source's compliance account under section 54, the Administrator will record in the Hg Budget source's compliance account the Hg allowances allocated for the Hg Budget units at the source, as submitted by the Secretary or determined by the Administrator in accordance with subsection 41.2, for the control period in the sixth year after the year of the control period for which such deductions were or could have been made.

53.4. By December 1, 2010 and December 1 of each year thereafter, the Administrator will record the Hg allowances determined by the Administrator in accordance with subsection 42.4, for the control period in the year of the applicable deadline for recordation under this subsection.

53.5. Serial numbers for allocated Hg allowances. -- When recording the allocation of Hg allowances for a Hg Budget unit in a compliance account, the Administrator will assign each Hg allowance a unique identification number that will include digits identifying the year of the control period for which the Hg allowance is allocated.

§45-37-54. Compliance with Hg Budget Emissions Limitation.

54.1. Allowance transfer deadline. -- The Hg allowances are available to be deducted for compliance with a source's Hg Budget emissions limitation for a control period in a given calendar year only if the Hg allowances:

54.1.a. Were allocated for the control period in the year or a prior year;

54.1.b. Are held in the compliance account as of the allowance transfer deadline for the control period or are transferred into the compliance

account by a Hg allowance transfer correctly submitted for recordation under sections 60 through 62 by the allowance transfer deadline for the control period; and

54.1.c. Are not necessary for deductions for excess emissions for a prior control period under subsection 54.4.

54.2. Deductions for compliance. -- Following the recordation, in accordance with sections 60 through 62, of Hg allowance transfers submitted for recordation in a source's compliance account by the allowance transfer deadline for a control period, the Administrator will deduct from the compliance account Hg allowances available under subsection 54.1 in order to determine whether the source meets the Hg Budget emissions limitation for the control period, as follows:

54.2.a. Until the amount of Hg allowances deducted equals the number of ounces of total Hg emissions, determined in accordance with sections 70 through 76, from all Hg Budget units at the source for the control period; or

54.2.b. If there are insufficient Hg allowances to complete the deductions in subdivision 54.2.a, until no more Hg allowances available under subsection 54.1 remain in the compliance account.

54.3. Hg allowance accounting methods.

54.3.a. Identification of Hg Allowances by serial number. -- The Hg authorized account representative for a source's compliance account may request that specific Hg allowances, identified by serial number, in the compliance account be deducted for emissions or excess emissions for a control period in accordance with subsection 54.2 or 54.4. Such request must be submitted to the Administrator by the allowance transfer deadline for the control period and include, in a format prescribed by the Administrator, the identification of the Hg Budget

source and the appropriate serial numbers.

54.3.b. First-in, first-out. -- The Administrator will deduct Hg allowances under subsection 54.2 or 54.4 from the source's compliance account, in the absence of an identification or in the case of a partial identification of Hg allowances by serial number under subdivision 54.3.a, on a first-in, first-out accounting basis in the following order:

54.3.b.1. Any Hg allowances that were allocated to the units at the source, in the order of recordation; and then

54.3.b.2. Any Hg allowances that were allocated to any unit and transferred and recorded in the compliance account pursuant to sections 60 through 62, in the order of recordation.

54.4. Deductions for excess emissions.

54.4.a. After making the deductions for compliance under subsection 54.2 for a control period in a calendar year in which the Hg Budget source has excess emissions, the Administrator will deduct from the source's compliance account an amount of Hg allowances, allocated for the control period in the immediately following calendar year, equal to 3 times the number of ounces of the source's excess emissions.

54.4.b. Any allowance deduction required under subdivision 54.4.a will not affect the liability of the owners and operators of the Hg Budget source or the Hg Budget units at the source for any fine, penalty or assessment or their obligation to comply with any other remedy, for the same violation, as ordered under the Clean Air Act or W. Va. Code §22-5-1, et seq.

54.5. Recordation of deductions. -- The Administrator will record in the appropriate compliance account all deductions from such an account under subsection 54.2 or 54.4.

54.6. Administrator's action on submissions.

54.6.a. The Administrator may review and conduct independent audits concerning any submission under the Hg Budget Trading Program and make appropriate adjustments of the information in the submissions.

54.6.b. The Administrator may deduct Hg allowances from or transfer Hg allowances to a source's compliance account based on the information in the submissions, as adjusted under subdivision 54.6.a.

§45-37-55. Banking.

55.1. Hg allowances may be banked for future use or transfer in a compliance account or a general account in accordance with subsection 55.2.

55.2. Any Hg allowance that is held in a compliance account or a general account will remain in such account unless and until the Hg allowance is deducted or transferred under sections 54, 56, or 60 through 62.

§45-37-56. Account Error.

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

§45-37-57. Closing of General Accounts.

57.1. The Hg authorized account representative of a general account may submit to the Administrator a request to close the account, which must include a correctly submitted allowance transfer under sections 60 through 62 for any Hg allowances in the account to one or more other Hg Allowance Tracking System accounts.

57.2. If a general account has no allowance transfers in or out of the account for a 12-month period or longer and does not contain any Hg allowances, the Administrator may notify the Hg authorized account representative for the account that the account will be closed following 20 business days after the notice is sent. The account will be closed after the 20-day period unless, before the end of the 20-day period, the Administrator receives a correctly submitted transfer of Hg allowances into the account under sections 60 through 62 or a statement submitted by the Hg authorized account representative demonstrating to the satisfaction of the Administrator good cause as to why the account should not be closed.

§45-37-60. Submission of Hg Allowance Transfers.

60.1. An Hg authorized account representative seeking recordation of a Hg allowance transfer must submit the transfer to the Administrator. To be considered correctly submitted, the Hg allowance transfer must include the following elements, in a format specified by the Administrator:

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

60.1.b. The serial number of each Hg allowance that is in the transferor account and is to be transferred; and

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

§45-37-61. Recordation.

61.1. Within 5 business days (except as provided in subsection 61.2) of receiving a Hg allowance transfer, the Administrator will record a Hg allowance transfer by moving each Hg allowance from the transferor account to the

transferee account as specified by the request, provided that:

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

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

61.2. A Hg allowance transfer that is submitted for recordation after the allowance transfer deadline for a control period and that includes any Hg allowances allocated for any control period before such allowance transfer deadline will not be recorded until after the Administrator completes the deductions under section 54 for the control period immediately before such allowance transfer deadline.

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

§45-37-62. Notification.

62.1. Notification of recordation. -- Within 5 business days of recordation of a Hg allowance transfer under section 61, the Administrator will notify the Hg authorized account representatives of both the transferor and transferee accounts.

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

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

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

62.3. Nothing in this section will preclude the

submission of a Hg allowance transfer for recordation following notification of non-recordation.

§45-37-70. General Requirements.

70.1. The owners and operators, and to the extent applicable, the Hg designated representative, of a Hg Budget unit, must comply with the monitoring, recordkeeping, and reporting requirements as provided in this section, sections 71 through 76, and Subpart I of 40 CFR Part 75. For purposes of complying with such requirements, the definitions in section 2 and in 40 CFR §72.2 will apply, and the terms "affected unit," "designated representative," and "continuous emission monitoring system" (or "CEMS") in 40 CFR Part 75 will be deemed to refer to the terms "Hg Budget unit," "Hg designated representative," and "continuous emission monitoring system" (or "CEMS") respectively, as defined in section 2. The owner or operator of a unit that is not a Hg Budget unit but that is monitored under 40 CFR §75.82(b)(2)(i) must comply with the same monitoring, recordkeeping, and reporting requirements as a Hg Budget unit.

70.2. Requirements for installation, certification, and data accounting. -- The owner or operator of each Hg Budget unit must:

70.2.a. Install all monitoring systems required under this section and sections 71 through 76 for monitoring Hg mass emissions and individual unit heat input (including all systems required to monitor Hg concentration, stack gas moisture content, stack gas flow rate, and CO₂ or O₂ concentration, as applicable, in accordance with 40 CFR §§75.81 and 75.82);

70.2.b. Successfully complete all certification tests required under section 71 and meet all other requirements of this section, sections 71 through 76, and Subpart I of 40 CFR Part 75 applicable to the monitoring systems under subdivision 70.2.a;

and

70.2.c. Record, report, and quality-assure the data from the monitoring systems under subdivision 70.2.a.

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

70.3.a. For the owner or operator of a Hg Budget unit that commences commercial operation before July 1, 2008, by January 1, 2009;

70.3.b. For the owner or operator of a Hg Budget unit that commences commercial operation on or after July 1, 2008, by the later of the following dates:

70.3.b.1. January 1, 2009; or

70.3.b.2. 90 unit operating days or 180 calendar days, whichever occurs first, after the date on which the unit commences commercial operation;

70.3.c. For the owner or operator of a Hg Budget unit for which construction of a new stack or flue or installation of add-on Hg emission controls, a flue gas desulfurization system, a selective catalytic reduction system or a compact hybrid particulate collector system is completed after the applicable deadline under subdivision 70.3.a or 70.3.b, by 90 unit operating days or 180 calendar days, whichever occurs first, after the date on which emissions first exit to the atmosphere through the new stack or flue, add-on Hg emissions controls, flue gas desulfurization system, selective catalytic reduction system or compact hybrid particulate collector system.

70.4. Reporting data.

70.4.a. Except as provided in subdivision 70.4.b, the owner or operator of a Hg Budget unit that does not meet the applicable compliance date set forth in subdivision 70.3 for any monitoring system under subdivision 70.2 must, for each such monitoring system, determine, record, and report maximum potential (or, as appropriate, minimum potential) values for Hg concentration, stack gas flow rate, stack gas moisture content, and any other parameters required to determine Hg mass emissions and heat input in accordance with 40 CFR §75.80(g).

70.4.b. The owner or operator of a Hg Budget unit that does not meet the applicable compliance date set forth in subdivision 70.3.c for any monitoring system under subdivision 70.2.a must, for each such monitoring system, determine, record, and report substitute data using the applicable missing data procedures in Subpart D of 40 CFR Part 75, in lieu of the maximum potential (or, as appropriate, minimum potential) values, for a parameter if the owner or operator demonstrates that there is continuity between the data streams for that parameter before and after the construction or installation under subdivision 70.3.c.

70.5. Prohibitions.

70.5.a. No owner or operator of a Hg Budget unit will use any alternative monitoring system, alternative reference method or any other alternative to any requirement of this section and sections 71 through 76 without having obtained prior written approval in accordance with section 75.

70.5.b. No owner or operator of a Hg Budget unit will operate the unit so as to discharge or allow to be discharged, Hg emissions to the atmosphere without accounting for all such emissions in accordance with the applicable provisions of this section, sections 71 through 76,

and Subpart I of 40 CFR Part 75.

70.5.c. No owner or operator of a Hg Budget unit will disrupt the continuous emission monitoring system, any portion thereof or any other approved emission monitoring method, and thereby avoid monitoring and recording Hg mass emissions discharged into the atmosphere, except for periods of recertification or periods when calibration, quality assurance testing or maintenance is performed in accordance with the applicable provisions of this section, sections 71 through 76, and Subpart I of 40 CFR Part 75.

70.5.d. No owner or operator of a Hg Budget unit will retire or permanently discontinue use of the continuous emission monitoring system, any component thereof or any other approved monitoring system under sections 70 through 76, and Subpart I of 40 CFR Part 75, except under any one of the following circumstances:

70.5.d.1. During the period that the unit is covered by an exemption under section 5 that is in effect;

70.5.d.2. The owner or operator is monitoring emissions from the unit with another certified monitoring system approved, in accordance with the applicable provisions of this section, sections 71 through 76, and Subpart I of 40 CFR Part 75, by the Secretary for use at that unit that provides emission data for the same pollutant or parameter as the retired or discontinued monitoring system; or

70.5.d.3. The Hg designated representative submits notification of the date of certification testing of a replacement monitoring system for the retired or discontinued monitoring system in accordance with paragraph 71.3.c.1.

§45-37-71. Initial Certification and Recertification Procedures.

71.1. The owner or operator of a Hg Budget

unit will be exempt from the initial certification requirements of this section for a monitoring system under subdivision 70.1.a if the following conditions are met:

71.1.a. The monitoring system has been previously certified in accordance with 40 CFR Part 75; and

71.1.b. The applicable quality-assurance and quality control requirements of 40 CFR §75.21 and Appendix B to 40 CFR Part 75 are fully met for the certified monitoring system described in subdivision 71.1.a.

71.2. The recertification provisions of this section will apply to a monitoring system under subdivision 70.1.a exempt from initial certification requirements under subsection 71.1.

71.3. Except as provided in subsection 71.1, the owner or operator of a Hg Budget unit must comply with the following initial certification and recertification procedures for a continuous monitoring system (e.g., a continuous emission monitoring system and an excepted monitoring system (sorbent trap monitoring system) under 40 CFR §75.15) under subdivision 70.2.a. The owner or operator of a unit that qualifies to use the Hg low mass emissions excepted monitoring methodology under 40 CFR §75.81(b) or that qualifies to use an alternative monitoring system under Subpart E of 40 CFR Part 75 must comply with the procedures in subsection 71.4 or 71.5 respectively.

71.3.a. Requirements for initial certification.
-- The owner or operator must ensure that each monitoring system under subdivision 70.2.a (including the automated data acquisition and handling system) successfully completes all of the initial certification testing required under 40 CFR §75.20 by the applicable deadline in subsection 70.3. In addition, whenever the owner or operator installs a monitoring system to meet the requirements of this rule in a location where no

such monitoring system was previously installed, initial certification in accordance with 40 CFR §75.20 is required.

71.3.b. Requirements for recertification. -- Whenever the owner or operator makes a replacement, modification or change in any certified continuous emission monitoring system or an excepted monitoring system (sorvent trap monitoring system) 40 CFR§75.15, under subdivision 70.2.a that may significantly affect the ability of the system to accurately measure or record Hg mass emissions or heat input rate or to meet the quality-assurance and quality-control requirements of 40 CFR §75.21 or Appendix B to 40 CFR Part 75, the owner or operator must recertify the monitoring system in accordance with 40 CFR §75.20(b). Furthermore, whenever the owner or operator makes a replacement, modification or change to the flue gas handling system or the unit's operation that may significantly change the stack flow or concentration profile, the owner or operator must recertify each continuous emission monitoring system, and each excepted monitoring system (sorvent trap monitoring system) under 40 CFR §75.15, whose accuracy is potentially affected by the change, in accordance with 40 CFR §75.20(b). Examples of changes to a continuous emission monitoring system that require recertification include replacement of the analyzer, complete replacement of an existing continuous emission monitoring system or change in location or orientation of the sampling probe or site.

71.3.c. Approval process for initial certification and recertification. -- Paragraphs 71.3.c.1 through 71.3.c.4 apply to both initial certification and recertification of a continuous monitoring system under subdivision 70.1.a. For recertifications, replace the words "certification" and "initial certification" with the word "recertification," replace the word "certified" with the word "recertified," and follow the procedures in 40 CFR §75.20(b)(5) in lieu of the procedures in paragraph 71.3.c.5.

71.3.c.1. Notification of certification. -- The Hg designated representative must submit to the Secretary, U.S. EPA Region III Office, and the Administrator written notice of the dates of certification testing, in accordance with section 73.

71.3.c.2. Certification application. -- The Hg designated representative must submit to the Secretary a certification application for each monitoring system. A complete certification application must include the information specified in 40 CFR §75.63.

71.3.c.3. Provisional certification date. -- The provisional certification date for a monitoring system will be determined in accordance with 40 CFR §75.20(a)(3). A provisionally certified monitoring system may be used under the Hg Budget Trading Program for a period not to exceed 120 days after receipt by the Secretary of the complete certification application for the monitoring system under paragraph 71.3.c.2. Data measured and recorded by the provisionally certified monitoring system, in accordance with the requirements of 40 CFR Part 75, will be considered valid quality assured data (retroactive to the date and time of provisional certification), provided that the Secretary does not invalidate the provisional certification by issuing a notice of disapproval within 120 days of the date of receipt of the complete certification application by the Secretary.

71.3.c.4. Certification application approval process. -- The Secretary will issue a written notice of approval or disapproval of the certification application to the owner or operator within 120 days of receipt of the complete certification application under paragraph 71.3.c.2. In the event the Secretary does not issue such a notice within such 120-day period, each monitoring system that meets the applicable performance requirements of 40 CFR Part 75 and is included in the certification application will be deemed certified for use under the Hg Budget

Trading Program.

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

71.3.c.4.B. Incomplete application notice. -- If the certification application is not complete, then the Secretary will issue a written notice of incompleteness that sets a reasonable date by which the Hg designated representative must submit the additional information required to complete the certification application. If the Hg designated representative does not comply with the notice of incompleteness by the specified date, then the Secretary may issue a notice of disapproval under subparagraph 71.3.c.4.C. The 120-day review period will not begin before receipt of a complete certification application.

71.3.c.4.C. Disapproval notice. -- If the certification application shows that any monitoring system does not meet the performance requirements of 40 CFR Part 75 or if the certification application is incomplete and the requirement for disapproval under subparagraph 71.3.c.4.B is met, then the Secretary will issue a written notice of disapproval of the certification application. Upon issuance of such notice of disapproval, the provisional certification is invalidated by the Secretary and the data measured and recorded by each uncertified monitoring system will not be considered valid quality-assured data beginning with the date and hour of provisional certification (as defined under 40 CFR §75.20(a)(3)). The owner or operator must follow the procedures for loss of certification in paragraph 71.3.c.5 for each monitoring system that is disapproved for initial certification.

71.3.c.4.D. Audit decertification. -- The

Secretary may issue a notice of disapproval of the certification status of a monitor in accordance with subsection 72.2.

71.3.c.5. Procedures for loss of certification. -- If the Secretary issues a notice of disapproval of a certification application under subparagraph 71.3.c.4.C or a notice of disapproval of certification status under subparagraph 71.3.c.4.D, then:

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

71.3.c.5.A.1. For a disapproved Hg pollutant concentration monitors and disapproved flow monitor, respectively, the maximum potential concentration of Hg and the maximum potential flow rate, as defined in sections 2.1.7.1 and 2.1.4.1 of Appendix A to 40 CFR Part 75; and

71.3.c.5.A.2. For a disapproved moisture monitoring system and disapproved diluent gas monitoring system, respectively, the minimum potential moisture percentage and either the maximum potential CO₂ concentration or the minimum potential O₂ concentration (as applicable), as defined in sections 2.1.3.1, and 2.1.3.2, and 2.1.5 of Appendix A to 40 CFR Part 75.

71.3.c.5.A.3. For a disapproved excepted monitoring system (sorbent trap monitoring system) under 40 CFR §75.15 and disapproved flow monitor, respectively, the maximum potential concentration of Hg and maximum potential flow rate, as defined in sections 2.1.7.1 and 2.1.4.1 of Appendix A to 40 CFR Part 75.

71.3.c.5.B. The Hg designated

representative must submit a notification of certification retest dates and a new certification application in accordance with paragraphs 71.3.c.1 and 71.3.c.2.

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

71.4. Initial certification and recertification procedures for units using the Hg low mass emission excepted methodology under 40 CFR §75.81(b). -- The owner or operator of a unit qualified to use the Hg low mass emissions (HgLME) excepted methodology under 40 CFR §75.81(b) must meet the applicable certification and recertification requirements in 40 CFR §75.81(c) through (f).

71.5. Certification and recertification procedures for alternative monitoring systems. -- The Hg designated representative of each unit for which the owner or operator intends to use an alternative monitoring system approved by the Administrator and, if applicable, the Secretary under Subpart E of 40 CFR Part 75 must comply with the applicable notification and application procedures of 40 CFR §75.20(f).

§45-37-72. Out of Control Periods.

72.1. Whenever any monitoring system fails to meet the quality-assurance and quality-control requirements or data validation requirements of 40 CFR Part 75, data must be substituted using the applicable missing data procedures in Subpart D of 40 CFR Part 75.

72.2. Audit decertification. -- Whenever both an audit of a monitoring system and a review of the initial certification or recertification application reveal that any monitoring system should not have been certified or recertified because it did not

meet a particular performance specification or other requirement under section 71 or the applicable provisions of 40 CFR Part 75, both at the time of the initial certification or recertification application submission and at the time of the audit, the Secretary will issue a notice of disapproval of the certification status of such monitoring system. For the purposes of this subsection, an audit will be either a field audit or an audit of any information submitted to the Secretary or the Administrator. By issuing the notice of disapproval, the Secretary revokes prospectively the certification status of the monitoring system. The data measured and recorded by the monitoring system will not be considered valid quality-assured data from the date of issuance of the notification of the revoked certification status until the date and time that the owner or operator completes subsequently approved initial certification or recertification tests for the monitoring system. The owner or operator must follow the applicable initial certification or recertification procedures in section 71 for each disapproved monitoring system.

§45-37-73. Notifications.

73.1. The Hg designated representative for a Hg Budget unit must submit written notice to the Secretary and the Administrator in accordance with 40 CFR §75.61, except that if the unit is not subject to an Acid Rain emissions limitation, the notification is only required to be sent to the Secretary.

§45-37-74. Recordkeeping and Reporting.

74.1. General provisions.

74.1.a. The Hg designated representative must comply with all recordkeeping and reporting requirements in this section and the requirements of subdivision 10.5.a.

74.1.b. If a Hg Budget unit is subject to an

Acid Rain emission limitation or the CAIR NO_x Annual Trading Program, CAIR SO₂ Trading Program or CAIR NO_x Ozone Season Trading Program, and the Hg designated representative who signed and certified any submission that is made under Subpart F or G of 40 CFR Part 75 and that includes data and information required under this section, sections 70 through 73, section 75, section 76 or Subpart I of 40 CFR Part 75 is not the same person as the designated representative or alternative designated representative or the CAIR designated representative or alternate CAIR designated representative, for the unit under 40 CFR Part 72 and the CAIR NO_x Annual Trading Program, CAIR SO₂ Trading Program or CAIR NO_x Ozone Season Trading Program, then the submission must also be signed by the designated representative or alternative designated representative or the CAIR designated representative or alternate CAIR designated representative, as applicable.

74.2. Monitoring plans. -- The owner or operator of a Hg Budget unit must comply with the requirements of 40 CFR §75.84(e).

74.3. Certification applications. -- The Hg designated representative must submit an application to the Secretary within 45 days after completing all initial certification or recertification tests required under section 71, including the information required under 40 CFR §75.63.

74.4. Quarterly reports. -- The Hg designated representative must submit quarterly reports, as follows:

74.4.a. The Hg designated representative must report the Hg mass emissions data and heat input data for the Hg Budget unit, in an electronic quarterly report in a format prescribed by the Administrator, for each calendar quarter beginning with:

74.4.a.1. For a unit that commences

commercial operation before July 1, 2008, the calendar quarter covering January 1, 2009 through March 31, 2009; or

74.4.a.2. For a unit that commences commercial operation on or after July 1, 2008, the calendar quarter corresponding to the earlier of the date of provisional certification or the applicable deadline for initial certification under subsection 70.3, unless that quarter is the third or fourth quarter of 2008, in which case reporting will commence in the quarter covering January 1, 2009 through March 31, 2009.

74.4.b. The Hg designated representative must submit each quarterly report to the Administrator within 30 days following the end of the calendar quarter covered by the report. Quarterly reports must be submitted in the manner specified in 40 CFR §75.84(f).

74.4.c. For Hg Budget units that are also subject to an Acid Rain emissions limitation or the CAIR NO_x Annual Trading Program, CAIR SO₂ Trading Program or CAIR NO_x Ozone Season Trading Program, quarterly reports must include the applicable data and information required by Subparts F through H of 40 CFR Part 75 as applicable, in addition to the Hg mass emission data, heat input data, and other information required by this section, sections 70 through 73, section 75 and section 76.

74.5. Compliance certification. -- The Hg designated representative must submit to the Administrator a compliance certification (in a format prescribed by the Administrator) in support of each quarterly report based on reasonable inquiry of those persons with primary responsibility for ensuring that all of the unit's emissions are correctly and fully monitored. The certification must state that:

74.5.a. The monitoring data submitted were recorded in accordance with the applicable requirements of this section, sections 70 through

73, section 75, and section 76, and 40 CFR Part 75, including the quality assurance procedures and specifications; and

74.5.b. For a unit with add-on Hg emission controls, a flue gas desulfurization system, a selective catalytic reduction system or a compact hybrid particulate collector system and for all hours where Hg data are substituted in accordance with 40 CFR §75.34(a)(1), the Hg add-on emission controls, flue gas desulfurization system, selective catalytic reduction system or compact hybrid particulate collector system were operating within the range of parameters listed in the quality assurance/quality control program under Appendix B to 40 CFR Part 75 or quality-assured SO₂ emission data recorded in accordance with 40 CFR Part 75 document that the flue gas desulfurization system or quality-assured NO_x emission data recorded in accordance with 40 CFR Part 75 document that the selective catalytic reduction system, was operating properly, as applicable, and the substitute data values do not systematically underestimate Hg emissions.

§45-37-75. Petitions.

75.1 The Hg designated representative of a Hg unit may submit a petition under 40 CFR §75.66 to the Administrator requesting approval to apply an alternative to any requirement of sections 70 through 74, and section 76. Application of an alternative to any requirement of sections 70 through 74, and section 76 is in accordance with this section and sections 70 through 74, and section 76 only to the extent that the petition is approved in writing by the Administrator, in consultation with the Secretary.

§45-37-76. Additional Requirements to Provide Heat Input Data.

76.1 The owner or operator of a Hg Budget unit that monitors and reports Hg mass emissions using a Hg concentration monitoring system and a flow monitoring system must also monitor and

report heat input rate at the unit level using the procedures set forth in 40 CFR Part 75.

§45-37-80. Inconsistency Between Rules.

80.1. In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, such inconsistency will be resolved by the determination of the Secretary and such determination will be based upon the application of the more stringent provision, term, condition, method or rule.

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY
CHARLESTON, WEST VIRGINIA

IN RE:

ACCEPT COMMENTS ON PROPOSED REVISIONS
TO EXISTING LEGISLATIVE RULE 45CSR15 -
EMISSION STANDARDS FOR HAZARDOUS AIR
POLLUTANTS; 45CSR16-STANDARDS OF
PERFORMANCE FOR NEW STATIONARY SOURCES;
45CSR25 - TO PREVENT AND CONTROL AIR
POLLUTION FROM HAZARDOUS WASTE TREATMENT,
STORAGE, OR DISPOSAL FACILITIES; 45CSR33
- ACID RAIN PROVISIONS AND PERMITS; 45CSR34
- EMISSION STANDARDS FOR HAZARDOUS AIR
POLLUTANTS FOR SOURCE CATEGORIES; 45CSR37 -
MERCURY BUDGET TRADING PROGRAM TO REDUCE
MERCURY EMISSIONS; 45CSR39 - CONTROL OF
ANNUAL NITROGEN OXIDE EMISSIONS TO MITIGATE
INTERSTATE TRANSPORT OF OZONE AND NITROGEN
OXIDES; 45CSR40 - CONTROL OF OZONE SEASON
NITROGEN OXIDE EMISSIONS TO MITIGATE
INTERSTATE TRANSPORT OF OZONE AND NITROGEN
OXIDES; AND 45CSR41 - CONTROL OF ANNUAL
SULFUR DIOXIDE EMISSIONS TO MITIGATE
INTERSTATE TRANSPORT OF FINE PARTICULATE
MATTER AND SULFUR DIOXIDE.

TRANSCRIPT OF PROCEEDINGS had and/or testimony adduced
in the public hearing regarding the above-referenced
matter, held on the 18th day of July, 2005, commencing at
6:00 p.m. and concluding at 6:35 p.m., at the West Virginia
Department of Environmental Protection, Cooper's Rock
Training Room, 601 57th Street, S.E., Charleston, Kanawha
County, West Virginia, with Jeanie Chandler, presiding.

NANCY MCNEALY
CERTIFIED COURT REPORTER

Post Office Box 13415
Charleston, West Virginia 25360-0415
(304) 988-2873 FAX (304) 988-1419

MS. CHANDLER: This public hearing will now come to order on this 18th day of July, 2005, at the West Virginia Department of Environmental Protection, Cooper's Rock Training Room, 601 57th Street S.E., Charleston, West Virginia. This public is being held to accept comments on proposed revisions to existing legislative rule 45CSR15- Emission Standards for Hazardous Air Pollutants pursuant to 40 CFR Part 61; 45CSR16 - Standards of Performance for New Stationary Sources pursuant to 40 CFR Part 60; 45CSR25 - To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities; 45CSR33; Acid Rain Provisions and Permits; 45CSR34 - Emission Standards for Hazardous Air Pollutants for Source Categories pursuant to 40 CFR Part 63; 45CSR37 - Mercury Budget Trading Program to Reduce Mercury Emissions; 45CSR39 - Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides; 45CSR40 - Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides; and 45CSR41 - Control of Annual Sulfur Dioxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Sulfur Dioxide.

A notice for the hearing was filed in the Secretary of State's office on June 15, 2005, and noticed

1 in the *State Register* on June 17, 2005. A class 1 legal
2 advertisement was published in both the *Charleston Daily*
3 *Mail* and *Charleston Gazette* on June 17, 2005, and the
4 notice was posted on the Division of Air Quality's web
5 site.

6 This public hearing is being held pursuant to the
7 provisions of 29A of the West Virginia Code. My name is
8 Jeanne Chandler with the Division of Air Quality,
9 Department of Environmental Protection. I will be the
10 moderator for the proceedings this evening.

11 Each rule will be considered separately this
12 evening. Comments and testimony will be accepted until the
13 close of this hearing and will be made part of the rule
14 making record.

15 The court reporter is Nancy McNealy. If anyone
16 desires a transcript of this proceeding, please contact Ms.
17 McNealy at 988-2873.

18 The purpose of this hearing is to accept comments
19 on proposed revisions to rule 45CSR37 - Mercury Budget
20 Trading Program to Reduce Mercury Emissions.

21 This rule establishes the general provisions and
22 designated representative, permitting, allowance and
23 monitoring provisions for the Mercury Budget Trading
24 Program, as a means of reducing national mercury emissions,

1 pursuant to the federal Clean Air Mercury Rule (CAMR)
2 established under Section 111 of the Clean Air and 40 CFR
3 60, Subpart HHH.

4 This rule partially fulfills the State's
5 obligations in response to the U. S. Environmental
6 Protection Agency's final rule, Standards of Performance
7 for New and Existing Stationary Sources: Electric Utility
8 Steam Generating Units (18 May 2005, at Federal Register,
9 page 28606). The federal rule establishes standards of
10 performance for mercury for new and existing coal-fired
11 electric utility steam generating units (utility units).
12 This rule establishes a mechanism by which mercury
13 emissions from new and existing coal-fired utility units
14 are capped at specific nationwide levels. The U.S.
15 Environmental Protection Agency has specified that annual
16 mercury emission reductions be implemented in two phases.
17 The first phase of mercury reductions starts in 2010 and
18 the second phase begins in 2018 and continues thereafter.
19 Flexibility is built in through market-based "cap and
20 trade" provisions which allow sources to buy or sell
21 mercury emission allowances from or to other program
22 participants. West Virginia will withhold 5 percent of the
23 annual State mercury budget and sell these allowances.

24 45CSR37 applies to coal-fired electric utility

1 steam generating units that have greater than 25 megawatts
2 generating capacity.

3 The floor is now open for public comment. Please
4 identify yourself and affiliation, if any, prior to making
5 comments.

6 (No response.)

7 There being nothing further, this public hearing
8 for the proposed 45CSR37 is concluded.

9 (WHEREUPON, the hearing was concluded.)

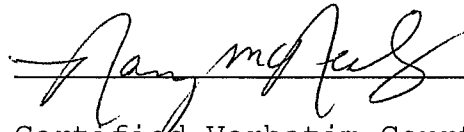
REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, to wit:

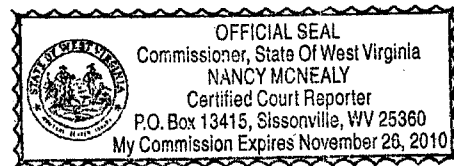
I, **NANCY MCNEALY**, Certified Verbatim Court
Reporter and Commissioner of West Virginia, do hereby
certify that the foregoing is, to the best of my skill and
ability, a true and accurate transcript of all the
proceedings as set forth in the caption hereof.

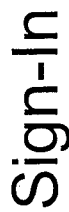
Given under my hand this 21st day of July, 2005.

My commission expires November 26, 2010.



Certified Verbatim Court Reporter





2006 Proposed Rules Public Hearing
601 57th Street SE
Charleston, WV 25302
July 18, 2005 6:00 p.m.

west virginia department of environmental protection

NAME (Please Print)

ADDRESS

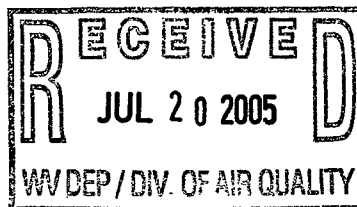
ORGANIZATION

PHONE/FAX

E-MAIL

COMMENT
YES/NO

[illegible]



American Electric Power
1 Riverside Plaza
Columbus, OH 43215-2373
aep.com

July 18, 2005

Mr. John A. Benedict, Director
Division of Air Quality
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304

RE: AEP Comments on Proposed Division of Air Quality Rules

Dear Director Benedict:

Appalachian Power Company and Ohio Power Company, dba American Electric Power (AEP), are pleased to offer these comments on the Division of Air Quality's (DAQ) proposed rules 45 C.S.R. 15, 45 C.S.R. 16, 45 C.S.R. 33, 45 C.S.R. 34, 45 C.S.R. 37, 45 C.S.R. 39, 45 C.S.R. 40, and 45 C.S.R. 41 which update and create new rules to incorporate the recent revisions to the federal air quality rules by the USEPA. AEP also wishes to endorse comments prepared and submitted by the West Virginia Chamber of Commerce and West Virginia Manufacturers Association.

AEP is pleased that the DAQ has chosen to adopt the CAIR and CAMR rules (45 CSR 37, 45 CSR 39, 45 CSR 40, and 45 CSR 41) for the utility sector largely as finalized by USEPA. One minor oversight was noted in both 45 CSR 39.53.1 and 45 CSR 40.53.1. It appears that the December 1, 2006 deadline for recording the 2009 through 2014 CAIR NO_x allowance allocations in the general compliance accounts was missed in Section 53.1 of both rules.

With regard to allowing other sources to opt-into the CAIR program or to absorb the non-EGU portion of the NO_x SIP Call program into the CAIR program, we believe that these options are appropriate so long as they do not jeopardize the ability of the West Virginia utility sources to participate in the USEPA CAIR trading program. To meet the USEPA cost estimates for CAIR, we believe that it is essential that the CAIR trading region be as large as possible.

AEP also supports the revisions to current rules 45 C.S.R. 15, 45 C.S.R. 16, 45 C.S.R. 33, and 45 C.S.R. 34, which update the rules to conform with the revisions to their respective federal counterparts.

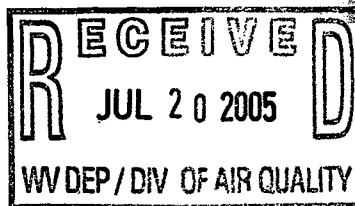
If you have any questions on these comments, please contact G. J. Wooten of my staff at 614-716-1262.

Sincerely,

P. A. Dal Porto
Manager – Air Quality Services

cc: T. P. Mallan - Charleston
G. J. Wooten - AQS

Pamela F. Faggert
Vice President and Chief Environmental Officer
5000 Dominion Boulevard, Glen Allen, VA 23060
Phone: 804-273-3467



DominionSM

July 18, 2005

Mr. John A. Benedict
Director
Division of Air Quality
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304-2943

Re: WV DEP Division of Air Quality Proposed Legislative Rules

Dear Mr. Benedict:

Dominion is submitting this letter in response to the Division of Air Quality's (DAQ) Notice of Public Hearing and Public Comment Period regarding several air quality rules proposed for consideration in the 2006 West Virginia Legislature. Dominion owns and operates a large number of facilities in West Virginia that are affected by the following rules:

- ◆ Series 37 – Mercury Budget Trading Program to Reduce Mercury Emissions
- ◆ Series 39 – Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate and Nitrogen Oxides
- ◆ Series 40 – Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides
- ◆ Series 41 – Control of Annual Sulfur Dioxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Sulfur Dioxide

Dominion commends the DAQ on its timely development of these proposed revisions to the West Virginia State Implementation Plan to address the Federal Clean Air Mercury Rule (CAMR) and the Clean Air Interstate Rule (CAIR). Dominion supports the DAQ's full adoption of the Federal "model rules", provided as part of the EPA CAMR and CAIR final rules, as proposed in the draft Series 37 Rule (for CAMR) and the draft Series 39-41 Rules (for CAIR).

Thank you for this opportunity to comment. If you have any questions, please call Lenny Dupuis at (804) 273-3022 or Bob Asplund at (804) 273-3012.

Sincerely,

Pamela F. Faggert

cc: R. B. Asplund
L. R. Dupuis



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

JUL 18 2005

Mr. John A. Benedict
West Virginia Department of Environmental Protection
Division of Air Quality
601 57th Street, SE
Charleston, WV 25304

Dear Mr. Benedict:

Thank you for the opportunity to comment on West Virginia's proposed rule 45CSR37 (Mercury Budget Trading Program to Reduce Mercury Emissions) to implement the Clean Air Mercury Rule (CAMR). We commend West Virginia's efforts in initiating the regulatory process needed to implement the requirements of the CAMR in such a timely manner. However, please note there is a potential that changes in the CAMR rules may be required as a result of future litigation. Obviously, the State does not have the benefit of knowing in advance whether any of these changes will require revision of its rules, and unfortunately, West Virginia may be required to make future revisions to 45CSR37 to address changes to the federal rules. However, we assure you that EPA will work with the State as necessary to appropriately address future revisions to the federal CAMR rules.

If you have any questions, please do not hesitate to contact Ray Chalmers of my staff at (215) 814-2061.

Sincerely,

A handwritten signature in black ink, appearing to read "Judith M. Katz", written over a horizontal line.

Judith M. Katz
Director, Air Protection Division



*Printed on 100% recycled/recyclable paper with 100% post-consumer fiber and process chlorine free.
Customer Service Hotline: 1-800-438-2474*



FAX TRANSMISSION

To: John A. Benedict, Director
WVDEP

Date: July 18, 2005

Fax #: 304-926-0479

Pages: 2, including this cover sheet.

From: Judith Katz, Director
Air Protection Division
EPA Region III

Subject: EPA Comments on WV's Proposed Mercury Budget Trading Program

COMMENTS: Attached are EPA's comments pertaining to WV's Proposed Mercury Budget Trading Program to Reduce Mercury Emissions.



WEST VIRGINIA CHAMBER OF COMMERCE

The Voice of Business in West Virginia

July 18, 2005

07-18-05P05

John A. Benedict, Director
West Virginia Department of Environmental Protection
Division of Air Quality
601 57th Street SE
Charleston, West Virginia 25304

Re: Comments on Proposed Regulations 45CSR15, 45CSR16, 45CSR25, 45CSR33, 45CSR34, 45CSR37, 45CSR39, 45CSR40, 45CSR41

Dear Director Benedict:

The West Virginia Chamber of Commerce is pleased to have the opportunity to comment on the proposed referenced rules. The West Virginia Chamber of Commerce has as its mission statement the goal of being an action-taking business organization. It is the state's largest business trade organization. We represent companies that employ more than half the state's private sector work force. The members of the Chamber seek not only to improve the state's business climate but also to improve the state's quality of life.

As the amendments to Rules 15, 16, 25, 33, and 34 involve the incorporation of updates and amendments to federal regulations, the Chamber expresses its support for your efforts to maintain West Virginia's Air Quality Regulations in accord with the nation's regulatory structure. Moreover, we support the Division of Air Quality's efforts to issue the new regulations (45 CSR 37, 39, 40, 41), which incorporate the requirements contained in EPA's Clean Air Interstate Rule and the Clean Air Mercury Rule. Our review shows that these rules are in substantial agreement with the letter and purpose of these federal rules. The Chamber considers these proposed regulations to represent an important effort to link the goals of increased air quality with a reasonable and achievable program of emission control.

The Chamber would, however, like to express puzzlement and, to some degree of concern, about the change in language in 45 CSR 25. In Section 1.1.b there is a modification of the section that appears to significantly change the meaning of the requirement imposed. The existing language states:

"all persons engaged in the treatment, storage, or disposal of hazardous waste shall give careful consideration to the effects of the resultant emissions on the air quality or the areas affected by such hazardous waste or constituent thereof."

John A. Benedict

Comments on Proposed Regulations 45CSR15, 45CSR16, 45CSR25, 45CSR33, 45CSR34, 45CSR37, 45CSR39, 45CSR40, 45CSR41.

Page 2 of 3

July 18, 2005

This phrase has been eliminated in the proposed section and replaced by:

“all persons engaged in the treatment, storage, or disposal of hazardous waste or any constituent thereof, will prevent emissions to the air in quantities which cause ambient air concentrations that may be injurious to human health or welfare or would interfere with the enjoyment of life or property.”

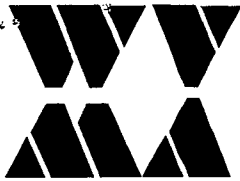
The new language certainly seems to be much more stringent than existing language, it is quite broad as well as vague. Such poorly defined and overly broad language could lead to subjectivity and as a consequence arbitrarily applied regulatory actions. We would like to better understand the reason the Division feels the need to introduce this change.

In summary, with the exception noted above, the West Virginia Chamber of Commerce supports the agency's proposed changes to the West Virginia Air Quality Regulations.

Sincerely



West Virginia Chamber of Commerce
Timothy P. Mallan, Chair, Air Subcommittee,
1624 Kanawha Blvd, E.
Charleston, WV 25301



WEST VIRGINIA MANUFACTURERS ASSOCIATION

2001 Quarrier Street, Charleston, WV 25311

Telephone: (304) 342-2123

FAX: (304) 342-4552

wvma@wvma.com

July 18, 2005

07-18-05P06:00 RCVD

John A. Benedict, Director
West Virginia Department of Environmental Protection
Division of Air Quality
601 57th SE
Charleston, WV 25304

RE: Comments on proposed 45 C.S.R. 15, 45
C.S.R. 16, 45 C.S.R. 25, 45 C.S.R. 33, 45
C.S.R. 34, 45 C.S.R. 37, 45 C.S.R. 39, 45
C.S.R. 40, and 45 C.S.R. 41.

COMMENTS OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION ON THE PROPOSED DIVISION OF AIR QUALITY RULES

The West Virginia Manufacturers Association ("WVMA") has many members operating sources which are affected by the West Virginia Department of Environmental Protection's Division of Air Quality ("DAQ") rules. In general, WVMA supports the DAQ's proposed rules 45 C.S.R. 15, 45 C.S.R. 16, 45 C.S.R. 25, 45 C.S.R. 33, 45 C.S.R. 34, 45 C.S.R. 37, 45 C.S.R. 39, 45 C.S.R. 40, and 45 C.S.R. 41 which update and create new rules to incorporate the recent revisions to the federal air quality rules by the United States Environmental Protection Agency ("EPA"). Specifically, the WVMA supports the revisions to current rules 45 C.S.R. 15, 45 C.S.R. 16, 45 C.S.R. 33, and 45 C.S.R. 34, which update the rules to conform with the revisions to their respective federal

Board of Directors

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Eagle Manufacturing Co.

Elkem Metals Company
Flexsys
FMC Corporation
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GE Plastics
Kanawha Manufacturing Co.

Kingsford Manufacturing Co.
Koppers Industries, Inc.
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Pechiney Rolled Products, LLC
Phillips Machine Service, Inc.

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Toyota
W.M. Cramer Lumber Co.
Weirton Steel Corporation

counterparts. In addition, the WVMA supports the promulgation of new rules 45 C.S.R. 39, 45 C.S.R. 40 and 45 C.S.R. 41, which incorporate by reference the new Clean Air Interstate Rules promulgated by the EPA and new rule 45 C.S.R. 37, which incorporates the federal Clean Air Mercury Rule. However, WVMA has some concerns regarding the changes to proposed rule 45 C.S.R. 25, *et seq.*, To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities ("Rule 25"). The WVMA also suggests certain uniform amendments to Rules 15, 16 and 34 to comport with the requirements of W.Va. Code §22-5-4(a)(4). The WVMA appreciates the opportunity to submit the following comments in response to the proposed rules by DAQ:

I. Clean Air Interstate Rule and Clean Air Mercury Rule

The EPA has recently promulgated the Clean Air Interstate Rule ("CAIR") to reduce the interstate transport of fine particulate matter ("PM 2.5") and ozone. Under the CAIR rule, EPA requires that certain States that are not meeting the annual PM 2.5 national ambient air quality standards ("NAAQS") or the 8-hour ozone NAAQS adopt and submit revisions to their State Implementation Plan ("SIP") that would eliminate specified amounts of SO₂ and/or NO_x emissions. The DAQ has proposed to incorporate the EPA's CAIR rule in the proposed new Rules 39, 40, and 41. In addition, EPA has recently promulgated the Clean Air Mercury Rule as a means of reducing mercury emissions. The DAQ has incorporated this rule in the new proposed Rule 37. We support the incorporation of these revisions to the federal rules by West Virginia in these new rules.

II. Rule 25

The WVMA is concerned with the DAQ's proposed revisions to Rule 25. Specifically, we object to the proposed language in Section 1.1.b. Currently, the language states that "all persons engaged in the treatment, storage, or disposal of hazardous waste shall give careful consideration to the effects of the resultant emissions on the air quality or the areas affected by such hazardous waste or constituent thereof." The proposed revisions state as follows: "all persons engaged in the treatment, storage, or disposal of hazardous waste or any constituent thereof, will prevent emissions to the air in quantities which cause ambient air concentrations that may be injurious to human health or welfare or would interfere with the enjoyment of life or property."

We believe that the proposed language is vague and overly stringent. The current language does not require affirmative action of the regulated sources to "prevent" such emissions. In addition, the DAQ has not offered any basis or reasoning for the proposed revisions. The WVMA is concerned that this provision could be applied subjectively to regulated sources as a "catch all" citation for alleged violations. All sources are bound by law not to cause a "statutory air pollution", but this rule goes beyond that obligation without necessary definitions.

Specifically, "constituent" is not defined in the proposed rule. The definition of "hazardous waste" in Rule 25 refers to the general definition in the federal regulations for "hazardous waste" which includes characteristic hazardous wastes and listed hazardous wastes. See, 40 CFR §261.3. The definition of "hazardous waste constituent" in the federal regulations only includes constituents that cause a hazardous waste to be listed or constituents specifically listed in the federal regulations. See, 40 CFR §260.10

Therefore, the definition of “hazardous waste constituent” in the federal regulations does not include constituents of *characteristic* hazardous wastes set forth under the general hazardous waste definition. The provision proposed in Rule 25 would not provide notice to a regulated entity as to what constitutes a constituent of a hazardous waste. As proposed, the term is so broad that it could literally include water or simple calcium, for example. In order to provide adequate clarification, the proposed rule would need to include a definition of “hazardous waste constituent” or, at the least, incorporate the definition of “hazardous waste constituent” under 40 CFR §260.10, which limits hazardous waste constituents to either those constituents listed under the federal regulations or those that cause a hazardous waste to be listed under the federal regulations.

In addition, “emissions to the air which cause ambient air concentrations that may be injurious to human health or welfare or would interfere with the enjoyment of life or property” is very subjective, especially since there are no ambient air quality standards for “hazardous waste.” Since the proposed provision would require sources to prevent such emissions, a definition of the term would be necessary to provide due process notice to the regulated sources. In order to comply with the proposed rule, a source must be able to understand its obligation. As proposed, the rule does not provide the clarity required under due process rights of the Constitution. Under the void-for-vagueness doctrine, constitutional due process requires that statutes and rules set forth impermissible conduct with sufficient clarity so that a person of ordinary intelligence knows what conduct is prohibited. See, State v. Appleby, 583 S.E.2d 800, 815 (W.Va. 2002). The West Virginia Supreme Court of Appeals has held that:

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.

State v. Appleby, 583 S.E.2d at 815 (quoting State v. Miller, 476 S.E.2d 535, 546 (W.Va. 1996); BMW of North American, Inc. v. Gore, 517 U.S. 559, 574, 116 S.Ct. 1589, 1598 (1996)). Likewise, a rule which creates an affirmative obligation should do so with clarity sufficient that the regulated entity can clearly implement compliance. The proposed language in Section 1.1.b in Rule 25 does not clearly define the prohibited conduct and would, therefore, be void-for-vagueness. The WVMA urges the DAQ to withdraw the proposed revisions to Section 1.1.b. At the very least, if these revisions remain, the DAQ should further clarify the provision by including specific definitions of “constituent” of hazardous waste and for those levels of “emissions to the air which cause ambient air concentrations that may be injurious to human health or welfare or would interfere with the enjoyment of life or property”, all consistent with W.Va. Code §22-5-4(a)(4) as well. We do not believe that federal rules for hazardous waste management contain such stringent provisions.

III. Opacity Stringency Conformity

The WVMA believes that in order to comply with the mandate of W.Va. Code §22-5-4(a)(4), that the “stringency” provisions in Rules 15, 16, and 34, in Section 7.1 of those rules, must be modified with respect to opacity. Opacity is not a regulated pollutant; it is not a pollutant at all. Rather, it is a measure of light transmission used as an indicator of compliance with underlying pollutant emission limits. The federal counterpart rules for sources regulated by NESHAP, NSPS and MACT standards all contain opacity limits of 20%, not the 10% opacity reflected in Rule 2 for boilers.

Accordingly, we request that Section 7.1 in each of Rules 15, 16 and 34 be amended to add the following phrase at the end thereof: "Notwithstanding the foregoing principle, any affected source governed by this rule shall be subject to the opacity (visible emissions) limits contained in the United States Environmental Protection Agency's rules herein adopted by reference in lieu of any other opacity limit established in the rules of the Department of Environmental Protection."

The WVMA appreciates the opportunity to comment on the proposed revisions to the rules and supports the DAQ's proposal to adopt the recent revisions to the federal rules by the EPA. However, the WVMA recommends that the DAQ reconsider the adoption of the additional proposals as discussed hereinabove.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "John Pitner" with a stylized flourish at the end.

The West Virginia Manufacturers Association
John Pitner, Air Team Leader
2001 Quarrier Street
Charleston, WV 25311

cc: Karen S. Price, President, WVMA
Air Team Members

David W. White
8204 Asbury Hills Drive
Cincinnati, Ohio 45255

July 18, 2005

Mr. John Benedict
Director
West Virginia Division of Air Quality
601 57th Street SE
Charleston, West Virginia 25304

Re: Proposed Regulations and Revisions
45 CSR 15, 16, 25, 33, 34, 37, 39, 40 and 41

Dear Mr. Benedict,

Thank you for the opportunity to provide comments on the proposed revisions to 45 CSR 15, 16, 25, 33 and 34 and the proposed new regulations 45 CSR 37, 39, 40 and 41. Unfortunately, such proposed revisions and new regulations fail to meet the requirements of the enabling legislation under which they are proposed for promulgation.

The West Virginia Code provides that the director of the division of environmental protection, or such other person to whom the director has delegated authority, is authorized to promulgate legislative rules not inconsistent with the provisions of the Air Pollution Control Act. W. Va. Code § 22-5-4(a)(4). The Code also provides that it shall be unlawful to cause a statutory air pollution. W. Va. Code § 22-5-3. A statutory air pollution is defined as the discharge in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property. W. Va. Code § 22-5-2(6).

For decades residents of communities along the Kanawha and Ohio River valleys have been assaulted by noxious emissions from coke batteries, steel mills, chemical plants and other sources subject to 45 CSR 15, 16, 25, and 34. Residents of towns such as Follansbee, Nitro, Institute, and Belle have historically and continue to have the quiet enjoyment of their property disturbed by toxic and noxious emissions. Revising these regulations in their present forms will only serve the farce that they are somehow consistent with the requirements of the West Virginia Code.

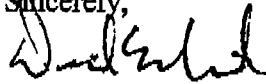
What are needed are regulations reflecting unique topographic conditions peculiar to West Virginia. The chronic and acute impacts on the health and welfare of West Virginians must be evaluated before any one of the regulations can be considered to have

been promulgated in accordance with the law. But no medical or toxicological evaluation has been conducted to make such a determination. Adoption of federal standards does not rise to the level of consistency with the law of West Virginia. These regulations are adopted under the authority of the West Virginia Code and must comply with its requirements.

Similarly the proposed programs under 45 CSR 37, 39, 40 and 41 do not provide for the protection of all residents of the state from adverse effects of power plant emissions. As research by past personnel of the Division of Air Quality has demonstrated, the vast majority of power plant emission impacts will occur at distances considerably less than 250 kilometers, generally within 50 kilometers. As such, trading programs such as 45 CSR 37 and transport programs such as 45 CSR 39, 40 and 41 are ineffective in controlling emission impacts of those residents adjacent to a paper reduction purchased on the open market, in contrast to an actual reduction required by the language of the West Virginia Code preventing creation of a statutory air pollution.

In short, the DAQ needs to quit permitting pollution and start enforcing the clear language of the law. Thank you again for the opportunity to provide these comments.

Sincerely,



David White

45CSR37

MERCURY BUDGET TRADING PROGRAM TO REDUCE MERCURY EMISSIONS

RESPONSE TO COMMENTS

On June 17, 2005, the Department of Environmental Protection (DEP) Division of Air Quality (DAQ) commenced the thirty (30) day public comment period on proposed rule 45CSR37. On July 18, 2005, at 6 pm a public hearing was held to accept oral comments on 45CSR37, in the Cooper's Rock Training Room of the West Virginia DEP Building located at 601 57th Street, SE, in Charleston. No oral comments were received. Written comments were accepted through the close of the public comment period, which closed at the conclusion of the public hearing. Written comments were received from American Electric Power (AEP), Dominion, the United States Environmental Protection Agency (U.S. EPA), Mr. David White, the West Virginia Manufacturers Association and the West Virginia Chamber of Commerce. DAQ addresses the written comments below.

I. COMMENTER: United States Environmental Protection Agency (U.S. EPA)

COMMENT:

We commend West Virginia's efforts in initiating the regulatory process needed to implement the requirements of the CAMR in such a timely manner. However, please note there is a potential that changes in the CAMR rules may be requires as a result of future litigation. Obviously, the State does not have benefit of knowing in advance whether any of these changes will require revisions of its rules, and unfortunately, West Virginia may be required to make future revisions to 45CSR37 to address changes to the federal rules. However, we assure you that EPA will work with the State as necessary to appropriately address future revisions to the federal CAMR rules.

RESPONSE:

West Virginia is aware of the pending litigation and the potential for future litigation that may result in changes to the federal rules. However, 40CFR60.24(h)(2) requires that "[t]he State's State plan under paragraph (h)(1) of this section must be submitted to the Administrator by no later than November 17, 2006." West Virginia's rules are required to go through legislative approval and for West Virginia to meet the deadline DEP had to initiate the rule making process at this time. However, the DEP intends to work with the legislature to incorporate any federal rule changes that are finalized prior to legislative approval of 45CSR37. If changes are made to the federal rule after 45CSR37 has received legislative approval, then the DEP will make further revisions to the rule by again going through the legislative process.

II. COMMENTER: American Electric Power (AEP)

COMMENT:

AEP is pleased that the DAQ has chosen to adopt the CAIR and CAMR rules (45 CSR 37, 45 CSR 39, 45 CSR 40, and 45 CSR 41) for the utility sector largely as finalized by USEPA.

RESPONSE:

No response required.

III. COMMENTER: Dominion

COMMENT:

Dominion commends the DAQ on its timely development of these proposed revisions to the West Virginia State Implementation Plan to address the Federal Clean Air Mercury Rule (CAMR) and the Clean Air Interstate Rule (CAIR). Dominion supports the DAQ's full adoption of the Federal "model rules", provided as part of the EPA CAMR and CAIR final rules, as proposed in the draft Series 37 Rule (for CAMR) and the draft Series 39 - 41 Rules (for CAIR).

RESPONSE:

No response required.

IV. COMMENTER: Mr. David White of Cincinnati, Ohio

COMMENT:

Similarly the proposed programs under 45 CSR 37, 39, 40 and 41 do not provide for the protection of all residents of the state from adverse effects of power plant emissions. As research by past personnel of the Division of Air Quality has demonstrated, the vast majority of power plant emission impacts will occur at distances considerably less than 250 kilometers, generally within 50 kilometers. As such, trading programs such as 45 CSR 37 and transport programs such as 45 CSR 39, 40 and 41 are ineffective in controlling impacts of those residents adjacent to a paper reduction purchased on the open market, in contrast to an actual reduction required by the language of the West Virginia Code preventing creation of a statutory air pollution.

RESPONSE:

DAQ believes that the U.S. EPA's extensive modeling shows that the federal Clean Air Interstate Rule (CAIR) will significantly reduce the majority of the coal-fired power plant mercury

emissions that deposit in the United States, and those reductions will occur in areas where mercury deposition is currently the highest. Moreover, the federal Clean Air Mercury Rule (CAMR) is expected to make additional reductions in mercury emissions that are transported regionally and deposited domestically, and it will reduce emissions that contribute to atmospheric mercury worldwide. While it is possible that an EGU may purchase a mercury allowance to cover actual emissions, transport programs such as the successful Acid Rain and NOx SIP Call programs have proven to significantly reduce SO2 and NOx emissions, providing cleaner air for all West Virginians. Thus, a mercury transport rule such as CAMR will also reduce mercury emissions on a regional, as well as a local basis.

Modeling done by EPA in support of CAIR, CAMR and the Clear Skies Act of 2003 predicts a 68% decrease in mercury emissions in West Virginia by 2020. The modeling predicts a decrease in mercury deposition of 5-15% across much of the state, and up to 60% in some western portions of the state. A number of facilities in West Virginia have already announced plans to install additional controls to comply with CAIR that will also reduce mercury emissions. In addition, SCR NOx control equipment that has recently been installed to comply with the NOx SIP Call, in combination with existing or new SO2 scrubber controls, are already reducing the mercury emissions of the power sector in the state.

If the State has sufficient facts to demonstrate that the proposed program under 45CSR37 is inadequate or inappropriate, the Secretary may, under W. Va. Code §22-1-3a, make a specific determination and adopt more stringent standards. At this point, the Secretary does not believe such a demonstration is necessary or appropriate. In addition, the DAQ may utilize its authority under W. Va. Code §22-5-3 on a case-by-case basis where warranted.

V. COMMENTER: West Virginia Chamber of Commerce

COMMENT:

[W]e support the Division of Air Quality's efforts to issue the new regulations (45CSR37, 39, 40, 41), which incorporate the requirements contained in EPA's Clean Air Interstate Rule and the Clean Air Mercury Rule. Our review shows that these rules are in substantial agreement with the letter and purpose of these federal laws. The Chamber considers these proposed regulations to represent an important effort to link the goals of increased air quality with a reasonable and achievable program of emission control.

RESPONSE:

No response required.

VI. COMMENTER: West Virginia Manufacturers Association

COMMENT:

. . . EPA has recently promulgated the Clean Air Mercury Rule as a means of reducing mercury emissions. The DAQ has incorporated this rule in the new proposed Rule 37. We support the incorporation of these revisions to the federal rules by West Virginia in these new rules.

RESPONSE:

No response required.