

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

Form #3

Do Not Mark In This Box

FILED

2005 JUL 29 P 2:38

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

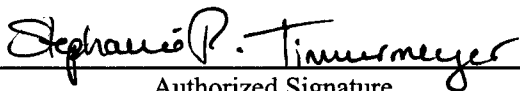
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 39

TITLE OF RULE BEING PROPOSED: Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate
Transport of Fine Particulate Matter and Nitrogen Oxides

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


Authorized Signature

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: 45CSR39 - Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides

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

Phone: 304 926-0499
Fax: 304 926-0488

e-mail: jbenedict@wvdep.org

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)

James Mason, Technical Analyst II
601 57th Street, S.E.
Charleston, WV 25304

Phone: 304 926-0499 ext. 1200
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: 45CSR39 - "Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides"

A. AUTHORITY: W.Va. Code §22-5-4

B. SUMMARY OF RULE:

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.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

In the final CAIR rule, U.S. EPA finds that 28 States and the District of Columbia contribute significantly to nonattainment of the NAAQS for fine particles (PM_{2.5}) and/or 8-

hour ozone in downwind States. U.S. EPA is requiring these upwind states to revise their SIPs to include control measures to reduce annual emissions of NO_x. Consequently, the 28 states, including West Virginia, are required to submit SIP revisions implementing CAIR by September 11, 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 CAIR 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 reming 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: 45CSR39 - "Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides"

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.

Although the rule will increase the resources required for implementation compared to current regulations, the net difference should be marginal and 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 | \$ 12,400 | \$ 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 | 0 |

Rule Title: 45CSR39 - "Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides"

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 and upon full implementation, the personal costs continue due to annual agency allocation responsibilities under the program.

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 39
CONTROL OF ANNUAL NITROGEN OXIDE EMISSIONS TO MITIGATE INTERSTATE
TRANSPORT OF FINE PARTICULATE MATTER AND NITROGEN OXIDES

FILED

2005 JUL 29 P 2:38

OFFICE WEST VIRGINIA
SECRETARY OF STATE**§45-39-1. General.**

1.1. Scope. -- 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). 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 CAIR NO_x Annual Trading Program by carrying out the functions set forth for the Administrator in this rule and 40 CFR Part 51. The CAIR NO_x Ozone Season Trading Program requirements are set forth in 45CSR40.

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 Part 96, Subparts AA through II, 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. --

§45-39-2. Definitions.

2.1. "Account number" means the identification number given by the Administrator to each CAIR NO_x Annual 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, with regard to CAIR NO_x Annual allowances issued under sections 40 through 43, the determination by the Secretary or the Administrator of the amount of such CAIR NO_x Annual allowances to be initially credited to a CAIR NO_x Annual unit or a new unit set-aside and, with regard to CAIR NO_x Annual allowances issued under section 88, the determination by the Secretary of the amount of such CAIR NO_x Annual allowances to be initially credited to a CAIR NO_x Annual unit.

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 CAIR NO_x Annual allowance transfer must be submitted for recordation in a CAIR NO_x Annual source's

compliance account in order to be used to meet the source's CAIR NO_x Annual emissions limitation for such control period in accordance with section 54.

2.7. "Alternate CAIR designated representative" means, for a CAIR NO_x Annual source and each CAIR NO_x Annual 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 and sections 80 through 88, to act on behalf of the CAIR designated representative in matters pertaining to the CAIR NO_x Annual Trading Program. If the CAIR NO_x Annual source is also a CAIR SO₂ source under 45CSR41, then this natural person will be the same person as the alternate CAIR designated representative under the CAIR SO₂ Trading Program. If the CAIR NO_x Annual source is also a CAIR NO_x Ozone Season source under 45CSR40, then this natural person will be the same person as the alternate CAIR designated representative under the CAIR NO_x Ozone Season Trading Program. If the CAIR NO_x Annual source is also subject to the Acid Rain Program, then this natural person will be the same person as the alternate designated representative under the Acid Rain Program under 45CSR33.

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

2.9. "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 authorized account representative" means, with regard to a general account, a responsible natural person who is authorized, in accordance with sections 10 through 14 and sections 80 through 88, to transfer and otherwise dispose of CAIR NO_x Annual allowances held in the general account and, with regard to a compliance account, the CAIR designated representative of the source.

2.12. "CAIR designated representative" means, for a CAIR NO_x Annual source and each CAIR NO_x Annual 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 and sections 80 through 88, to represent and legally bind each owner and operator in matters pertaining to the CAIR NO_x Annual Trading Program. If the CAIR NO_x Annual source is also a CAIR SO₂ source under 45CSR41, then this natural person will be the same person as the CAIR designated representative under the CAIR SO₂ Trading Program. If the CAIR NO_x Annual source is also a CAIR NO_x Ozone Season source under 45CSR40, then this natural person will be the same person as the CAIR designated representative under the CAIR NO_x Ozone Season Trading Program. If the CAIR NO_x Annual source is also subject to the Acid Rain Program, then this natural person will be the same person as the designated representative under the Acid Rain Program under 45CSR33.

2.13. "CAIR NO_x Annual allowance" means a limited authorization issued by the Secretary under sections 40 through 43 or section 88 to emit one ton of nitrogen oxide during a control period of the specified calendar year for which the authorization is allocated or of any calendar year thereafter under the CAIR NO_x Program. An authorization to emit nitrogen oxides that is not issued under provisions of a state implementation plan that are approved under 40 CFR §§51.123(o)(1) or (2) will not be a CAIR NO_x

Annual allowance.

2.14. "CAIR NO_x Annual allowance deduction" or "deduct CAIR NO_x Annual allowances" means the permanent withdrawal of CAIR NO_x Annual allowances by the Administrator from a compliance account in order to account for a specified number of tons of total nitrogen oxide emissions from all CAIR NO_x Annual units at a CAIR NO_x Annual source for a control period, determined in accordance with sections 70 through 76, or to account for excess emissions.

2.15. "CAIR NO_x Annual allowances held" or "hold CAIR NO_x Annual allowances" means the CAIR NO_x Annual allowances recorded by the Administrator, or submitted to the Administrator for recordation, in accordance with sections 51 through 57, sections 60 through 62, and sections 80 through 88, in a CAIR NO_x Annual Allowance Tracking System account.

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

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

2.18. "CAIR NO_x Annual emissions limitation" means, for a CAIR NO_x Annual source, the tonnage equivalent of the CAIR NO_x Annual allowances available for deduction for the source under subsections 54.1 and 54.2 for a control period.

2.19. "CAIR NO_x Annual source" means a source that includes one or more CAIR NO_x Annual units.

2.20. "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 40 CFR Part 96, Subparts AA through II and 40 CFR §51.123, as a means of mitigating interstate transport of fine particulates and nitrogen oxides.

2.21. "CAIR NO_x Annual unit" means a unit that is subject to the CAIR NO_x Annual Trading Program under section 4 or, except for purposes of section 5 and sections 40 through 43, a CAIR NO_x Annual opt-in unit under sections 80 through 88.

2.22. "CAIR NO_x Ozone Season source" means a source that includes one or more CAIR NO_x Ozone Season units.

2.23. "CAIR NO_x Ozone Season Trading Program" means a multi-state nitrogen oxides air pollution control and emission reduction program approved and administered by the Administrator in accordance with 40 CFR Part 96, Subparts AAAA through IIII and 40 CFR §51.123, as a means of mitigating interstate transport of ozone and nitrogen oxides.

2.24. "CAIR NO_x Ozone Season unit" means a unit that is subject to the CAIR NO_x Ozone Season Trading Program under 45CSR§40-4 or a CAIR NO_x Ozone Season opt-in unit under sections 80 through 88 of 45CSR40.

2.25. "CAIR 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 CAIR NO_x Annual Trading Program requirements applicable to a CAIR NO_x Annual source, to each CAIR NO_x Annual unit at the source, and to the owners and operators and the CAIR designated representative of the source and each such unit.

2.26. "CAIR SO₂ source" means a source that includes one or more CAIR SO₂ units.

2.27. "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 40 CFR Part 96, Subparts AAA through III and 40 CFR §51.124, as a means of mitigating interstate transport of fine particulates and sulfur dioxide.

2.28. "CAIR SO₂ unit" means a unit that is subject to the CAIR SO₂ Trading Program under 45CSR§41-4 or a CAIR SO₂ opt-in unit under sections 80 through 88 of 45CSR41.

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

2.30. "Coal" means any solid fuel classified as anthracite, bituminous, subbituminous or lignite.

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

2.32. "Coal-fired" means:

2.32.a. Except for purposes of sections 40 through 43, combusting any amount of coal or coal-derived fuel, alone or in combination with any amount of any other fuel, during any year; or

2.32.b. For purposes of sections 40 through 43, combusting any amount of coal or coal-derived fuel, alone or in combination with any amount of any other fuel, during a specified year.

2.33. "Cogeneration unit" means a stationary, fossil-fuel-fired boiler or stationary, fossil-fuel-fired combustion turbine:

2.33.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

2.33.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:

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

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

2.33.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; and

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

2.34. "Combustion turbine" means:

2.34.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

2.34.b. If the enclosed device under subdivision 2.34.a is combined cycle, any associated heat recovery steam generator and steam turbine.

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

2.35.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.

2.35.a.1. For a unit that is a CAIR NO_x Annual unit under section 4 on the date the unit commences commercial operation as defined in subdivision 2.35.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.

2.35.a.2. For a unit that is a CAIR NO_x Annual unit under section 4 on the date the unit commences commercial operation as defined in subdivision 2.35.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 subdivisions 2.35.a, 2.35.b, or 2.35.c as appropriate.

2.35.b. Notwithstanding subdivision 2.35.a and except as provided in section 5, for a unit that is not a CAIR NO_x Annual unit under section 4 on the date the unit commences commercial operation as defined in subdivision 2.35.a and is not a unit under subdivision 2.35.c, the unit's date for commencement of commercial operation will be the date on which the unit becomes a CAIR NO_x Annual unit under section 4.

2.35.b.1. For a unit with a date for commencement of commercial operation as defined in subdivision 2.35.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.

2.35.b.2. For a unit with a date for commencement of commercial operation as defined in subdivision 2.35.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 subdivisions 2.35.a, 2.35.b, or 2.35.c as appropriate.

2.35.c. Notwithstanding subdivision 2.35.a and except as provided in subsection 84.8 or subdivisions 87.2.d and 87.2.e, for a CAIR NO_x Annual opt-in unit or a unit for which a CAIR opt-in permit application is submitted and not withdrawn and a CAIR opt-in permit is not yet issued or denied under sections 80 through 88, the unit's date for commencement of commercial

operation will be the date on which the owner or operator is required to start monitoring and reporting the NO_x emissions rate and the heat input of the unit under subdivision 84.2.a.

2.35.c.1. For a unit with a date for commencement of commercial operation as defined in subdivision 2.35.c 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.

2.35.c.2. For a unit with a date for commencement of commercial operation as defined in subdivision 2.35.c 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 subdivisions 2.35.a, 2.35.b, or 2.35.c as appropriate.

2.35.d. Notwithstanding subdivisions 2.35.a through 2.35.c, for a unit not serving a generator producing electricity for sale, the unit's date of commencement of operation will also be the unit's date of commencement of commercial operation.

2.36. "Commence operation" means:

2.36.a. To have begun any mechanical, chemical, or electronic process, including, with regard to a unit, start-up of a unit's combustion chamber, except as provided in section 5.

2.36.a.1. For a unit that is a CAIR NO_x Annual unit under section 4 on the date the unit commences operation as defined in subdivision 2.36.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.

2.36.a.2. For a unit that is a CAIR NO_x Annual unit under section 4 on the date the unit commences operation as defined in subdivision 2.36.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 subdivisions 2.36.a, 2.36.b, or 2.36.c as appropriate.

2.36.b. Notwithstanding subdivision 2.36.a and except as provided in section 5, for a unit that is not a CAIR NO_x Annual unit under section 4 on the date the unit commences operation as defined in subdivision 2.36.a and is not a unit under subdivision 2.36.c, the unit's date for commencement of operation will be the date on which the unit becomes a CAIR NO_x Annual unit under section 4.

2.36.b.1. For a unit with a date for commencement of operation as defined in subdivision 2.36.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.

2.36.b.2. For a unit with a date for commencement of operation as defined in subdivision 2.36.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 subdivisions 2.36.a, 2.36.b, or 2.36.c as appropriate.

2.36.c. Notwithstanding subdivision 2.36.a and except as provided in subsection 84.8 or subdivisions 87.2.d and 87.2.e, for a CAIR NO_x Annual opt-in unit or a unit for which a CAIR opt-in permit application is submitted and not withdrawn and a CAIR opt-in permit is not yet issued or denied under sections 80 through 88, the unit's date for commencement of operation will be the date on which the owner or operator is required to start monitoring and reporting the NO_x emissions rate and the heat input of the unit under subdivision 84.2.a.

2.36.c.1. For a unit with a date for commencement of operation as defined in subdivision 2.36.c 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.

2.36.c.2. For a unit with a date for commencement of operation as defined in subdivision 2.36.c 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 subdivisions 2.36.a, 2.36.b, or 2.36.c as appropriate.

2.37. "Common stack" means a single flue through which emissions from 2 or more units are exhausted.

2.38. "Compliance account" means a CAIR NO_x Annual Allowance Tracking System account, established by the Administrator for a CAIR NO_x Annual source under sections 51 through 57 or sections 80 through 88, in which any CAIR NO_x Annual allowance allocations for the CAIR NO_x Annual units at the source are initially recorded and in which are held any CAIR NO_x Annual allowances available for use for a control period in order to meet the source's CAIR NO_x Annual emissions limitation in accordance with section 54.

2.39. "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 nitrogen oxide 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 continuous emission monitoring systems required under sections 70 through 76:

2.39.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 standard cubic feet per hour (scfh); and

2.39.b. A nitrogen oxides concentration monitoring system, consisting of a NO_x pollutant concentration monitor and an automated data acquisition and handling system and providing a permanent, continuous record of NO_x emissions, in parts per million (ppm); and

2.39.c. A nitrogen oxides emission rate (or NO_x-diluent) monitoring system, consisting of a NO_x pollutant concentration monitor, a diluent gas (CO₂ or O₂) monitor, and an automated data acquisition and handling system and providing a permanent, continuous record of NO_x concentration, in parts per million (ppm), diluent gas concentration, in percent CO₂ or O₂; and NO_x emission rate, in pounds per million British thermal units (lb/mmBtu); and

2.39.d. 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 H₂O; and

2.39.e. A carbon dioxide monitoring system, consisting of a CO₂ pollutant concentration monitor (or an oxygen monitor plus suitable mathematical equations from which the CO₂ concentration is derived) and an automated data acquisition and handling system and providing a permanent, continuous record of CO₂ emissions, in percent CO₂; or

2.39.f. An oxygen monitoring system, consisting of an O₂ concentration monitor and an automated data acquisition and handling system and providing a permanent, continuous record of O₂, in percent O₂.

2.40. "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.

2.41. "Emissions" means air pollutants exhausted from a unit or source into the atmosphere, as measured, recorded, and reported to the Administrator by the CAIR designated

representative and as determined by the Administrator in accordance with sections 70 through 76.

2.42. "Excess emissions" means any ton of nitrogen oxide emitted by the CAIR NO_x Annual units at a CAIR NO_x Annual source during a control period that exceeds the CAIR NO_x Annual emissions limitation for the source.

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

2.44. "Fossil fuel-fired" means, with regard to a unit, combusting any amount of fossil fuel in any calendar year.

2.45. "Fuel oil" means any petroleum-based fuel (including diesel fuel or petroleum derivatives such as oil tar) and any recycled or blended petroleum products or petroleum by-products used as a fuel whether in a liquid, solid, or gaseous state.

2.46. "General account" means a CAIR NO_x Annual Allowance Tracking System account, established under sections 51 through 57, that is not a compliance account.

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

2.48. "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).

2.49. "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 CAIR 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.

2.50. "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.

2.51. "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:

2.51.a. For the life of the unit;

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

2.51.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.

2.52. "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.

2.53. "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.

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

2.55. "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.

2.56. "Oil-fired" means, for purposes of sections 40 through 43, combusting fuel oil for more than 15.0 percent of the annual heat input in a specified year and not qualifying as coal-fired.

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

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

2.58.a. With regard to a CAIR NO_x Annual source or a CAIR NO_x Annual unit at a source, respectively:

2.58.a.1. Any holder of any portion of the legal or equitable title in a CAIR NO_x Annual

unit at the source or the CAIR NO_x Annual unit;

2.58.a.2. Any holder of a leasehold interest in a CAIR NO_x Annual unit at the source or the CAIR NO_x Annual unit; or

2.58.a.3. Any purchaser of power from a CAIR NO_x Annual unit at the source or the CAIR NO_x Annual 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 CAIR NO_x Annual unit; or

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

2.59. "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.

2.60. "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.

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

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

2.63. "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:

2.63.a. Atmospheric or pressurized fluidized bed combustion;

2.63.b. Integrated gasification combined cycle;

2.63.c. Magnetohydrodynamics;

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

2.63.e. Integrated gasification fuel cells; or

2.63.f. As determined by the Administrator in consultation with the Secretary of Energy, a derivative of one or more of the technologies under subdivisions 2.63.a through 2.63.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.

2.64. "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.

2.65. "Serial number" means, for a CAIR NO_x Annual allowance, the unique identification number assigned to each CAIR NO_x Annual allowance by the Administrator.

2.66. "Sequential use of energy" means:

2.66.a. For a topping-cycle cogeneration unit, the use of reject heat from electricity

production in a useful thermal energy application or process; or

2.66.b. For a bottoming-cycle cogeneration unit, the use of reject heat from useful thermal energy application or process in electricity production

2.67. "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."

2.68. "State" means one of the states or the District of Columbia that adopts the CAIR NO_x Annual Trading Program pursuant to 40 CFR §§51.123(o)(1) or (2).

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

2.69.a. In person;

2.69.b. By United States Postal Service;
or

2.69.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.

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

2.71. "Ton" means 2,000 pounds. For the purpose of determining compliance with the CAIR NO_x Annual emissions limitation, total tons of nitrogen oxides 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 a ton equal to or greater than 0.50 tons deemed to equal one ton and any remaining fraction of a ton

less than 0.50 tons deemed to equal zero tons.

2.72. "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.

2.73. "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.

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

2.75. "Unit" means a stationary, fossil fuel-fired boiler or combustion turbine or other stationary, fossil fuel-fired combustion device.

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

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

2.78. "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 onsite emission controls).

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

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

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

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

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

2.81. 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.

§45-39-3. Measurements, Abbreviations and Acronyms. -- Measurements, abbreviations and acronyms used in this rule are defined as follows:

Btu -- British thermal unit.

CO₂ -- carbon dioxide.

NO_x -- nitrogen oxide.

hr -- hour.

kW-- kilowatt electrical.

kWh -- kilowatt hour.

mmBtu -- million Btu.

MW_e -- megawatt electrical.

MWh -- megawatt hour.

O₂ -- oxygen.

ppm -- parts per million.

lb -- pound.

scfh -- standard cubic feet per hour.

SO₂ -- sulfur dioxide.

H₂O -- water.

yr -- year.

§45-39-4. Applicability. -- The following units in West Virginia will be CAIR NO_x Annual units, and any source that includes one or more such units will be a CAIR NO_x Annual source, subject to the requirements of sections 5 through 76:

4.1. Electric generating units. -- Except as provided in subsection 4.2, a stationary fossil fuel-fired boiler or stationary fossil fuel-fired combustion turbine serving at any time since the start-up of a unit's combustion chamber, a generator with nameplate capacity of more than 25 MW_e producing electricity for sale; and

4.2. Cogeneration units. -- 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 subsection 4.1 starting on the day on which the unit first no longer qualifies as a cogeneration unit.

§45-39-5. Retired Unit Exemption.

5.1. General exemption provisions.

5.1.a. Any CAIR NO_x Annual unit that is permanently retired and is not a CAIR NO_x Annual opt-in unit under sections 80 through 88 will be exempt from the CAIR NO_x Annual Trading Program, except for the provisions of this section, section 2, section 3, section 4, subdivisions 6.3.d through 6.3.g, section 7, and sections 40 through 62.

5.1.b. The exemption under subdivision 5.1.a will become effective the day on which the CAIR NO_x Annual unit is permanently retired. Within 30 days of the unit's permanent retirement,

the CAIR designated representative will submit a statement to the Secretary and 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 subdivision 5.1.a must not emit any nitrogen oxides, starting on the date that the exemption takes effect.

5.2.b. The Secretary will allocate CAIR NO_x Annual allowances under sections 40 through 43 to a unit exempt under subdivision 5.1.a.

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 subdivision 5.1.a 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 CAIR designated representative of a unit exempt under subdivision 5.1.a must comply with the requirements of the CAIR NO_x Annual 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 subdivision 5.1.a 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 CAIR designated representative of the source submits a complete CAIR 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, 2009 or the date on which the unit resumes operation.

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

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

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

5.2.f.3. The date on which the unit resumes operation, if the CAIR designated representative is not required to submit a CAIR 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 subdivision 5.1.a will be treated as a unit that commences operation and commercial operation on the first date on which the unit resumes operation.

§45-39-6. Standard Requirements.

6.1. Permit requirements.

6.1.a. The CAIR designated representative of each CAIR NO_x Annual source required to have a Title V operating permit and each CAIR NO_x Annual unit required to have a Title V operating permit at the source will:

6.1.a.1. Submit to the Secretary a complete CAIR 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 CAIR permit application and issue or deny a CAIR permit.

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

6.1.c. Except as provided in sections 80 through 88, the owners and operators of a CAIR NO_x Annual source that is not otherwise required to have a Title V operating permit and each CAIR NO_x Annual unit that is not otherwise required to have a Title V operating permit are not required to submit a CAIR permit application, and to have a CAIR permit, under sections 20 through 24 for such CAIR NO_x Annual source and such CAIR NO_x Annual unit.

6.2. Monitoring requirements.

6.2.a. The owners and operators, and the CAIR designated representative, of each CAIR NO_x Annual source and each CAIR NO_x Annual unit at the source will comply with the monitoring, reporting, and recordkeeping requirements of sections 70 through 76.

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

6.3. Nitrogen oxides emission requirements.

6.3.a. As of the allowance transfer deadline for the 2009 control period and each control period thereafter, the owners and operators of each CAIR NO_x Annual source and each CAIR NO_x Annual unit at the source must hold, in the source's compliance account, CAIR NO_x Annual

allowances available for compliance deductions for the control period under subsection 54.1 in an amount not less than the tons of total nitrogen oxides emissions for the control period from all CAIR NO_x Annual units at the source, as determined in accordance with sections 70 through 76.

6.3.b. A CAIR NO_x Annual unit will be subject to the requirements under subdivision 6.3.a for the control period starting on the later of January 1, 2009 or the deadline for meeting the unit's monitor certification requirements under subdivision 70.2.a, subsection 70.2.b, or subsection 70.2.e and for each control period thereafter.

6.3.c. A CAIR NO_x Annual 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 CAIR NO_x Annual allowance was allocated.

6.3.d. CAIR NO_x Annual allowances will be held in, deducted from, or transferred into or among CAIR NO_x Annual Allowance Tracking System accounts in accordance with sections 40 through 43.

6.3.e. A CAIR NO_x Annual allowance is a limited authorization to emit one ton of nitrogen oxide in accordance with the CAIR NO_x Annual Trading Program. No provision of the CAIR NO_x Annual Trading Program, the CAIR permit application, the CAIR 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 CAIR NO_x Annual allowance does not constitute a property right.

6.3.g. Upon recordation by the Administrator under sections 51 through 57, sections 60 through 62, or sections 80 through 88, every allocation, transfer, or deduction of a CAIR NO_x Annual allowance to or from a CAIR NO_x Annual unit's compliance account is incorporated automatically in any CAIR permit of the source

that includes the CAIR NO_x Annual unit.

6.4. Excess emissions requirements.

6.4.a. If a CAIR NO_x Annual source emits nitrogen oxides during any control period in excess of the CAIR NO_x Annual emissions limitation, then:

6.4.a.1. The owners and operators of the source and each CAIR NO_x Annual unit at the source will surrender the CAIR NO_x Annual 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 CAA or W.Va. Code §22-5-1 et seq; and

6.4.a.2. Each ton of such excess emissions and each day of such control period will constitute a separate violation of this rule, the CAA, 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 CAIR NO_x Annual source and each CAIR NO_x Annual 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 CAIR designated representative for the source and each CAIR NO_x Annual 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 will 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 CAIR 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 CAIR NO_x Annual Trading Program; and

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

6.5.b. The CAIR designated representative of a CAIR NO_x Annual source and each CAIR NO_x Annual unit at the source will submit the reports required under the CAIR NO_x Annual Trading Program, including those under sections 70 through 76.

6.6. Liability.

6.6.a. Each CAIR NO_x Annual source and each CAIR NO_x Annual unit must meet the requirements of the CAIR NO_x Annual Trading Program.

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

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

6.7. Effect on other authorities. -- No provision of the CAIR NO_x Annual Trading Program, a CAIR permit application, a CAIR

permit, or an exemption under section 5 will be construed as exempting or excluding the owners and operators, or the CAIR designated representative of a CAIR NO_x Annual source or CAIR NO_x Annual unit from compliance with any other provision of the applicable, approved state implementation plan, a federally enforceable permit, order, or the CAA.

§45-39-7. Computation of Time.

7.1. Unless otherwise stated, any time period scheduled, under the CAIR NO_x Annual 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 CAIR NO_x Annual 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 CAIR NO_x Annual Trading Program, falls on a weekend or a state or federal holiday, the time period will be extended to the next business day.

§45-39-8. Appeal Procedures.

8.1. The appeal procedures for decisions of the Administrator under the CAIR NO_x Annual Trading Program are set forth in 40 CFR Part 78.

§45-39-10. Authorization and Responsibilities of the CAIR Designated Representative.

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

10.2. The CAIR designated representative of the CAIR NO_x Annual source will be selected by an agreement binding on the owners and operators of the source and all CAIR NO_x Annual units at

the source and will 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 CAIR designated representative of the source will represent and, by his or her representations, actions, inactions, or submissions, legally bind each owner and operator of the CAIR NO_x Annual source represented and each CAIR NO_x Annual unit at the source in all matters pertaining to the CAIR NO_x Annual Trading Program, notwithstanding any agreement between the CAIR designated representative and such owners and operators. The owners and operators will be bound by any decision or order issued to the CAIR designated representative by the Secretary, the Administrator, or a court regarding the source or unit.

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

10.5. Each submission under the CAIR NO_x Annual Trading Program will be submitted, signed, and certified by the CAIR designated representative for each CAIR NO_x Annual source on behalf of which the submission is made. Each such submission must include the following certification statement by the CAIR 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.”

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

§45-39-11. Alternate CAIR Designated Representative.

11.1. A certificate of representation under section 13 may designate one and only one alternate CAIR designated representative, who may act on behalf of the CAIR designated representative. The agreement by which the alternate CAIR designated representative is selected will include a procedure for authorizing the alternate CAIR designated representative to act in lieu of the CAIR 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 CAIR designated representative will be deemed to be a representation, action, inaction, or submission by the CAIR designated representative.

11.3. Except in this section, section 2, subsections 10.1 and 10.4, sections 12, 13, 51 and 82, whenever the term “CAIR designated representative” is used in sections 4 through 88, the term will be construed to include the CAIR designated representative or any alternate CAIR designated representative.

§45-39-12. Changing the CAIR Designated Representative and Alternate CAIR Designated Representative; Changes in Owners and Operators.

12.1. Changing CAIR designated representative. -- The CAIR 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 CAIR designated representative before the time and date when the Administrator receives the superseding certificate of representation will be binding on the new CAIR designated representative and the owners and operators of the CAIR NO_x Annual source and the CAIR NO_x Annual units at the source.

12.2. Changing alternate CAIR designated representative. -- The alternate CAIR 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 CAIR designated representative before the time and date when the Administrator receives the superseding certificate of representation will be binding on the new alternate CAIR designated representative and the owners and operators of the CAIR NO_x Annual source and the CAIR NO_x Annual units at the source.

12.3. Changes in owners and operators.

12.3.a. In the event a new owner or operator of a CAIR NO_x Annual source or a CAIR NO_x Annual 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 CAIR designated representative and any alternate CAIR 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 CAIR NO_x Annual source or a CAIR NO_x Annual unit, including the addition of a new owner or operator, the CAIR designated representative or any alternate CAIR designated representative will submit a revision to the certificate of

representation under section 13 amending the list of owners and operators to include the change.

§45-39-13. Certificate of Representation.

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

13.1.a. Identification of the CAIR NO_x Annual source, and each CAIR NO_x Annual 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 CAIR designated representative and any alternate CAIR designated representative;

13.1.c. A list of the owners and operators of the CAIR NO_x Annual source and of each CAIR NO_x Annual unit at the source;

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

13.1.d.1. "I certify that I was selected as the CAIR designated representative or alternate CAIR designated representative, as applicable, by an agreement binding on the owners and operators of the source and each CAIR NO_x Annual 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 CAIR NO_x Annual Trading Program on behalf of the owners and operators of the source and of each CAIR NO_x Annual unit at the source and that each such owner and operator shall 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 CAIR NO_x Annual unit at the source shall 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 CAIR NO_x Annual unit, or where a customer purchases power from a CAIR NO_x Annual 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 'CAIR designated representative' or 'alternate CAIR designated representative', as applicable, and of the agreement by which I was selected to each owner and operator of the source and of each CAIR NO_x Annual unit at the source; and CAIR NO_x Annual allowances and proceeds of transactions involving CAIR NO_x Annual 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 CAIR NO_x Annual allowances by contract, CAIR NO_x Annual allowances and proceeds of transactions involving CAIR NO_x Annual allowances will be deemed to be held or distributed in accordance with the contract."; and

13.1.e. The signature of the CAIR designated representative and any alternate CAIR 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.

§45-39-14. Objections Concerning the CAIR 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 subsections 12.1 or 12.2, no objection or other communication submitted to the Secretary or the Administrator concerning the authorization, or any representation, action, inaction, or submission, of the CAIR designated representative will affect any representation, action, inaction, or submission of the CAIR designated representative or the finality of any decision or order by the Secretary or the Administrator under the CAIR NO_x Annual 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 CAIR designated representative, including private legal disputes concerning the proceeds of CAIR NO_x Annual allowance transfers.

§45-39-20. General CAIR Trading Program Permit Requirements.

20.1. For each CAIR NO_x Annual source required to have a Title V operating permit or required, under sections 80 through 88, to have a Title V operating permit or other federally enforceable permit, such permit must include a CAIR permit administered by the Secretary for the Title V operating permit or the federally enforceable permit as applicable. The CAIR portion of the Title V operating permit or other federally enforceable permit as applicable will be administered in accordance with 45CSR30 and any other applicable rule, except as provided otherwise by sections 20 through 24 and sections 80 through 88.

20.2. Each CAIR permit will contain, with regard to the CAIR NO_x Annual source and the CAIR NO_x Annual units at the source covered by the CAIR permit, all applicable CAIR NO_x Annual Trading Program requirements, CAIR NO_x Ozone Season Trading Program requirements, and CAIR SO₂ Trading Program requirements and will be a complete and separable portion of the Title V operating permit or other

federally enforceable permit under subsection 20.1.

§45-39-21. Submission of CAIR Permit Applications.

21.1. Duty to apply. -- The CAIR designated representative of any CAIR NO_x Annual source required to have a Title V operating permit will submit to the Secretary a complete CAIR permit application under section 22 for the source covering each CAIR NO_x Annual unit at the source at least 18 months (or such lesser time provided by the Secretary) before the later of January 1, 2009 or the date on which the CAIR NO_x Annual unit commences operation.

21.2. Duty to reapply. -- For a CAIR NO_x Annual source required to have a Title V operating permit, the CAIR designated representative will submit a complete CAIR permit application under section 22 for the source covering each CAIR NO_x Annual unit at the source to renew the CAIR permit in accordance with 45CSR30.

§45-39-22. Information Requirements for CAIR Permit Applications.

22.1. A complete CAIR permit application will include the following elements concerning the CAIR NO_x Annual source for which the application is submitted, in a format prescribed by the Secretary:

22.1.a. Identification of the CAIR NO_x Annual source;

22.1.b. Identification of each CAIR NO_x Annual unit at the CAIR NO_x Annual source;

22.1.c. The standard requirements under section 6; and

22.1.d. A copy of the complete certificate of representation under section 13.

§45-39-23. CAIR Permit Contents and Term.

23.1. Each CAIR permit will contain, in a

format prescribed by the Secretary, all elements required for a complete CAIR permit application under section 22.

23.2. Each CAIR permit is deemed to incorporate automatically the definitions of terms under section 2 and, upon recordation by the Administrator under sections 51 through 57, sections 60 through 62, or sections 80 through 88, every allocation, transfer, or deduction of a CAIR NO_x Annual allowance to or from the compliance account of the CAIR NO_x Annual source covered by the permit.

23.3. The term of the CAIR permit will be set by the Secretary, as necessary to facilitate coordination of the renewal of the CAIR permit with issuance, revision, or renewal of the CAIR NO_x Annual source's Title V operating permit or other federally enforceable permit as applicable.

§45-39-24. CAIR Permit Revisions.

24.1. Except as provided in subsection 23.2, the Secretary will revise the CAIR permit, as necessary, in accordance with 45CSR30 or any other applicable rule addressing permit revisions.

§45-39-30. Reserved.

§45-39-40. CAIR NO_x Annual Trading Budget.

40.1. The West Virginia CAIR NO_x annual trading budget for allocations of CAIR NO_x Annual allowances for the control periods of 2009 through 2014 and 2015 and thereafter are respectively as follows:

| | | |
|--|-------------|------------------------|
| CAIR NO _x Annual Trading Budget | 2009-2014 | 2015 and thereafter |
| | 74,220 tons | 61,850 tons |

§45-39-41. Timing Requirements for CAIR NO_x Annual Allowance Allocations.

41.1. By October 31, 2006, the Secretary will submit to the Administrator the CAIR NO_x

Annual allowance allocations, in a format prescribed by the Administrator and in accordance subsections 42.1 and 42.2, for the control periods in 2009, 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 CAIR NO_x Annual allowance allocations, in a format prescribed by the Administrator and in accordance with subsections 42.1 and 42.2, for the control period in the sixth year after the year of the applicable deadline for submission under this section. If the Secretary fails to submit to the Administrator the CAIR NO_x Annual allowance allocations in accordance with this subsection, the Administrator will assume that the allocations of CAIR NO_x Annual 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 2015, the Administrator will assume that the allocations equal 83 percent of the allocations for the control period that immediately precedes the applicable control period.

41.3. By October 31, 2009 and October 31 of each year thereafter, the Secretary will submit to the Administrator the CAIR NO_x Annual allowance allocations, in a format prescribed by the Administrator and in accordance with subsections 42.1, 42.3 and 42.4, for the control period in the year of the applicable deadline for submission under this section. If the Secretary fails to submit to the Administrator the CAIR NO_x Annual allowance allocations in accordance with this subsection, the Administrator will assume that the allocations of CAIR NO_x Annual 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 2015, the Administrator will assume that the allocations equal 83 percent of the allocations for the control period that immediately precedes the applicable control period and except that any CAIR NO_x Annual unit that would otherwise be allocated CAIR NO_x Annual allowances under subsections 42.1 and 42.2, as well as under subsections 42.1, 42.3 and 42.4, for the applicable control period

will be assumed to be allocated no CAIR NO_x Annual allowances under subsections 42.1, 42.3 and 42.4 for the applicable control period.

§45-39-42. CAIR NO_x Annual Allowance Allocations.

42.1. Determination of heat input. -- The baseline heat input (in mmBtu) used with respect to CAIR NO_x Annual allowance allocations under subsection 42.2 for each CAIR NO_x Annual unit will be:

42.1.a. For units commencing operation before January 1, 2001 the average of the 3 highest amounts of the unit's adjusted control period heat input for 2000 through 2004, with the adjusted control period heat input for each year calculated as follows:

42.1.a.1. If the unit is coal-fired during the year, the unit's control period heat input for such year is multiplied by 100 percent;

42.1.a.2. If the unit is oil-fired during the year, the unit's control period heat input for such year is multiplied by 60 percent; and

42.1.a.3. If the unit is not subject to paragraphs 42.1.a.1 or 42.1.a.2, the unit's control period heat input for such year is multiplied by 40 percent;

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, and a unit's status as coal-fired or oil-fired, for a calendar year under subdivision 42.1.a, and a unit's total tons of NO_x emissions during a calendar year under subdivision 42.3.c, 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; and

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 paragraphs 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, if the unit is coal-fired for the year, or 6,675 Btu/kWh, if the unit is not coal-fired for the year, and divided by 1,000,000 Btu/mmBtu, provided that if a generator is served by 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 multiplied by 0.8, and with the sum divided by 1,000,000 Btu/mmBtu.

42.2. Allocations for established units.

42.2.a. For each control period in 2009 and thereafter, the Secretary will allocate to all CAIR NO_x Annual units in the state that have a baseline heat input (as determined under

subsection 42.1) a total amount of CAIR NO_x Annual allowances equal to 95 percent for a control period during 2009 through 2014, and 97 percent for a control period during 2015 and thereafter, of the tons of NO_x emissions in the state trading budget under section 40 (except as provided in subsection 42.4).

42.2.b. The Secretary will allocate CAIR NO_x Annual allowances to each CAIR NO_x Annual unit under subdivision 42.2.a in an amount determined by multiplying the total amount of CAIR NO_x Annual allowances allocated under subdivision 42.2.a by the ratio of the baseline heat input of such CAIR NO_x Annual unit to the total amount of baseline heat input of all such CAIR NO_x Annual units in West Virginia and rounding to the nearest whole allowance as appropriate.

42.3. New unit set-aside allocation. -- For each control period in 2009 and thereafter, the Secretary will allocate CAIR NO_x Annual allowances to CAIR NO_x Annual units in the state that commenced operation on or after January 1, 2001 and do not yet have a baseline heat input (as determined under subsection 42.1), in accordance with the following procedures:

42.3.a. The Secretary will establish a separate new unit set-aside for each control period. Each new unit set-aside will be allocated CAIR NO_x Annual allowances equal to 5 percent for a control period in 2009 through 2014, and 3 percent for a control period in 2015 and thereafter, of the amount of tons of NO_x emissions in the CAIR NO_x annual trading budget under section 40;

42.3.b. The CAIR designated representative of such a CAIR NO_x Annual unit may submit to the Secretary a request, in a format specified by the Secretary, to be allocated CAIR NO_x Annual allowances, starting with the later of the control period in 2009 or the first control period after the control period in which the CAIR NO_x Annual unit commences commercial operation and until the first control period for which the unit is allocated CAIR NO_x Annual allowances under subsection 42.2. The CAIR NO_x Annual allowance allocation request must be

submitted on or before July 1 of the first control period for which the CAIR NO_x Annual allowances are requested and after the date on which the CAIR NO_x Annual unit commences commercial operation;

42.3.c. In a CAIR NO_x Annual allowance allocation request under subdivision 42.3.b, the CAIR designated representative may request for a control period CAIR NO_x Annual allowances in an amount not exceeding the CAIR NO_x Annual unit's total tons of NO_x emissions during the calendar year immediately before such control period; and

42.3.d. The Secretary will review each CAIR NO_x Annual allowance allocation request under subdivision 42.3.b and will allocate CAIR NO_x Annual allowances for each control period pursuant to such request as follows:

42.3.d.1. The Secretary will accept an allowance allocation request only if the request meets, or is adjusted by the Secretary as necessary to meet, the requirements of subdivisions 42.3.b and 42.3.c;

42.3.d.2. On or after July 1 of the control period, the Secretary will determine the sum of the CAIR NO_x Annual allowances requested (as adjusted under paragraph 42.3.d.1) in all allowance allocation requests accepted under paragraph 42.3.d.1 for the control period;

42.3.d.3. If the amount of CAIR NO_x Annual allowances in the new unit set-aside for the control period is greater than or equal to the sum under paragraph 42.3.d.2, then the Secretary will allocate the amount of CAIR NO_x Annual allowances requested (as adjusted under paragraph 42.3.d.1) to each CAIR NO_x Annual unit covered by an allowance allocation request accepted under paragraph 42.3.d.1;

42.3.d.4. If the amount of CAIR NO_x Annual allowances in the new unit set-aside for the control period is less than the sum under paragraph 42.3.d.2, then the Secretary will allocate to each CAIR NO_x Annual unit covered by an allowance allocation request accepted under

paragraph 42.3.d.1 the amount of the CAIR NO_x Annual allowances requested (as adjusted under paragraph 42.3.d.1), multiplied by the amount of CAIR NO_x Annual allowances in the new unit set-aside for the control period, divided by the sum determined under paragraph 42.3.d.2, and rounded to the nearest whole allowance as appropriate; and

42.3.d.5. The Secretary will notify each CAIR designated representative that submitted an allowance allocation request of the amount of CAIR NO_x Annual allowances (if any) allocated for the control period to the CAIR NO_x Annual unit covered by the request.

42.4. Unallocated new unit set-aside NO_x allowances. -- If, after completion of the procedures under subdivision 42.3.d for a control period, any unallocated CAIR NO_x Annual allowances remain in the new unit set-aside for the control period, the Secretary will allocate to each CAIR NO_x Annual unit that was allocated CAIR NO_x Annual allowances under subsection 42.2 an amount of CAIR NO_x Annual allowances equal to the total amount of such remaining unallocated CAIR NO_x Annual allowances, multiplied by the unit's allocation under subsection 42.2, divided by 95 percent for a control period during 2009 through 2014, and 97 percent for a control period during 2015 and thereafter, of the amount of tons of NO_x emissions in the CAIR NO_x annual trading budget under section 40, and rounded to the nearest whole allowance as appropriate.

§45-39-43. Compliance Supplement Pool.

43.1. In addition to the CAIR NO_x Annual allowances allocated under section 42, the Secretary may allocate for the control period in 2009 up to 16,929 CAIR NO_x Annual allowances to CAIR NO_x Annual units in West Virginia.

43.2. For any CAIR NO_x Annual unit in West Virginia that achieves NO_x emission reductions in 2007 and 2008 that are not necessary to comply with any state or federal emissions limitation applicable during such years, the CAIR designated representative of the unit may request early reduction credits, and allocation of CAIR NO_x

Annual allowances from the compliance supplement pool under subsection 43.1 for such early reduction credits, in accordance with the following:

43.2.a. The owners and operators of such CAIR NO_x Annual unit will monitor and report the NO_x emissions rate and the heat input of the unit in accordance with sections 70 through 76 in each control period for which early reduction credit is requested.

43.2.b. The CAIR designated representative of such CAIR NO_x Annual unit will submit to the Secretary by July 1, 2009 a request, in a format specified by the Secretary, for allocation of an amount of CAIR NO_x Annual allowances from the compliance supplement pool not exceeding the sum of the amounts (in tons) of the unit's NO_x emission reductions in 2007 and 2008 that are not necessary to comply with any state or federal emissions limitation applicable during such years, determined in accordance with sections 70 through 76.

43.3. For any CAIR NO_x Annual unit in West Virginia whose compliance with CAIR NO_x Annual emissions limitation for the control period in 2009 would create an undue risk to the reliability of electricity supply during such control period, the CAIR designated representative of the unit may request the allocation of CAIR NO_x Annual allowances from the compliance supplement pool under subsection 43.1, in accordance with the following:

43.3.a. The CAIR designated representative of such CAIR NO_x Annual unit will submit to the Secretary by July 1, 2009 a request, in a format specified by the Secretary, for allocation of an amount of CAIR NO_x Annual allowances from the compliance supplement pool not exceeding the minimum amount of CAIR NO_x Annual allowances necessary to remove such undue risk to the reliability of electricity supply;

43.3.b. In the request under subdivision 43.3.a, the CAIR designated representative of such CAIR NO_x Annual unit will demonstrate that, in the absence of allocation to the unit of the

amount of CAIR NO_x Annual allowances requested, the unit's compliance with CAIR NO_x Annual emissions limitation for the control period in 2009 would create an undue risk to the reliability of electricity supply during such control period. This demonstration must include a showing that it would not be feasible for the owners and operators of the unit to:

43.3.b.1. Obtain a sufficient amount of electricity from other electricity generation facilities, during the installation of control technology at the unit for compliance with the CAIR NO_x Annual emissions limitation, to prevent such undue risk; or

43.3.b.2. Obtain under subsections 43.2 and 43.4, or otherwise obtain, a sufficient amount of CAIR NO_x Annual allowances to prevent such undue risk.

43.4. The Secretary will review each request under subsections 43.2 or 43.3 submitted by July 1, 2009 and will allocate CAIR NO_x Annual allowances for the control period in 2009 to CAIR NO_x Annual units in West Virginia and covered by such request as follows:

43.4.a. Upon receipt of each such request, the Secretary will make any necessary adjustments to the request to ensure that the amount of the CAIR NO_x Annual allowances requested meets the requirements of subsections 43.2 or 43.3;

43.4.b. If the compliance supplement pool under subsection 43.1 has an amount of CAIR NO_x Annual allowances not less than the total amount of CAIR NO_x Annual allowances in all such requests (as adjusted under subdivision 43.4.a), the Secretary will allocate to each CAIR NO_x Annual unit covered by such requests the amount of CAIR NO_x Annual allowances requested (as adjusted under subdivision 43.4.a);

43.4.c. Reserved;

43.4.d. If the compliance supplement pool under subsection 43.1 has a smaller amount of CAIR NO_x Annual allowances than the total

amount of CAIR NO_x Annual allowances in all such requests (as adjusted under subdivision 43.4.a), the Secretary will allocate CAIR NO_x Annual allowances to each CAIR NO_x Annual unit covered by such requests according to the following formula and rounding to the nearest whole allowance as appropriate:

Unit's allocation = Unit's adjusted allocation X (16,929 ÷ total adjusted allocations for all units)

Where:

"Unit's allocation" is the number of CAIR NO_x Annual allowances allocated to the unit from the compliance supplement pool;

"Unit's adjusted allocation" is the amount of CAIR NO_x Annual allowances requested for the unit under subsections 43.2 or 43.3 as adjusted under subdivision 43.4.a;

"Total adjusted allocations for all units" is the sum of the amounts of allocations requested for all units under subsections 43.2 or 43.3, as adjusted under subdivision 43.4.a;

43.4.e. By November 30, 2009, the Secretary will determine, and submit to the Administrator, the allocations under subdivisions 43.4.b or 43.4.d; and

43.4.f. By January 1, 2010, the Administrator will record the allocations under subdivision 43.4.e.

§45-39-50. Reserved.

§45-39-51. Establishment of Accounts.

51.1. Compliance accounts. -- Except as provided in subsection 84.5, upon receipt of a complete certificate of representation under section 13, the Administrator will establish a compliance account for the CAIR NO_x Annual source for which the certificate of representation was submitted, unless the source already has a compliance account.

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

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

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

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

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

51.2.a.4. The following certification statement by the CAIR authorized account representative and any alternate CAIR authorized account representative: "I certify that I was selected as the CAIR authorized account representative or the alternate CAIR authorized account representative, as applicable, by an agreement that is binding on all persons who have an ownership interest with respect to CAIR NO_x Annual allowances held in the general account. I certify that I have all the necessary authority to carry out my duties and responsibilities under the

CAIR NO_x Annual Trading Program on behalf of such persons and that each such person shall be fully bound by my representations, actions, inactions, or submissions and by any order or decision issued to me by the Administrator or a court regarding the general account.""; and

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

51.2.b. 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.

51.3. Authorization of CAIR authorized account representative. -- Upon receipt by the Administrator of a complete application for a general account under subsection 51.2:

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

51.3.b. The CAIR authorized account representative and any alternate CAIR 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 CAIR NO_x Annual allowances held in the general account in all matters pertaining to the CAIR NO_x Annual Trading Program, notwithstanding any agreement between the CAIR authorized account representative or any alternate CAIR authorized account representative and such person. Any such person will be bound by any order or decision issued to the CAIR authorized account representative or any alternate CAIR authorized account representative by the Administrator or a court regarding the general account; and

51.3.c. Any representation, action,

inaction, or submission by any alternate CAIR authorized account representative will be deemed to be a representation, action, inaction, or submission by the CAIR authorized account representative.

51.4. Each submission concerning the general account under subsection 51.2 must be submitted, signed, and certified by the CAIR authorized account representative or any alternate CAIR authorized account representative for the persons having an ownership interest with respect to CAIR NO_x Annual allowances held in the general account. Each such submission must include the following certification statement by the CAIR authorized account representative or any alternate CAIR authorized account representative: "I am authorized to make this submission on behalf of the persons having an ownership interest with respect to the CAIR NO_x Annual 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."

51.5. The Administrator will accept or act on a submission concerning a general account under subsection 51.2 only if the submission has been made, signed, and certified in accordance with subsection 51.4.

51.6. Changing CAIR authorized account representative and alternate CAIR authorized account representative; changes in persons with ownership interest.

51.6.a. The CAIR authorized account representative for a general account under subsection 51.2 may be changed at any time upon receipt by the Administrator of a superseding complete application for a general account.

Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous CAIR 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 CAIR authorized account representative and the persons with an ownership interest with respect to the CAIR NO_x Annual allowances in the general account.

51.6.b. The alternate CAIR 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. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous alternate CAIR 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 CAIR authorized account representative and the persons with an ownership interest with respect to the CAIR NO_x Annual allowances in the general account.

51.6.c. In the event a new person having an ownership interest with respect to CAIR NO_x Annual 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 CAIR authorized account representative and any alternate CAIR 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.

51.6.d. Within 30 days following any change in the persons having an ownership interest with respect to CAIR NO_x Annual allowances in the general account, including the addition of persons, the CAIR authorized account representative or any alternate CAIR authorized account representative will submit a revision to the application for a general account amending the list of persons having an ownership interest with

respect to the CAIR NO_x Annual allowances in the general account to include the change.

51.7. Objections concerning CAIR authorized account representative.

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

51.7.b. Except as provided in subdivision 51.6.a or 51.6.b, no objection or other communication submitted to the Administrator concerning the authorization, or any representation, action, inaction, or submission of the CAIR authorized account representative or any alternative CAIR authorized account representative for a general account will affect any representation, action, inaction, or submission of the CAIR authorized account representative or any alternative CAIR authorized account representative or the finality of any decision or order by the Administrator under the CAIR NO_x Annual Trading Program.

51.7.c. The Administrator will not adjudicate any private legal dispute concerning the authorization or any representation, action, inaction, or submission of the CAIR authorized account representative or any alternative CAIR authorized account representative for a general account, including private legal disputes concerning the proceeds of CAIR NO_x Annual allowance transfers.

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

§45-39-52. Responsibilities of CAIR Authorized Account Representative.

52.1. Following the establishment of a CAIR NO_x Annual 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 CAIR NO_x Annual allowances in the account, will be made only by the CAIR authorized account representative for the account.

§45-39-53. Recordation of CAIR NO_x Annual Allowance Allocations.

53.1. The Administrator will record in the CAIR NO_x Annual source's compliance account the CAIR NO_x Annual allowances allocated for the CAIR NO_x Annual units at a source, as submitted by the Secretary in accordance with subsection 41.1, for the control periods in 2009, 2010, 2011, 2012, 2013 and 2014.

53.2. By December 1, 2009, the Administrator will record in the CAIR NO_x Annual source's compliance account the CAIR NO_x Annual allowances allocated for the CAIR NO_x Annual 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 CAIR NO_x Annual source's compliance account under section 54, the Administrator will record in the CAIR NO_x Annual source's compliance account the CAIR NO_x Annual allowances allocated for the CAIR NO_x Annual 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, 2009 and December 1 of each year thereafter, the Administrator will record in the CAIR NO_x Annual source's compliance account the CAIR NO_x Annual allowances allocated for the CAIR NO_x Annual units at the source, as submitted by the Secretary or determined by the Administrator in accordance with subsection 41.3, for the control period in the year of the applicable deadline for recordation under this subsection.

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

§45-39-54. Compliance with CAIR NO_x Emissions Limitation.

54.1. Allowance transfer deadline. -- The CAIR NO_x Annual allowances are available to be deducted for compliance with a source's CAIR NO_x Annual emissions limitation for a control period in a given calendar year only if the CAIR NO_x Annual 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 CAIR NO_x Annual allowance transfer correctly submitted for recordation under section 60 by the allowance transfer deadline for the control period; and

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

54.2. Deductions for compliance. -- Following the recordation, in accordance with section 61, of CAIR NO_x Annual 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 CAIR NO_x Annual allowances available under subsection 54.1 in order to determine whether the source meets the CAIR NO_x Annual emissions limitation for the control period as follows:

54.2.a. Until the amount of CAIR NO_x Annual allowances deducted equals the number of tons of total nitrogen oxides emissions,

determined in accordance with sections 70 through 76, from all CAIR NO_x Annual units at the source for the control period; or

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

54.3. Identification of CAIR NO_x Annual allowances by serial number.

54.3.a. The CAIR authorized account representative for a source's compliance account may request that specific CAIR NO_x Annual allowances, identified by serial number, in the compliance account be deducted for emissions or excess emissions for a control period in accordance with subsections 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 CAIR NO_x Annual source and the appropriate serial numbers.

54.3.b. First-in, first-out. -- The Administrator will deduct CAIR NO_x Annual allowances under subsections 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 CAIR NO_x Annual 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 CAIR NO_x Annual allowances that were allocated to the units at the source, in the order of recordation; and then

54.3.b.2. Any CAIR NO_x Annual 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 CAIR NO_x Annual source has excess emissions, the Administrator will deduct from the source's compliance account an amount of CAIR NO_x Annual allowances, allocated for the control period in the immediately following calendar year, equal to three times the number of tons 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 CAIR NO_x Annual source or the CAIR NO_x Annual units at the source for any fine, penalty, or assessment, or their obligation to comply with any other remedy, for the same violations, as ordered under the CAA 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 subsections 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 CAIR NO_x Annual Trading Program and make appropriate adjustments of the information in the submissions.

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

§45-39-55. Banking.

55.1. CAIR NO_x Annual 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 CAIR NO_x Annual allowance that is held in a compliance account or a general account will remain in such account unless and until the CAIR NO_x Annual allowance is deducted or transferred under sections 54, 56, or

sections 60 through 62.

§45-39-56. 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 CAIR NO_x Annual Allowance Tracking System account. Within 10 business days of making such correction, the Administrator will notify the CAIR authorized account representative for the account.

§45-39-57. Closing of General Accounts.

57.1. The CAIR 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 section 60 for any CAIR NO_x Annual allowances in the account to one or more other CAIR NO_x Annual 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 CAIR NO_x Annual allowances, the Administrator may notify the CAIR 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 CAIR NO_x Annual allowances into the account under section 60 or a statement submitted by the CAIR authorized account representative demonstrating to the satisfaction of the Administrator good cause as to why the account should not be closed.

§45-39-60. Submission of CAIR NO_x Annual Allowance Transfers.

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

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

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

60.1.c. The name and signature of the CAIR authorized account representative of the transferor and transferee accounts and the dates signed.

§45-39-61. U.S. EPA Recordation.

61.1. Within 5 business days (except as provided in subsection 61.2) of receiving a CAIR NO_x Annual allowance transfer, the Administrator will record a CAIR NO_x Annual allowance transfer by moving each CAIR NO_x Annual 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 CAIR NO_x Annual allowance identified by serial number in the transfer.

61.2. CAIR NO_x Annual allowance transfer that is submitted for recordation after the allowance transfer deadline for a control period and that includes any CAIR NO_x Annual 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 CAIR NO_x Annual allowance transfer submitted for recordation fails to meet the requirements of subsection 61.1, the Administrator will not record such transfer.

§45-39-62. Notification.

62.1. Notification of recordation. -- Within 5 business days of recordation of a CAIR NO_x

Annual allowance transfer under section 61, the Administrator will notify the CAIR authorized account representatives of both the transferor and transferee accounts.

62.2. Notification of non-recordation. -- Within 10 business days of receipt of a CAIR NO_x Annual allowance transfer that fails to meet the requirements of subsection 61.1, the Administrator will notify the CAIR 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 CAIR NO_x Annual allowance transfer for recordation following notification of non-recordation.

§45-39-70. General Monitoring and Reporting Requirements.

-- The owners and operators, and to the extent applicable, the CAIR designated representative of a CAIR NO_x Annual unit, must comply with the monitoring, recordkeeping and reporting requirements as provided in sections 70 through 76 and Subpart H of 40 CFR Part 75. For purposes of complying with such requirements, the definitions in section 2 and in 40 CFR §72.2 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 "CAIR NO_x Annual unit," "CAIR 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 CAIR NO_x Annual unit but that is monitored under 40 CFR §75.72(b)(2)(ii) must comply with the same monitoring, recordkeeping and reporting requirements as a CAIR NO_x Annual unit.

70.1. Requirements for installation, certification and data accounting. -- The owner or operator of each CAIR NO_x Annual unit will:

70.1.a. Install all monitoring systems required under sections 70 through 76 for monitoring NO_x mass emissions and individual unit heat input (including all systems required to monitor NO_x emission rate, NO_x concentration, stack gas moisture content, stack gas flow rate, CO₂ or O₂ concentration, and fuel flow rate, as applicable, in accordance with 40 CFR §§75.71 and 75.72);

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

70.1.c. Record, report and quality-assure the data from the monitoring systems under subdivision 70.1.a.

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

70.2.a. For the owner or operator of a CAIR NO_x Annual unit that commences commercial operation before July 1, 2007, by January 1, 2008;

70.2.b. For the owner or operator of a CAIR NO_x Annual unit that commences commercial operation on or after July 1, 2007, by the later of the following dates:

70.2.b.1. January 1, 2008; or

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

70.2.c. For the owner or operator of a CAIR NO_x Annual unit for which construction of a new stack or flue or installation of add-on NO_x emission controls is completed after the

applicable deadline under subdivisions 70.2.a, 70.2.b, 70.2.d or 70.2.e, 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 or add-on NO_x emissions controls;

70.2.d. Notwithstanding the dates in subdivisions 70.2.a and 70.2.b, for the owner or operator of a unit for which a CAIR opt-in permit application is submitted and not withdrawn and a CAIR opt-in permit is not yet issued or denied under sections 80 through 88, by the date specified in subsection 84.2; and

70.2.e. Notwithstanding the dates in subdivisions 70.2.a, 70.2.b and 70.2.d, and solely for purposes of subdivision 6.3.b, for the owner or operator of a CAIR NO_x Annual opt-in unit under sections 80 through 88, by the date on which the CAIR NO_x Annual opt-in unit enters the CAIR NO_x Annual Trading Program as provided in subsection 84.7.

70.3. Reporting data.

70.3.a. Except as provided in subdivision 70.3.b, the owner or operator of a CAIR NO_x Annual unit that does not meet the applicable compliance date set forth in subsection 70.2 for any monitoring system under subdivision 70.1.a will, for each such monitoring system, determine, record, and report maximum potential (or, as appropriate, minimum potential) values for NO_x concentration, NO_x emission rate, stack gas flow rate, stack gas moisture content, fuel flow rate, and any other parameters required to determine NO_x mass emissions and heat input in accordance with 40 CFR §§75.31(b)(2) or (c)(3), section 2.4 of Appendix D to 40 CFR Part 75, or section 2.5 of Appendix E to 40 CFR Part 75, as applicable.

70.3.b. The owner or operator of a CAIR NO_x Annual unit that does not meet the applicable compliance date set forth in subdivision 70.2.c for any monitoring system under subdivision 70.1.a will, for each such monitoring system, determine, record, and report substitute data using the applicable missing data procedures in Subpart D or Subpart H of, or Appendix D or Appendix E to,

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 70.2.c.

70.4. Prohibitions.

70.4.a. No owner or operator of a CAIR NO_x Annual unit will use any alternative monitoring system, alternative reference method, or any other alternative to any requirement of sections 70 through 76 without having obtained prior written approval in accordance with section 75.

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

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

70.4.d. No owner or operator of a CAIR NO_x Annual 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, except under any one of the following circumstances:

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

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

70.4.d.3. The CAIR 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 71.4.c.1.

§45-39-71. Initial Certification and Recertification Procedures.

71.1. The owner or operator of a CAIR NO_x Annual 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, Appendix D, and Appendix E 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. If the Administrator has previously approved a petition under 40 CFR §§75.17(a) or (b) for apportioning the NO_x emission rate measured in a common stack or a petition under 40 CFR §75.66 for an alternative to a requirement in 40 CFR §§75.12, 75.17; or Subpart H of 40 CFR Part 75, the CAIR designated representative will resubmit the petition to the Administrator under subsection 75.1 to determine whether the

approval applies under the CAIR NO_x Annual Trading Program.

71.4. Except as provided in subsection 71.1, the owner or operator of a CAIR NO_x Annual unit must comply with the following initial certification and recertification procedures for a continuous monitoring system (i.e., a continuous emission monitoring system and an excepted monitoring system under Appendices D and E to 40 CFR Part 75) under subdivision 70.1.a. The owner or operator of a unit that qualifies to use the low mass emissions excepted monitoring methodology under 40 CFR §75.19 or that qualifies to use an alternative monitoring system under Subpart E of 40 CFR Part 75 must comply with the procedures in subsections 71.5 or 71.6, respectively.

71.4.a. Requirements for initial certification. -- The owner or operator will ensure that each continuous monitoring system under subdivision 70.1.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 70.2. In addition, whenever the owner or operator installs a monitoring system to meet the requirements of sections 70 through 76 in a location where no such monitoring system was previously installed, initial certification in accordance with 40 CFR §75.20 is required.

71.4.b. Requirements for recertification. -- Whenever the owner or operator makes a replacement, modification, or change in any certified continuous emission monitoring system under subdivision 70.1.a that may significantly affect the ability of the system to accurately measure or record NO_x mass emissions or heat input rate or to meet the quality-assurance and quality-control requirements of 40 CFR §75.21 or Appendix B to 40 CFR Part 75, the owner or operator will 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 will

recertify each continuous emission monitoring system 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. Any fuel flowmeter systems, and any excepted NO_x monitoring system under Appendix E to 40 CFR Part 75, under subdivision 70.1.a are subject to the recertification requirements in 40 CFR §75.20(g)(6).

71.4.c. Approval process for initial certification and recertification. -- Paragraphs 71.4.c.1 through 71.4.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) and (g)(7) in lieu of the procedures in paragraph 71.4.c.5.

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

71.4.c.2. Certification application. -- The CAIR designated representative will 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.

71.4.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 CAIR NO_x Annual 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 71.4.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.

71.4.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 71.4.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 CAIR NO_x Annual Trading Program.

71.4.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.

71.4.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 CAIR designated representative must submit the additional information required to complete the certification application. If the CAIR 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 71.4.c.4.C. The 120-day review period will not begin before receipt of a complete certification application.

71.4.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 71.4.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 71.4.c.5 for each monitoring system that is disapproved for initial certification.

71.4.c.4.D. Audit decertification. -- The Secretary, or for a CAIR NO_x opt-in unit or a unit for which a CAIR opt-in permit application is submitted and not withdrawn and a CAIR opt-in permit is not yet issued or denied under sections 80 through 88, the Administrator may issue a notice of disapproval of the certification status of a monitor in accordance with subsection 72.2.

71.4.c.5. Procedures for loss of certification. -- If the Secretary or the Administrator issues a notice of disapproval of a certification application under subparagraph 71.4.c.4.C or a notice of disapproval of certification status under subparagraph 71.4.c.4.D, then:

71.4.c.5.A. The owner or operator will 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), 75.20(g)(7), or 40 CFR §75.21(e) and continuing until the applicable date and hour specified under 40 CFR §§75.20(a)(5)(i) or 75.20(g)(7):

71.4.c.5.A.1. For a disapproved NO_x emission rate (i.e., NO_x-diluent) system, the maximum potential NO_x emission rate, as defined in 40 CFR §72.2;

71.4.c.5.A.2. For a disapproved NO_x pollutant concentration monitor and disapproved flow monitor, respectively, the maximum potential concentration of NO_x and the maximum potential flow rate, as defined in sections 2.1.2.1 and 2.1.4.1 of Appendix A to 40 CFR Part 75;

71.4.c.5.A.3. 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 2.1.5, 2.1.3.1, and 2.1.3.2 of Appendix A to 40 CFR Part 75;

71.4.c.5.A.4. For a disapproved fuel flowmeter system, the maximum potential fuel flow rate, as defined in section 2.4.2.1 of Appendix D to 40 CFR Part 75;

71.4.c.5.A.5. For a disapproved excepted NO_x monitoring system under Appendix E to 40 CFR Part 75, the fuel-specific maximum potential NO_x emission rate, as defined in 40 CFR §72.2;

71.4.c.5.B. The CAIR designated representative must submit a notification of certification retest dates and a new certification application in accordance with paragraphs 71.4.c.1 and 71.4.c.2; and

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

71.5. Initial certification and recertification procedures for units using the low mass emission excepted methodology under 40 CFR §75.19. -- The owner or operator of a unit qualified to use the low mass emissions (LME) excepted methodology under 40 CFR §75.19 will meet the applicable certification and recertification requirements in 40 CFR §§75.19(a)(2) and

75.20(h). If the owner or operator of such a unit elects to certify a fuel flowmeter system for heat input determination, the owner or operator will also meet the certification and recertification requirements in 40 CFR §75.20(g).

71.6. Certification and recertification procedures for alternative monitoring systems. -- The CAIR 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).

§45-39-72. 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 or Subpart H of, or Appendix D or Appendix E to 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, or for a CAIR NO_x opt-in unit or a unit for which a CAIR opt-in permit application is submitted and not withdrawn and a CAIR opt-in permit is not yet issued or denied under sections 80 through 88, the Administrator 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 or the Administrator 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.

§45-39-73. Notifications.

73.1. The CAIR designated representative for a CAIR NO_x Annual unit will 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.

§45-39-74. Recordkeeping and Reporting.

74.1. General provisions. -- The CAIR designated representative must comply with all recordkeeping and reporting requirements under this section, the applicable recordkeeping and reporting requirements under 40 CFR §75.73, and the requirements of subsection 10.5.

74.2. Monitoring plans. -- The owner or operator of a CAIR NO_x Annual unit must comply with the requirements of 40 CFR §§75.73(c) and (e) and, for a unit for which a CAIR opt-in permit application is submitted and not withdrawn and a CAIR opt-in permit is not yet issued or denied under sections 80 through 88, the requirements of section 83 and subsection 84.1.

74.3. Certification applications. -- The CAIR 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 CAIR designated representative must submit quarterly

reports, as follows:

74.4.a. The CAIR designated representative will report the NO_x mass emissions data and heat input data for the CAIR NO_x Annual 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, 2007, the calendar quarter covering January 1, 2008 through March 31, 2008; or

74.4.a.2. For a unit that commences commercial operation on or after July 1, 2007, the calendar quarter corresponding to the earlier of the date of provisional certification or the applicable deadline for initial certification under subsection 70.2, unless that quarter is the third or fourth quarter of 2007, in which case reporting will commence in the quarter covering January 1, 2008 through March 31, 2008;

74.4.b. The CAIR designated representative will 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 §75.73(f); and

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

74.5. Compliance certification. -- The CAIR designated representative will 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 sections 70 through 76 and 40 CFR Part 75, including the quality assurance procedures and specifications; and

74.5.b. For a unit with add-on NO_x emission controls and for all hours where NO_x data are substituted in accordance with 40 CFR §75.34(a)(1), the add-on emission controls were operating within the range of parameters listed in the quality assurance and quality control program under Appendix B to 40 CFR Part 75 and the substitute data values do not systematically underestimate NO_x emissions.

§45-39-75. Petitions.

75.1. Except as provided in subsection 75.3, the CAIR designated representative of a CAIR NO_x Annual unit that is subject to an Acid Rain emissions limitation may submit a petition under 40 CFR §75.66 to the Administrator requesting approval to apply an alternative to any requirement of sections 70 through 76. Application of an alternative to any requirement of sections 70 through 76 is in accordance with sections 70 through 76 only to the extent that the petition is approved in writing by the Administrator, in consultation with the Secretary.

75.2. The CAIR designated representative of a CAIR NO_x Annual unit that is not subject to an Acid Rain emissions limitation may submit a petition under 40 CFR §75.66 to the Secretary and the Administrator requesting approval to apply an alternative to any requirement of sections 70 through 76. Application of an alternative to any requirement of sections 70 through 76 is in accordance with sections 70 through 76 only to the extent that the petition is approved in writing by both the Secretary and the Administrator.

75.3. The CAIR designated representative of a CAIR NO_x Annual unit that is subject to an Acid Rain emissions limitation may submit a petition under 40 CFR §75.66 to the Secretary and the Administrator requesting approval to apply an

alternative to a requirement concerning any additional continuous emission monitoring system required under 40 CFR §75.72. Application of an alternative to any such requirement is in accordance with sections 70 through 76 only to the extent that the petition is approved in writing by both the Secretary and the Administrator.

§45-39-76. Additional Requirements to Provide Heat Input Data.

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

§45-39-80. CAIR NO_x Opt-In Unit Applicability. -- A CAIR NO_x Annual opt-in unit must be a unit that:

80.1. Is located in West Virginia;

80.2. Is not a CAIR NO_x Annual unit under section 4 and is not covered by a retired unit exemption under section 5 that is in effect;

80.3. Is not covered by a retired unit exemption under 40 CFR §72.8 that is in effect;

80.4. Has or is required or qualified to have a Title V operating permit or other federally enforceable permit; and

80.5. Vents all of its emissions to a stack and can meet the monitoring, recordkeeping, and reporting requirements of sections 70 through 76.

§45-39-81. Opt-in General Requirements.

81.1. Except as otherwise provided in sections 1 through 4, sections 6 through 8, sections 10 through 14, sections 20 through 24 and sections 50 through 76, a CAIR NO_x Annual opt-in unit will be treated as a CAIR NO_x Annual unit for purposes of applying such sections.

81.2. Solely for purposes of applying, as provided in sections 80 through 88, the

requirements of sections 70 through 76 to a unit for which a CAIR opt-in permit application is submitted and not withdrawn and a CAIR opt-in permit is not yet issued or denied under sections 80 through 88, such unit will be treated as a CAIR NO_x Annual unit before issuance of a CAIR opt-in permit for such unit.

§45-39-82. CAIR Designated Representative.

82.1. Any CAIR NO_x Annual opt-in unit, and any unit for which a CAIR opt-in permit application is submitted and not withdrawn and a CAIR opt-in permit is not yet issued or denied under sections 80 through 88, located at the same source as one or more CAIR NO_x Annual units will have the same CAIR designated representative and alternate CAIR designated representative as such CAIR NO_x Annual units.

§45-39-83. Applying for CAIR Opt-in Permit.

83.1. Applying for initial CAIR opt-in permit. -- The CAIR designated representative of a unit meeting the requirements for a CAIR NO_x Annual opt-in unit in section 80 may apply for an initial CAIR opt-in permit at any time, except as provided under subsections 86.6 and 86.7, and, in order to apply, must submit to the Secretary the following:

83.1.a. A complete CAIR permit application under section 22;

83.1.b. A certification, in a format specified by the Secretary, that the unit:

83.1.b.1. Is not a CAIR NO_x Annual unit under section 4 and is not covered by a retired unit exemption under section 5 that is in effect;

83.1.b.2. Is not covered by a retired unit exemption under 40 CFR §72.8 that is in effect;

83.1.b.3. Vents all of its emissions to a stack; and

83.1.b.4. Has documented heat input for more than 876 hours during the 6 months immediately preceding submission of the CAIR

permit application under section 22;

83.1.c. A monitoring plan in accordance with section 70 through 76;

83.1.d. A complete certificate of representation under section 13 consistent with section 82, if no CAIR designated representative has been previously designated for the source that includes the unit; and

83.1.e. A statement, in a format specified by the Secretary, whether the CAIR designated representative requests that the unit be allocated CAIR NO_x Annual allowances under subsection 88.3 (subject to the conditions in subsections 84.8 and 86.7).

83.2. Duty to reapply.

83.2.a. The CAIR designated representative of a CAIR NO_x Annual opt-in unit must submit a complete CAIR permit application under section 22 to renew the CAIR opt-in unit permit in accordance with 45CSR30 or any other applicable rule, addressing permit renewal.

83.2.b. Unless the Secretary issues a notification of acceptance of withdrawal of the CAIR opt-in unit from the CAIR NO_x Annual Trading Program in accordance with section 86 or the unit becomes a CAIR NO_x Annual unit under section 4, the CAIR NO_x Annual opt-in unit will remain subject to the requirements for a CAIR NO_x Annual opt-in unit, even if the CAIR designated representative for the CAIR NO_x Annual opt-in unit fails to submit a CAIR permit application that is required for renewal of the CAIR opt-in permit under subdivision 83.2.a.

§45-39-84. Opt-in Process. -- The Secretary will issue or deny a CAIR opt-in permit for a unit for which an initial application for a CAIR opt-in permit under section 83 is submitted in accordance with this section.

84.1. Interim review of monitoring plan. -- The Secretary and the Administrator will determine, on an interim basis, the sufficiency of the monitoring plan accompanying the initial

application for a CAIR opt-in permit under section 83. A monitoring plan is sufficient, for purposes of interim review, if the plan appears to contain information demonstrating that the NO_x emissions rate and heat input of the unit and all other applicable parameters are monitored and reported in accordance with sections 70 through 76. A determination of sufficiency will not be construed as acceptance or approval of the monitoring plan.

84.2. Monitoring and reporting.

84.2.a. If the Secretary and the Administrator determine that the monitoring plan is sufficient under subsection 84.1, the owner or operator must monitor and report the NO_x emissions rate and the heat input of the unit and all other applicable parameters, in accordance with sections 70 through 76, starting on the date of certification of the appropriate monitoring systems under sections 70 through 76 and continuing until a CAIR opt-in permit is denied under subsection 84.6 or, if a CAIR opt-in permit is issued, the date and time when the unit is withdrawn from the CAIR NO_x Annual Trading Program in accordance with section 86.

84.2.b. The monitoring and reporting under subdivision 84.2.a must include the entire control period immediately before the date on which the unit enters the CAIR NO_x Annual Trading Program under subsection 84.7, during which period monitoring system availability must not be less than 90 percent under sections 70 through 76 and the unit must be in full compliance with any applicable state or federal emissions or emissions-related requirements.

84.2.c. To the extent the NO_x emissions rate and the heat input of the unit are monitored and reported in accordance with sections 70 through 76 for one or more control periods, in addition to the control period under subdivision 84.2.b, during which control periods monitoring system availability is not less than 90 percent under sections 70 through 76 and the unit is in full compliance with any applicable state or federal emissions or emissions-related requirements and which control periods begin not more than 3 years before the unit enters the CAIR NO_x Annual

Trading Program under subsection 84.7, such information will be used as provided in subsections 84.3 and 84.4.

84.3. Baseline heat input. -- The unit's baseline heat input will equal:

84.3.a. If the unit's NO_x emissions rate and heat input are monitored and reported for only one control period, in accordance with subdivisions 84.2.a and 84.2.b, the unit's total heat input (in mmBtu) for the control period; or

84.3.b. If the unit's NO_x emissions rate and heat input are monitored and reported for more than one control period, in accordance with subdivisions 84.2.a, 84.2.b and 84.2.c, the average of the amounts of the unit's total heat input (in mmBtu) for the control period under subdivision 84.2.b and for the control periods under subdivision 84.2.c.

84.4. Baseline NO_x emission rate. -- The unit's baseline NO_x emission rate will equal:

84.4.a. If the unit's NO_x emissions rate and heat input are monitored and reported for only one control period, in accordance with subdivisions 84.2.a and 84.2.b, the unit's NO_x emissions rate (in lb/mmBtu) for the control period;

84.4.b. If the unit's NO_x emissions rate and heat input are monitored and reported for more than one control period, in accordance with subdivisions 84.2.a, 84.2.b and 84.2.c, and the unit does not have add-on NO_x emission controls during any such control periods, the average of the amounts of the unit's NO_x emissions rate (in lb/mmBtu) for the control period under subdivision 84.2.b and the control periods under subdivision 84.2.c; or

84.4.c. If the unit's NO_x emissions rate and heat input are monitored and reported for more than one control period, in accordance with subdivisions 84.2.a, 84.2.b and 84.2.c, and the unit has add-on NO_x emission controls during any such control periods, the average of the amounts of the unit's NO_x emissions rate (in lb/mmBtu)

for such control period during which the unit has add-on NO_x emission controls.

84.5. Issuance of CAIR opt-in permit. -- After calculating the baseline heat input and the baseline NO_x emissions rate for the unit under subsections 84.3 and 84.4, and if the Secretary determines that the CAIR designated representative shows that the unit meets the requirements for a CAIR NO_x Annual opt-in unit in section 80 and meets the elements certified in subdivision 83.1.b, the Secretary will issue a CAIR opt-in permit. The Secretary will provide a copy of the CAIR opt-in permit to the Administrator, who will then establish a compliance account for the source that includes the CAIR NO_x Annual opt-in unit unless the source already has a compliance account.

84.6. Issuance of denial of CAIR opt-in permit. -- Notwithstanding subsections 84.1 through 84.5, if at any time before issuance of a CAIR opt-in permit for the unit, the Secretary determines that the CAIR designated representative fails to show that the unit meets the requirements for a CAIR NO_x Annual opt-in unit in section 80 or meets the elements certified in subdivision 83.1.b, the Secretary will issue a denial of a CAIR NO_x opt-in permit for the unit.

84.7. Date of entry into CAIR NO_x Annual Trading Program. -- A unit for which an initial CAIR opt-in permit is issued by the Secretary will become a CAIR NO_x Annual opt-in unit, and a CAIR NO_x Annual unit, as of the later of January 1, 2009 or January 1 of the first control period during which such CAIR opt-in permit is issued.

84.8. Repowered CAIR NO_x Annual opt-in unit.

84.8.a. If the CAIR designated representative requests, and the Secretary issues a CAIR opt-in permit providing for, allocation to a CAIR NO_x Annual opt-in unit of CAIR NO_x Annual allowances under subsection 88.3 and such unit is repowered after its date of entry into the CAIR NO_x Annual Trading Program under subsection 84.7, the repowered unit will be treated as a CAIR NO_x Annual opt-in unit replacing the

original CAIR NO_x Annual opt-in unit, as of the date of start-up of the repowered unit's combustion chamber.

84.8.b. Notwithstanding subsections 84.3 and 84.4, as of the date of start-up under subdivision 84.8.a, the repowered unit will be deemed to have the same date of commencement of operation, date of commencement of commercial operation, baseline heat input, and baseline NO_x emission rate as the original CAIR NO_x Annual opt-in unit, and the original CAIR NO_x Annual opt-in unit will no longer be treated as a CAIR opt-in unit or a CAIR NO_x Annual unit.

§45-39-85. CAIR Opt-in Permit Contents.

85.1. Each CAIR opt-in permit must contain:

85.1.a. All elements required for a complete CAIR permit application under section 22;

85.1.b. The certification in subdivision 83.1.b;

85.1.c. The unit's baseline heat input under subsection 84.3;

85.1.d. The unit's baseline NO_x emission rate under subsection 84.4;

85.1.e. A statement whether the unit is to be allocated CAIR NO_x Annual allowances under subsection 88.3 (subject to the conditions in subsections 84.8 and 86.7);

85.1.f. A statement that the unit may withdraw from the CAIR NO_x Annual Trading Program only in accordance with section 86; and

85.1.g. A statement that the unit is subject to, and the owners and operators of the unit must comply with, the requirements of section 87.

85.2. Each CAIR opt-in permit is deemed to incorporate automatically the definitions of terms under section 2 and, upon recordation by the

Administrator under sections 51 through 57 or sections 60 through 62, every allocation, transfer, or deduction of CAIR NO_x Annual allowances to or from the compliance account of the source that includes a CAIR NO_x Annual opt-in unit covered by the CAIR opt-in permit.

§45-39-86. Withdrawal from CAIR NO_x Annual Trading Program. -- Except as provided under subsection 86.7, a CAIR NO_x Annual opt-in unit may withdraw from the CAIR NO_x Annual Trading Program, but only if the Secretary issues a notification to the CAIR designated representative of the CAIR NO_x Annual opt-in unit of the acceptance of the withdrawal of the CAIR NO_x Annual opt-in unit in accordance with subsection 86.4.

86.1. Requesting withdrawal. -- In order to withdraw a CAIR opt-in unit from the CAIR NO_x Annual Trading Program, the CAIR designated representative of the CAIR NO_x Annual opt-in unit must submit to the Secretary a request to withdraw effective as of midnight of December 31 of a specified calendar year, which date must be at least 4 years after December 31 of the year of entry into the CAIR NO_x Annual Trading Program under subsection 84.7. The request must be submitted no later than 90 days before the requested effective date of withdrawal.

86.2. Conditions for withdrawal. -- Before a CAIR NO_x Annual opt-in unit covered by a request under subsection 86.1 may withdraw from the CAIR NO_x Annual Trading Program and the CAIR opt-in permit may be terminated under subsection 86.5, the following conditions must be met:

86.2.a. For the control period ending on the date on which the withdrawal is to be effective, the source that includes the CAIR NO_x Annual opt-in unit must meet the requirement to hold CAIR NO_x Annual allowances under subsection 6.3 and cannot have any excess emissions; and

86.2.b. After the requirement for withdrawal under subdivision 86.2.a is met, the Administrator will deduct from the compliance

account of the source that includes the CAIR NO_x Annual opt-in unit CAIR NO_x Annual allowances equal in number to and allocated for the same or a prior control period as any CAIR NO_x Annual allowances allocated to the CAIR NO_x Annual opt-in unit under section 88 for any control period for which the withdrawal is to be effective. If there are no remaining CAIR NO_x Annual units at the source, the Administrator will close the compliance account, and the owners and operators of the CAIR NO_x Annual opt-in unit may submit a CAIR NO_x Annual allowance transfer for any remaining CAIR NO_x Annual allowances to another CAIR NO_x Annual Allowance Tracking System account in accordance with sections 60 through 62.

86.3. Notification.

86.3.a. After the requirements for withdrawal under subsections 86.1 and 86.2 are met (including deduction of the full amount of CAIR NO_x Annual allowances required), the Secretary will issue a notification to the CAIR designated representative of the CAIR NO_x Annual opt-in unit of the acceptance of the withdrawal of the CAIR NO_x Annual opt-in unit as of midnight on December 31 of the calendar year for which the withdrawal was requested.

86.3.b. If the requirements for withdrawal under subsections 86.1 and 86.2 are not met, the Secretary will issue a notification to the CAIR designated representative of the CAIR NO_x Annual opt-in unit that the CAIR NO_x Annual opt-in unit's request to withdraw is denied. Such CAIR NO_x Annual opt-in unit will continue to be a CAIR NO_x Annual opt-in unit.

86.4. Permit amendment. -- After the Secretary issues a notification under subdivision 86.3.a that the requirements for withdrawal have been met, the Secretary will revise the CAIR permit covering the CAIR NO_x Annual opt-in unit to terminate the CAIR opt-in permit for such unit as of the effective date specified under subdivision 86.3.a. The unit will continue to be a CAIR NO_x Annual opt-in unit until the effective date of the termination and will comply with all requirements under the CAIR NO_x Annual

Trading Program concerning any control periods for which the unit is a CAIR NO_x Annual opt-in unit, even if such requirements arise or must be complied with after the withdrawal takes effect.

86.5. Reapplication upon failure to meet conditions of withdrawal. -- If the Secretary denies the CAIR NO_x Annual opt-in unit's request to withdraw, the CAIR designated representative may submit another request to withdraw in accordance with subsections 86.1 and 86.2.

86.6. Ability to reapply to the CAIR NO_x Annual Trading Program. -- Once a CAIR NO_x Annual opt-in unit withdraws from the CAIR NO_x Annual Trading Program and its CAIR opt-in permit is terminated under subsection 86.4, the CAIR designated representative may not submit another application for a CAIR opt-in permit under section 83 for such CAIR NO_x Annual opt-in unit before the date that is four years after the date on which the withdrawal became effective. Such new application for a CAIR opt-in permit will be treated as an initial application for a CAIR opt-in permit under section 84.

86.7. Inability to withdraw. -- Notwithstanding subsections 86.1 through 86.6, a CAIR NO_x Annual opt-in unit will not be eligible to withdraw from the CAIR NO_x Annual Trading Program if the CAIR designated representative of the CAIR NO_x Annual opt-in unit requests, and the Secretary issues a CAIR NO_x opt-in permit providing for, allocation to the CAIR NO_x Annual opt-in unit of CAIR NO_x Annual allowances under subsection 88.3.

§45-39-87. Change in Regulatory Status.

87.1. Notification. -- If a CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4, then the CAIR designated representative will provide written notification to the Secretary and the Administrator of such change in the CAIR NO_x Annual opt-in unit's regulatory status, within 30 days of such change.

87.2. Secretary's and Administrator's actions.

87.2.a. If a CAIR NO_x Annual opt-in unit

becomes a CAIR NO_x Annual unit under section 4, the Secretary will revise the CAIR NO_x Annual opt-in unit's CAIR opt-in permit to meet the requirements of a CAIR permit under section 23 as of the date on which the CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4.

87.2.b. The Administrator will deduct from the compliance account of the source that includes a CAIR NO_x Annual opt-in unit that becomes a CAIR NO_x Annual unit under section 4, CAIR NO_x Annual allowances equal in number to and allocated for the same or a prior control period as:

87.2.b.1. Any CAIR NO_x Annual allowances allocated to the CAIR NO_x Annual opt-in unit under section 88 for any control period after the date on which the CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4; and

87.2.b.2. If the date on which the CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4 is not December 31, the CAIR NO_x Annual allowances allocated to the CAIR NO_x Annual opt-in unit under section 88 for the control period that includes the date on which the CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4, multiplied by the ratio of the number of days, in the control period, starting with the date on which the CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4 divided by the total number of days in the control period and rounded to the nearest whole allowance as appropriate.

87.2.c. The CAIR designated representative must ensure that the compliance account of the source that includes the CAIR NO_x Annual unit that becomes a CAIR NO_x Annual unit under section 4 contains the CAIR NO_x Annual allowances necessary for completion of the deduction under subdivision 87.2.b.

87.2.d. For every control period after the date on which a CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section

4, the CAIR NO_x Annual opt-in unit will be treated, solely for purposes of CAIR NO_x Annual allowance allocations under section 42, as a unit that commences operation on the date on which the CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4 and will be allocated CAIR NO_x Annual allowances under section 42.

87.2.e. Notwithstanding subdivision 87.2.d, if the date on which the CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4 is not January 1, the following number of CAIR NO_x Annual allowances will be allocated to the CAIR NO_x Annual opt-in unit (as a CAIR NO_x Annual unit) under section 42 for the control period that includes the date on which the CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4:

87.2.e.1. The number of CAIR NO_x Annual allowances otherwise allocated to the CAIR NO_x Annual opt-in unit (as a CAIR NO_x Annual unit) under section 42 for the control period multiplied by;

87.2.e.2. The ratio of the number of days, in the control period, starting with the date on which the CAIR NO_x Annual opt-in unit becomes a CAIR NO_x Annual unit under section 4, divided by the total number of days in the control period; and

87.2.e.3. Rounded to the nearest whole allowance as appropriate.

§45-39-88. CAIR NO_x Annual Allowance Allocations to Opt-in Units.

88.1. Timing requirements.

88.1.a. When the CAIR opt-in permit is issued under subsection 84.5, the Secretary will allocate CAIR NO_x Annual allowances to the CAIR NO_x Annual opt-in unit, and submit to the Administrator the allocation for the control period in which a CAIR NO_x Annual opt-in unit enters the CAIR NO_x Annual Trading Program under subsection 84.7, in accordance with subsections

88.2 or 88.3.

88.1.b. By no later than October 31 of the control period in which a CAIR opt-in unit enters the CAIR NO_x Annual Trading Program under subsection 84.7, and October 31 of each year thereafter, the Secretary will allocate CAIR NO_x Annual allowances to the CAIR NO_x Annual opt-in unit, and submit to the Administrator the allocation for the control period that includes such submission deadline and in which the unit is a CAIR NO_x Annual opt-in unit, in accordance with subsections 88.2 or 88.3.

88.2. Calculation of allocation. -- For each control period for which a CAIR NO_x Annual opt-in unit is to be allocated CAIR NO_x Annual allowances, the Secretary will allocate in accordance with the following procedures:

88.2.a. The heat input (in mmBtu) used for calculating the CAIR NO_x Annual allowance allocation will be the lesser of:

88.2.a.1. The CAIR NO_x Annual opt-in unit's baseline heat input determined under subsection 84.3; or

88.2.a.2. The CAIR NO_x Annual opt-in unit's heat input, as determined in accordance with sections 70 through 76, for the immediately prior control period, except when the allocation is being calculated for the control period in which the CAIR NO_x Annual opt-in unit enters the CAIR NO_x Annual Trading Program under subsection 84.7;

88.2.b. The NO_x emission rate (in lb/mmBtu) used for calculating CAIR NO_x Annual allowance allocations will be the lesser of:

88.2.b.1. The CAIR NO_x Annual opt-in unit's baseline NO_x emissions rate determined under subsection 84.4 and multiplied by 70 percent; or

88.2.b.2. The most stringent state or federal NO_x emissions limitation applicable to the CAIR NO_x Annual opt-in unit at any time during the control period for which CAIR NO_x Annual

allowances are to be allocated; and

88.2.c. The Secretary will allocate CAIR NO_x Annual allowances to the CAIR NO_x Annual opt-in unit in an amount equaling the heat input under subdivision 88.2.a, multiplied by the NO_x emission rate under subdivision 88.2.b, divided by 2,000 lb/ton, and rounded to the nearest whole allowance as appropriate.

88.3. Notwithstanding subsection 88.2, and if the CAIR designated representative requests, and the Secretary issues a CAIR opt-in permit providing for, allocation to a CAIR NO_x Annual opt-in unit of CAIR NO_x Annual allowances under this subsection (subject to the conditions in subsections 84.8 and 86.7), the Secretary will allocate to the CAIR NO_x Annual opt-in unit as follows:

88.3.a. For each control period in 2009 through 2014 for which the CAIR NO_x Annual opt-in unit is to be allocated CAIR NO_x Annual allowances, the heat input (in mmBtu) used for calculating CAIR NO_x Annual allowance allocations will be determined as described in subdivision 88.2.a. The NO_x emission rate (in lb/mmBtu) used for calculating CAIR NO_x Annual allowance allocations will be the lesser of:

88.3.a.1. The CAIR NO_x Annual opt-in unit's baseline NO_x emissions rate determined under subsection 84.4; or

88.3.a.2. The most stringent state or federal NO_x emissions limitation applicable to the CAIR NO_x Annual opt-in unit at any time during the control period in which the CAIR NO_x Annual opt-in unit enters the CAIR NO_x Annual Trading Program under subsection 84.7;

88.3.b. The Secretary will allocate CAIR NO_x Annual allowances to the CAIR NO_x Annual opt-in unit in an amount equaling the heat input under subdivision 88.3.a, multiplied by the NO_x emission rate under subdivision 88.3.a, divided by 2,000 lb/ton, and rounded to the nearest whole allowance as appropriate;

88.3.c. For each control period in 2015

and thereafter for which the CAIR NO_x Annual opt-in unit is to be allocated CAIR NO_x Annual allowances, the heat input (in mmBtu) used for calculating the CAIR NO_x Annual allowance allocations will be determined as described in subdivision 88.2.a. The NO_x emission rate (in lb/mmBtu) used for calculating the CAIR NO_x Annual allowance allocation will be the lesser of:

88.3.c.1. 0.15 lb/mmBtu;

88.3.c.2. The CAIR NO_x Annual opt-in unit's baseline NO_x emissions rate determined under subsection 84.4; or

88.3.c.3. The most stringent state or federal NO_x emissions limitation applicable to the CAIR NO_x Annual opt-in unit at any time during the control period for which CAIR NO_x Annual allowances are to be allocated; and

88.3.d. The Secretary will allocate CAIR NO_x Annual allowances to the CAIR NO_x Annual opt-in unit in an amount equaling the heat input under subdivision 88.3.c, multiplied by the NO_x emission rate under subdivision 88.3.c, divided by 2,000 lb/ton, and rounded to the nearest whole allowance as appropriate.

88.4. Recordation.

88.4.a. The Administrator will record, in the compliance account of the source that includes the CAIR NO_x Annual opt-in unit, the CAIR NO_x Annual allowances allocated by the Secretary to the CAIR NO_x Annual opt-in unit under subdivision 88.1.a.

88.4.b. By December 1 of the control period in which a CAIR opt-in unit enters the CAIR NO_x Annual Trading Program under subsection 84.7, and December 1 of each year thereafter, the Administrator will record, in the compliance account of the source that includes the CAIR NO_x Annual opt-in unit, the CAIR NO_x Annual allowances allocated by the Secretary to the CAIR NO_x Annual opt-in unit under subdivision 88.1.b.

§45-39-90. Inconsistency Between Rules.

90.1. 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

1 MS. CHANDLER: This public hearing will now come
2 to order on this 18th day of July, 2005, at the West
3 Virginia Department of Environmental Protection, Cooper's
4 Rock Training Room, 601 57th Street S.E., Charleston, West
5 Virginia. This public is being held to accept comments on
6 proposed revisions to existing legislative rule 45CSR15-
7 Emission Standards for Hazardous Air Pollutants pursuant to
8 40 CFR Part 61; 45CSR16 - Standards of Performance for New
9 Stationary Sources pursuant to to 40 CFR Part 60; 45CSR25 -
10 To Prevent and Control Air Pollution from Hazardous Waste
11 Treatment, Storage, or Disposal Facilities; 45CSR33; Acid
12 Rain Provisions and Permits; 45CSR34 - Emission Standards
13 for Hazardous Air Pollutants for Source Categories pursuant
14 to 40 CFR Part 63; 45CSR37 - Mercury Budget Trading Program
15 to Reduce Mercury Emissions; 45CSR39 - Control of Annual
16 Nitrogen Oxide Emissions to Mitigate Interstate Transport
17 of Ozone and Nitrogen Oxides; 45CSR40 - Control of Ozone
18 Season Nitrogen Oxide Emissions to Mitigate Interstate
19 Transport of Ozone and Nitrogen Oxides; and 45CSR41 -
20 Control of Annual Sulfur Dioxide Emissions to Mitigate
21 Interstate Transport of Fine Particulate Matter and Sulfur
22 Dioxide.

23 A notice for the hearing was filed in the
24 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 45CSR39 - Control of Annual
20 Nitrogen Oxide Emissions to Mitigate Interstate Transport
21 of Fine Particulate Matter and Nitrogen Oxides.

22 This rule establishes general provisions and the
23 designated representative, permitting, allowance,
24 monitoring, and opt-in provisions for the State CAIR

1 Nitrogen Oxide Annual Trading Program pursuant to the
2 federal Clean Air Interstate Rule, which is CAIR under
3 Section 110 of the clean Air Act, 40 CFR Part 96, Subparts
4 AA through II, and 40 CFR §51.123 for state implementation
5 plans as a means of mitigating interstate transport of fine
6 particulates and nitrogen oxides.

7 This rule partially fulfills the State's
8 obligations in response to the U. S. Environmental
9 Protection Agency's final rule, Rule to Reduce Interstate
10 Transport of Fine Particulate Matter and Ozone, which is
11 CAIR, Clean Air Interstate Rule; Revisions to Acid Rain
12 Program; Revisions to the Nitrogen Oxides SIP Call (12 May
13 2005, at FR 25162). The federal rule requires that large
14 emitters of nitrogen oxides reduce annual emissions through
15 the constraint of set budgets. U.S. Environmental
16 Protection Agency is specifying that annual nitrogen oxide
17 emission reductions be implemented in two phases. The
18 first phase of nitrogen oxide reductions starts in 2009;
19 the second phase starts in 2015 and continues thereafter.
20 The nitrogen oxide emission reduction requirements are
21 based on controls that are known to be highly cost
22 effective for electric generating units. Flexibility is
23 built in through market-based "cap and trade" provisions
24 which allow sources to buy or sell nitrogen oxide emission

1 allowances from or to other program participants. Reducing
2 upwind nitrogen oxide emissions will assist downwind
3 particulate matter (PM) in 2.5 microns and 8-hour ozone non
4 attainment areas in achieving the National Ambient Air
5 Quality Standards (NAAQS).

6 45CSR39 applies to large fossil fuel-fired
7 electric generating units that have greater than 25
8 megawatts generating capacity. The Clean Air Interstate
9 Rule (CAIR) Nitrogen Oxide Ozone Season Trading Program
10 requirements are set forth in 45CSR40.

11 The floor is now open for public comment. Please
12 identify yourself and affiliation, if any, prior to making
13 comments.

14 (No response.)

15 There being nothing further, this public hearing
16 for the proposed 45CSR39 is concluded.

17 (WHEREUPON, the hearing was concluded.)

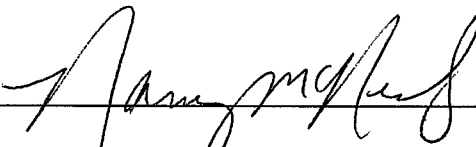
REPORTER'S CERTIFICATE

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

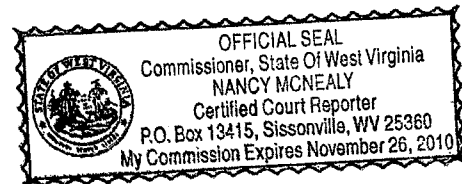
I, **NANCY MCNEALY**, Certified Verbatim Court Reporter and Commissioner of West Virginia, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption hereof.

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

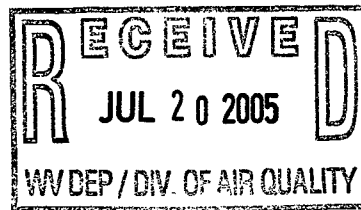
My commission expires November 26, 2010.



Certified Verbatim Court Reporter







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.

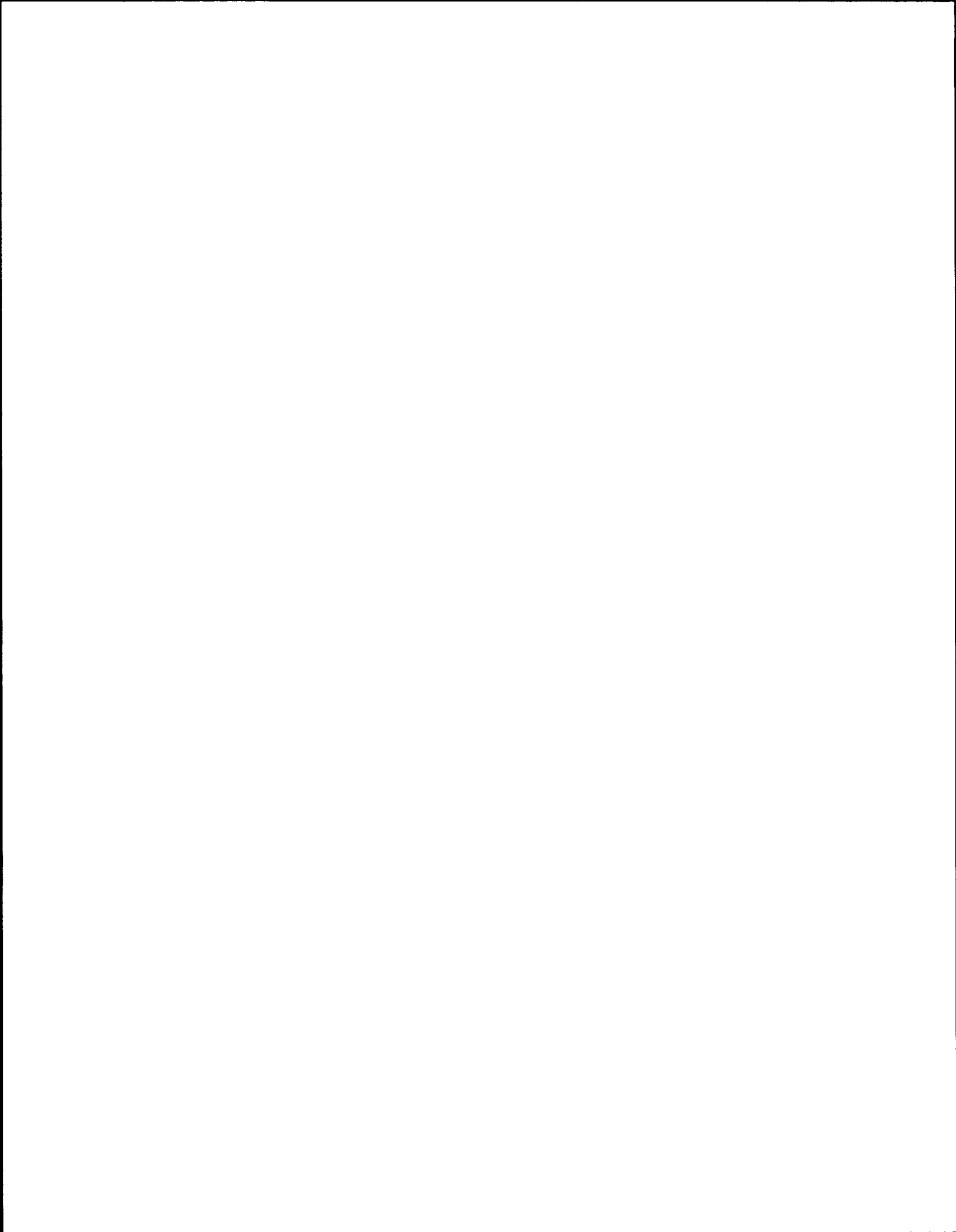
AEP also supports the revisions to current rules 45 C.S.R. 15, 45 C.S.R. 16, 45 C.S.R. 33, and 45 C.S.R. 34, which update the rules to conform with the revisions to their respective federal counterparts.

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

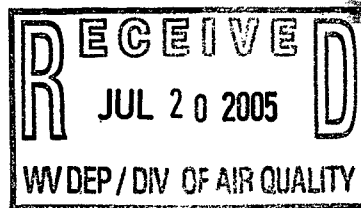
Sincerely,

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



Dominion™

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

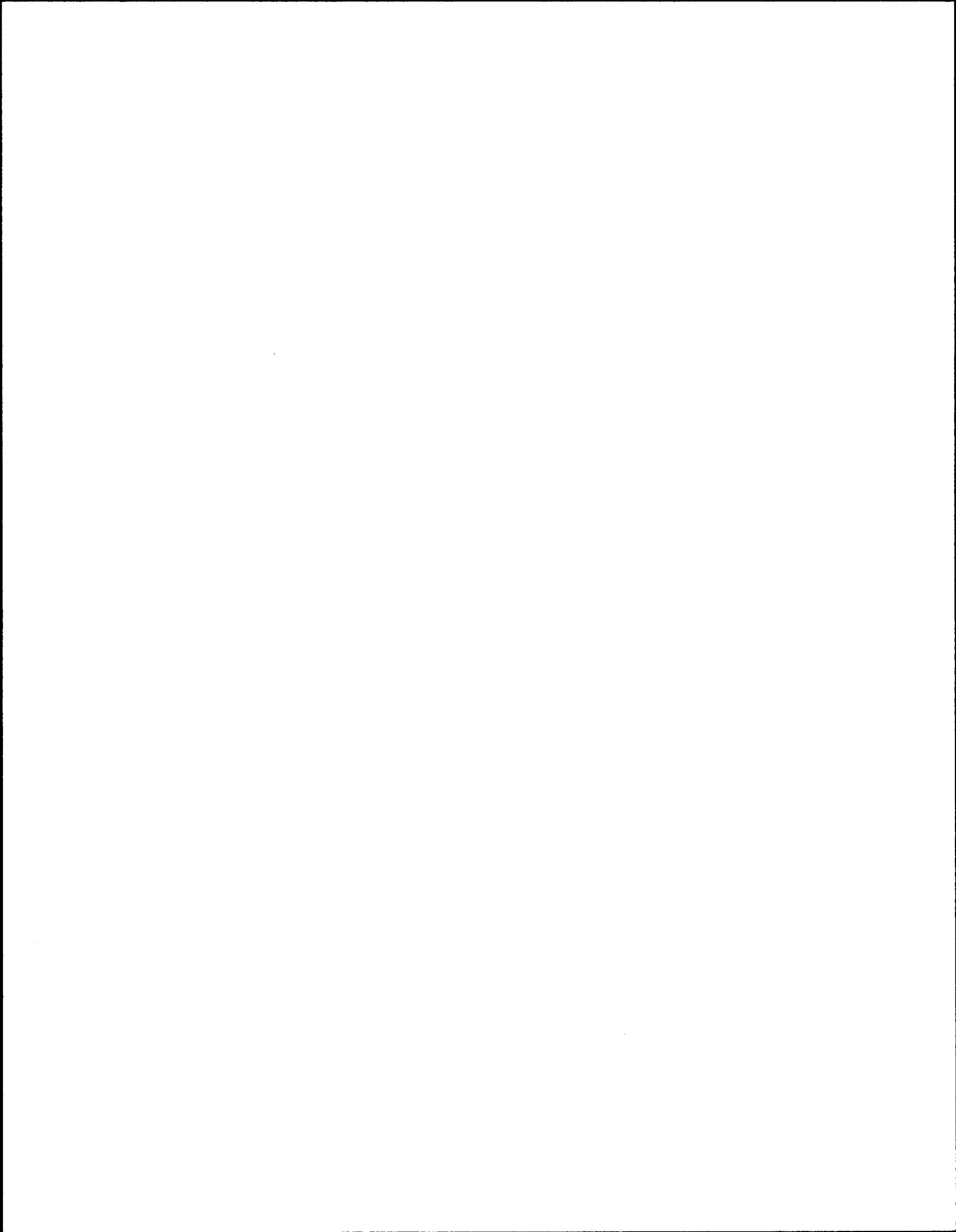
Dominion commends the DAQ on its timely development of these proposed revisions to the West Virginia State Implementation Plan to address the Federal Clean Air Mercury Rule (CAMR) and the Clean Air Interstate Rule (CAIR). Dominion supports the DAQ's full adoption of the Federal "model rules", provided 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





FAX TRANSMISSION

US Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

To: WV Dept of Environmental Protection Date: July 18, 2005

Fax #: (304) 926-0479

Pages: 3 , including this cover sheet.

From: Marilyn Powers

Subject: Rules 45CSR39, 40, and 41

COMMENTS:

EPA comments on proposed rules are attached.



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

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

JUL 18 2005

Dear Mr. Benedict:

Thank you for the opportunity to comment on West Virginia's proposed rules 45CSR39 (Annual NO_x Trading Program), 45CSR40 (Ozone Season NO_x Trading Program), and 45CSR41 (Annual SO₂ Trading Program) to implement the Clean Air Interstate Rule (CAIR). The following comments are provided:


1. Rule 45CSR40 (Ozone Season NO_x Program): Subdivisions 42.3.b and 42.3.d.2, pertaining to non-EGU new unit set-aside allocations, require that the CAIR NO_x Ozone Season allowance allocation request be submitted "...on or before April 1 before the first year including the ozone season for which the CAIR NO_x Ozone Season allowances are requested...", which in effect sets the required date of submission as the April of the previous year before the Ozone Season for which the allowances are requested. The data required by this request would not be available in this time frame, and the date should be revised to April 1 before the ozone season in accordance with the EPA Memorandum dated March 29, 2005 that adjusted the date from March 1 to April 1 to allow more time for the submission.
2. Rule 45CSR40: Subdivision 90.4.h, pertaining to credit for reductions in NO_x emissions resulting from shifting load capacity from an uncontrolled engine to a controlled engine, is recommended to be revised to clarify the data submission requirements by requiring units such as hrs/ozone season; g/bhp-hr, etc to be used for the various terms in this subdivision.
3. We commend West Virginia's efforts in initiating the regulatory process needed to implement the requirements of CAIR in such a timely manner. However, please note that we are planning to propose a Federal Implementation Plan (FIP) for CAIR in the near future. There may be changes to the CAIR model rules set forth in 40 CFR Part 96 as a result of the FIP as well as changes required to correct other inadvertent errors. 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



to make future revisions to 45CSR40 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 CAIR rules.

If you have any questions, please do not hesitate to contact Marilyn Powers of my staff at (215) 814-2308.

Sincerely,



Judith M. Katz, Director
Air Protection Division



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

| | | | | |
|----------------------------------|--------------------------|-----------------------------|--------------------------------|-----------------------------|
| Allegheny Energy | Cytec Industries, Inc. | Elkem Metals Company | Kingsford Manufacturing Co. | Pilgrim's Pride Corporation |
| Ashland Chemical, Inc. | Dean Company (The) | Flexsys | Koppers Industries, Inc. | PPG Industries, Inc. |
| Aventis CropScience | The Dow Chemical Company | FMC Corporation | Marble King, Inc. | Special Metals Corporation |
| BASF Corporation | Downard Hydraulics, Inc. | Georgia-Pacific Corporation | Mylan Pharmaceuticals, Inc. | Toyota |
| Bowles Rice McDavid Graff & Love | DuPont | GE Plastics | Pechiney Rolled Products, LLC | W.M. Cramer Lumber Co. |
| Capitol Cement Corp. (004499.1) | Eagle Manufacturing Co. | Kanawha Manufacturing Co. | Phillips Machine Service, Inc. | 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,



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.

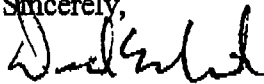
What are needed are regulations reflecting unique topographic conditions peculiar to West Virginia. The chronic and acute impacts on the health and welfare of West Virginians must be evaluated before any one of the regulations can be considered to have

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

45CSR39

CONTROL OF ANNUAL NITROGEN OXIDE EMISSIONS TO MITIGATE INTERSTATE TRANSPORT OF FINE PARTICULATE MATTER AND NITROGEN OXIDES

RESPONSE TO COMMENTS

On June 17, 2005, the Division of Air Quality (DAQ) commenced the public comment period and subsequently held a public hearing on July 18, 2005 to accept oral comments on proposed rule 45CSR39. Written comments were also accepted through 6:00 PM on Monday, July 18, 2005. No one verbally commented at the public hearing concerning proposed rule 45CSR39. Six commenters submitted written comments regarding proposed rule 45CSR39. DAQ addresses the written comments below.

I. COMMENTER: American Electric Power

COMMENT A. *The commenter states, "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."*

RESPONSE A. The absence of the date in this subsection is intentional. U.S. EPA suggested its removal to address timing concerns between subsections 53.1 and 41.1. No action required.

COMMENT B. *The commenter states, "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."*

RESPONSE B. DAQ notes that under CAIR, affected states have the option to include opt-in provisions and non-EGU sources from the NO_x SIP Call program along with EGU sources, without jeopardizing the ability of the West Virginia utility sources to participate in the CAIR trading programs.

II. COMMENTER: West Virginia Chamber of Commerce

COMMENT A. *The commenter states, ".....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."*

RESPONSE A. No response required.

III. COMMENTER: Dominion

COMMENT A. *The commenter states, "Dominion supports the DAQ's full adoption of the Federal "model rules", provided as a 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 A. No response required.

IV. COMMENTER: U.S. Environmental Protection Agency

COMMENT A. *The commenter states, "We commend West Virginia's efforts in initiating the regulatory process needed to implement the requirements of CAIR in such a timely manner. However, please note that we are planning to propose a Federal Implementation Plan (FIP) for CAIR in the near future. There may be changes to the CAIR model rules set forth in 40 CFR Part 96 as a result of the FIP as well as changes required to correct other inadvertent errors. 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 45CSR40 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 CAIR rules."*

RESPONSE A. DAQ is aware of the pending FIP that may result in changes to the federal CAIR rules. West Virginia's rules are required to obtain legislative approval and, for West Virginia to meet the CAIR State Implementation Plan revision deadline, DEP had to initiate the rulemaking process in 2005. However, DEP intends to work with the 2006 West Virginia Legislature to incorporate any federal rule changes that are finalized prior to legislative approval of 45CSR39. If changes are made to the federal rule after 45CSR39 has received legislative approval, DEP may make further revisions to the rule by again going through the legislative rulemaking process.

V. COMMENTER: West Virginia Manufacturer's Association

COMMENT A. *The commenter states, "The DAQ has proposed to incorporate the EPA's CAIR rule in the proposed new Rules 39, 40, and 41. We support the incorporation of these revisions to the federal rules by West Virginia in these new rules."*

RESPONSE A. No response required.

VI. COMMENTER: David W. White

COMMENT A. *The commenter states, "..... 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 such,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.”

RESPONSE A. DAQ believes that the U.S. EPA’s extensive modeling for CAIR demonstrates significant regional reductions in NO_x, SO₂ and particulate matter emissions from electric generating units (EGUs). While it is possible that an EGU may purchase a NO_x or SO₂ allowance to cover actual emissions, transport programs such as the successful Acid Rain and NO_x SIP Call programs have proven to significantly reduce SO₂ and NO_x emissions, providing cleaner air for all West Virginians. The regional reductions from trading programs under the Clean Air Interstate Rule will further reduce such emissions, assisting many counties across the eastern United States to reach attainment status for particulate matter and ozone under the National Ambient Air Quality Standards. If, however, the State has sufficient facts to demonstrate that the proposed program under 45CSR39 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.