WEST VIRGINIA
SECRETARY OF STATE
Betty Ireland
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Department of Environmental Protection - Division of Air Quality TITLE NUMBER: 45

RULE TYPE: Legislative CITE AUTHORITY: WV Code §22-5-4

AMENDMENT TO AN EXISTING RULE: YES [X] NO [ ]

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 41

TITLE OF RULE BEING AMENDED: Control of Annual Sulfur Dioxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Sulfur Dioxide

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: July 9, 2007 TIME: 6:00 p.m.

LOCATION OF PUBLIC HEARING: West Virginia Department of Environmental Protection
Dolly Sods Conference Room
601 57th Street, SE
Charleston, WV 25304

COMMENTS LIMITED TO: ORAL [ ] WRITTEN [ ] BOTH [X]

DATE WRITTEN COMMENT PERIOD ENDS: July 9, 2007 TIME: 6:00 p.m.

WRITTEN COMMENTS MAY BE MAILED TO:
Public Information Office
Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

BRIEFING DOCUMENT

Rule Title: 45CSR41 - "Control of Annual Sulfur Dioxide Emissions"

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 SO_2 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 (SO_2).

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 SO_2 reduce annual emissions based upon the implementation of retirement ratios for SO_2 allowances allocated under the Acid Rain Program. U.S. EPA is specifying that annual SO_2 emission reductions be implemented in two phases. The first phase of SO_2 reductions starts in 2010 and requires retiring SO_2 allowances at a 2:1 ratio; the second phase starts in 2015 and requires retiring SO_2 allowances at a 2.86:1 ratio, and continues thereafter. The SO_2 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 SO_2 emission allowances from or to other program participants. Reducing upwind SO_2 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_e generating capacity.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

U.S. EPA continued their CAIR rulemaking in final rule signed March 15, 2006. In this final rule, U.S. EPA revises CAIR federal counterpart 40 CFR Part 96, which directly affects language in 45CSR41. U.S. EPA is requiring affected states to revise their CAIR rules include these revisions to the CAIR model rules in order to receive full approval of CAIR.

Proposed deletion of program opt-in provisions will enable West Virginia to presume that CAIR equals reasonably available control technology for electric generating units under the U.S. EPA's $PM_{2.5}$ implementation rule. WVDAQ will submit to U.S. EPA a final CAIR SIP revision in Summer 2008.

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 May 21, 2007, and May 30, 2007 meetings, the Environmental Protection Advisory Council reviewed and discussed this rule. (See attached minutes for Council's discussion).

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Monday – May 21, 2007
1:00 p.m. – 3:00 p.m.
601 57th Street, SE, Charleston, WV
West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

Rick Roberts
Karen Price
Bill Raney
Lisa Dooley
Larry Harris
Jackie Hallinan

DEP:

Randy Huffman, Deputy Cabinet Secretary/Director –Division of Mining & Reclamation
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
Lewis Halstead, DMR
Ken Politan, DMR
Charlie Sturey, DMR
Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office
James Martin, Chief, Office of Oil & Gas
Carroll Cather, DWWM
Pam Nixon, Advocate
David L. Vande Linde, Blasting
Jim Mason, DAQ
Mike Zeto, DWWM – EE
Matt Sweeney, DWWM

VISITORS:

Ann Bradley, Spilman Thomas & Battle
Charlie Burd, IOGA
Don Garvin, WVEC
Dave Yaussy, Robinson & McElwee

Randy Huffman, Deputy Cabinet Secretary - West Virginia Department of Environmental Protection called the meeting to order at 1:00 p.m.

Karen Price stated that the Council did not have enough time to review the rules, therefore was requesting to have another meeting to discuss further and the remaining of the Council agreed. The Council will meet May 30, 2007 at 10:00 a.m. – WVDEP – 601 57th Street, SE – Charleston, WV 25304 – West Virginia Room (3001).

Deputy Cabinet Secretary Huffman apologized for the short time period regarding the rules getting out to Council. Randy Huffman then introduced Karen Watson, Assistant General Counsel to discuss with the Council the DEP bills that had passed in the 2007 Regular Legislative Session:

- SB 337 – Establishing New Greenhouse Gas Inventory Program
  Approved by Governor – April 4, 2007

- SB 425 – Relating to Water Pollution Control Revolving Fund
  Approved by Governor – April 4, 2007

- SB 465 – Establishing Dam Safety Rehabilitation Revolving Fund
  Approved by Governor – March 27, 2007

- SB 490 – Relating to Underground Storage Tank Insurance Fund
  Approved by Governor – April 3, 2007

- SB 524 – Requiring Proof of Lawful Disposal of Solid Waste
  Approved by Governor – March 28, 2007

- SB 588 – Removing Tax Expiration Date on Manufacturing or Production of Synthetic Fuel From Coal
  Approved by Governor – April 4, 2007

Karen Watson then gave a brief summary of each proposed rule for the 2008 legislative session:

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

Proposed Rule 6 is now a basic open burning/ incinerator rule. Revised scope includes 'statutory air pollution,' addition of new language for posted operating instructions and open burning or incineration of animal or poultry carcasses during a declared state of emergency. Except for temporary Air Curtain Incinerators for land clearing debris (DOH jobs) and incineration of animal or poultry remains, most Air Curtain Incinerators will now be exempted under Rule 6 and placed under Rule 18.

COMMENT

Mr. Harris: Why does it allow low-level radioactive waste?

DEP Response: To allow crematories to dispose of bodies with chemo drugs. Does not allow high-level radioactive compounds related to research.

Council wanted to know if the agency would accept comments in writing after the meeting (e-mail in comments)

DEP Response: Yes

45CSR8 – Ambient Air Quality Standards

SUMMARY

NAAQS rules 45CSR8, 45CSR9 & 45CSR12 have been combined for the 2008 legislative session. Rule 8 is now the complete NAAQS incorporation by reference rule, and 45CSR9 & 45CSR12 will be repealed and replaced. Revisions to SO_2 & PM NAAQS include correction of SO_2 annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour $PM_{2.5}$ standards, and addition of measurement methods for $PM_{2.5}$. Revisions to CO & Ozone NAAQS include revocation of one-hour ozone standard except for Berkeley & Jefferson counties, identification of one-hour ozone maintenance areas, and addition of 8-hour primary and secondary ozone standards. Revisions to NO_2 and Lead NAAQS include addition of primary and secondary standards for lead, and addition of measurement methods for lead. Revisions also include general language updates, improved citing and consistency.

COMMENT

Mr. Harris: Are we sure we are protecting the public's health? We should not be lowering standards so that our energy being transmitted to other states doesn't pollute our air. Are we aware of EPA's Science Advisory Panel?

DEP Response: CAIR aims to lower emissions at power plants. Utility controls are helping us meet targets earlier. EPA's regional approach has generally been successful and we are seeing tremendous benefits. The agency is aware of the EPA's panel, and EPA is considering more stringent regulations but has not done so yet.

45CSR16 – Standards of Performance for New Stationary Sources

SUMMARY

Revisions to rule incorporate annual incorporation by reference updates and exclusions.

COMMENT

No questions.

45CSR18 – Control of Air Pollution from Combustion of Solid Waste

SUMMARY

CISWI Rule 18 combines and incorporates by reference all current federal Section 111/129 combustion regulation into one rule. Old Rule 24 will be repealed and replaced. New exemption section is consistent with revised Rules 6, 25 and 34. Revisions also include revised scope, extensive federal counterpart language updates, improved citing and consistency.

COMMENT

No questions.

45CSR25 – Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities

SUMMARY

Revisions to the proposed rule include general annual incorporation by reference and revisions required to maintain consistency with the DWWM's rule 33CSR20 and federal counterpart regulation. Addition of direct incorporation by reference of new provisions published in the Federal Register. Language for pathological waste incinerators is revised for clarity.

COMMENT

No questions.

45CSR34 – Emission Standards for Hazardous Air Pollutants

SUMMARY

Rule 34 now combines all NESHAP regulations previously adopted under both Rules 15 & 34. Old Rule 15 will be repealed and replaced. Revisions to Rule 34 incorporate annual NESHAP updates under Parts 61 & 63. Some Part 63 standards affecting non-major sources of hazardous air pollutants are being excluded from incorporation by reference: Oil and Natural Gas; Polyvinyl Chloride and Copolymers; Primary Copper Smelting; Secondary Copper Smelting; and Primary Nonferrous Metals.

COMMENT

No questions.

45CSR39 – Control of Annual Nitrogen Oxides Emissions

SUMMARY

Annual CAIR NOx Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

No questions.

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

SUMMARY

Ozone Season CAIR NOx Rule - Incorporates revisions 40 CFR to Part 96.

COMMENT

No questions.

45CSR41 – Control of Annual Sulfur Dioxide Emissions

SUMMARY

Annual CAIR SO_2 Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

No questions.

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

The Greenhouse Gas Inventory Program Rule is authorized by SB337 passed in the 2007 legislative session. The rule establishes a program which requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount; inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions, capture and sequestration; provides for: a periodic compilation of a greenhouse gas inventory; a determination whether WV is a net sink or emitter; development of a registry for voluntary reductions; and a determination whether greenhouse gas can be developed as an asset for economic development.

COMMENT

Mr. Raney: Is the exclusion still there for coal preparation activities?

DEP Response: Yes, section 3.2. (45CSR42)

Mr. Raney: How do we quantify sequestration?

DEP Response: Don't think we will get down to stationary source level. Agency will look at area

sources and biogenic activities. Once we get information, we will compile in an inventory.

Division of Water and Waste Management

33CSR9 – Standards for Beneficial use of Filtrate from Water Treatment Plants

SUMMARY

This legislative rule establishes a mechanism and requirements for the permitting, siting, bonding, and use of water treatment plant sludge from water treatment plants that has beneficial properties. This rule applies to the beneficial use of water treatment plant sludge and to any person who seeks approval from the Secretary to beneficially use such sludge within the state. This rule is intended to enhance the resource recovery and recycling goals of article fifteen of chapter twenty-two of the West Virginia Code and to encourage the beneficial use of water treatment plant filtrate. Section 22-15-23 of the West Virginia Code and this rule, and not the provisions of W. Va. Code § 22-15-10 or 33 CSR 1, shall govern the beneficial use of water treatment plant sludge. This rule does not apply to sewage sludge, products derived from sewage sludge, sludges regulated under 33 CSR 8, or materials regulated as hazardous waste under W. Va. Code §§22-18-1, et seq.

COMMENT

Lisa Dooley: Public notice of permits – who bears the cost – there has to be a more efficient way of getting notices out than Class I legal ads. This is a suggestion for the future.

DEP Response: Applicant bears cost – DEP is trying other methods of getting the information out – but not everyone has access to e-mail.

400 people on DEP's mailing list to receive permits by e-mail and we have between 30-40 who receive permits by US mail.

33CSR20 – Hazardous Waste Management System

SUMMARY

This amendment will adopt by reference approximately two years of changes to federal regulations by adopting the federal regulations in effect as of June 1, 2007 consisting of changes that correct errors in previously enacted Dye and Pigment rule and Manifest rule, allow more hazardous waste, allow greater flexibility in SW-846 testing and monitoring, allow more mercury containing devices to be managed as universal waste, streamline permitting process through a standardized permit, allow additional headworks and de minimus waste exemptions, reference Clean Air Act standards for hazardous waste combustors, allow a series of paperwork burden reductions for hazardous waste management facilities, corrects errors in 40 CFR (federal regulations) and excludes cathode ray tubes from the definition of solid waste under certain conditions. Language corrections, updated references and a change as the result of an EPA comment regarding annual groundwater monitoring at corrective action sites are also included in the amended rule. The rule amendment is not projected to require additional operating expenses above current levels as the amendments are generally de-regulatory in nature.

COMMENT

No questions.

33CSR30 – Underground Storage Tanks

SUMMARY

There are several new provisions to reflect the 2005 Federal Energy Act, including: secondary containment requirements for new or replaced thanks or piping; secondary containment requirements for new or replaced fuel dispenser systems; tank eligibility for delivery, deposit or acceptance – enables agency to prevent deposit or delivery to a tank that is not in compliance; and training requirements for individuals who operate, maintain or are responsible to address emergencies from spills or releases from underground storage tank systems.

COMMENT

No questions.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

The proposed revisions reflect updates identified during the federally-mandated triennial review of the Water Quality Standards rule. These include proposed additions to the trout water list, new criteria for nutrients, revisions to criteria in Appendix E and a use redesignation in the Guyandotte River Basin.

COMMENT

Mr. Raney: Would like to have the trout water list stay within the agency and be able to discuss the science on a case-by-base basis before the EQB, not the Legislature.

DEP Response: The DEP believes the scientific basis for the proposed trout streams is clear and does not need to be litigated before the EQB.

Mr. Harris: Commented on the changes in Appendix E and asked whether the formula change for copper and cadmium resulted in a more or less stringent standard.

DEP Response: The changes in Appendix E are recommended by EPA, updating MCL's, etc. The revised hardness formulas represent EPA's latest science.

47CSR10 – National Pollutant Discharge Elimination System (NPDES)

SUMMARY

The proposed revisions to the National Pollutant Discharge Elimination System Rule reflect updates/additions made to the various federal regulations that govern the NPDES program. The proposed changes also include specific language in section 14 of the rule relating to the Pretreatment Program to ensure that the rule is consistent with the most recent federal pretreatment regulations in 40 CFR Part 403.

COMMENT

No questions.

47CSR34 – Dam Safety

SUMMARY

The proposed revisions establish requirements governing the disbursement and use of moneys in the Dam Safety Rehabilitation Revolving Fund, authorized by SB 465 in the 2007 legislative session.

COMMENT

Ms. Hallinan: Any progress being made in reducing the number of deficient dams?

DEP Response: Not very much. The fund initiative is badly needed.

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

Antidegradation is a requirement of the federal Clean Water Act intended to preserve the existing quality of the State's waters and to prevent and/or minimize future degradation. The rule was first adopted in 2001 and establishes four levels, or tiers, of protection for state waters, Tiers 1, 2, 2.5 and 3. Each tier provides a graduated level of protection used during the NPDES permit issuance process. The proposed revisions to the rule carry forward the agency's antidegradation implementation efforts, and move the Tier 2.5 streams that had been on the "presumptive" list in Appendix C to a final proposed list in Appendix A. The agency is proposing a total of 156 streams be included on the list. The list of 156 waters is comprised of the 37 waters that did not receive objections in the formal objection period, those waters that contain reproducing trout and are 100% on public land, those waters listed as high quality on public land based on their high biological scores, and Loop Creek.

COMMENT

Mr. Harris: Suggested we file with 309 streams instead of 156 streams because Legislature will further reduce.

Mr. Raney: Suggested we start with 39.

Mr. Harris: Asked about section 2.11 in the definitions regarding "trading" and if it includes cross-pollutant trading.

DEP Response: The definitions were unchanged from the ones the EQB first adopted in 2001. The agency does not think it allows cross-pollutant trading.

Division of Mining and Reclamation

38CSR2 – Surface Mining Reclamation Rule

SUMMARY

§38-2-3.2.g. Notice of Technical Completeness is new language and is to provide the public an opportunity to review the application once technical review is completed. §38-2-5.4.e.1 is removing language that is contrary to returning the natural drainway to its original pattern, profile, and dimensions once drainage control structure is removed. The changes in §38-2-5.6 clarify what operations may be exempt from conducting a "Surface Water Runoff Analysis", monitoring requirements and removes phase-in compliance schedule that expired on June 19, 2006. Changes to §38-2-6 removes duplication of rules for Blasting and after this change, all the requirements for blasting will be contained in Surface Mining Blasting Rule, Title 199 Series 1. New §38-2-11.8 titled "Bond Credit for Reclamation of Bond Forfeiture Site under a No Cost Reclamation Contract" encourages qualified operators to undertake reclamation of bond forfeiture sites for the purpose of eliminating hazards to human health and safety, abating pollution of surface and ground waters and the contribution of sediment to adjacent areas, and restoring land to beneficial uses. Changes in §38-2-14.15.c.2 and 14.15.d.3 are clarifying contemporaneous reclamation rules on excess spoil disposal. The changes in 14.15.e remove a phase-in compliance schedule that expired in 2004. The changes in §38-2-23 are being made to make the mining rule consistent with the proposed changes in the State's NPDES Mining Rules.

COMMENT

No questions.

47CSR5A – Individual State Certification of Activities Requiring a Federal Permit

SUMMARY

The proposed amendments to this rule are being made to adopt into rule requirements that have been applied through past practices for coal related activities requiring mitigation and issuance of a 401 State Certification of a 404 Permit. Ratios for monetary compensation for temporary impacts are detailed. Monetary compensation for permanent impacts to wetlands from coal related activities are made the same as non-coal related. Additional economic and stream measurement information is being requested to be added to the 401 application.

COMMENT

Mr. Harris: How do we determine the "ordinary high water mark" under section 4.2.f.4 and how is it determined on a small stream?

DEP Response: The US Army Corps of Engineers is responsible for determining "waters of the U.S." under the rule.

Mr. Harris: What are the differences between coal and non-coal impacts and how are they determined?

DEP Response: Rule has to be consistent with statute.

47CSR30 – WV/NPDES Rules for Coal Mining Facilities

SUMMARY

The proposed amendments to this rule are being made to allow general clean-up of sections referencing outdated names of agencies and references to the EQB governing rule making. This rule addresses the Secretary as being the person as head of all actions. References to the "Director" are changed to "Secretary" to eliminate the need to distinguish between the Director of Mining and Reclamation and the Director of Water and Waste Management when issuing a coal related WV/NPDES permit. This rule adds provision for storm-water coverage for certain minimal activities without the requirement for modification through application to the permit. This rule also provides for an advanced approval of transfer of a WV/NPDES Permit to coincide with the advanced approval of the corresponding Article 3 Permit. This rule clarifies provisions related to coal remining operations and provides a remining water quality standard variance for any parameter of concern.

COMMENT

No questions.

199CSR1 - Surface Mining Blasting Rule

SUMMARY

The proposed amendments change the following sections: 2.27. Adds the definition of "other structure" (structures built by the permittee); 2.38 Clarifies definition of "surface mine operation"; 3.2.C. Plan for blasting should include seismic monitoring when within 1000 ft of a structure, and performance specifications for blasting seismographs; 3.4. Areas of blasting that will be regulated for shaft and slope development; 3.6.c.3. Requiring field practice guidelines for blasting seismographs; 3.7a Request for alternate limits must have written consent of the owner; 3.9. Minimum qualifications and continuing education requirements for surveyor; 4.1.b. Allows the agency to consider blasting experience of applicants that was gained prior to the last three years; 4.5.d. Requires applicants who have been suspended or revoked in other states to show cause as to why should be issued a certification; 4.9.a.2 process for issuing a temporary suspension to a blaster and appeal rights; 4.13 Clarifies blasters responsibility of training the blasting crew; 5.2.a.3&4 Clarifies

the investigations process on a claim of blasting damage; 6.1 Requiring that any arbitrators that are removed from the list must be done with cause; and 7.3 Detonators and initiation systems are not considered for calculation of fees.

COMMENT

No questions.

Office of Oil and Gas

35CSR3 – Coalbed Methane Wells Rule

SUMMARY

The WVDEP, Office of Oil and Gas is proposing to revise existing rule 35CSR3. Series 3 is a legislative rule in place to enforce the provisions in WV Code §22-21-1 et seq., Coalbed Methane Wells and Units, commonly referred to at the Coalbed Methane Act. The revisions will: Address the establishment of special field rules to promote the orderly development of coalbed methane fields; Protect the correlative rights of all owners located within the geographic area for which special field rules are established; Provide a process by which the Review Board may hold a hearing on an application for special field rules and issue such rules; Insert language (Section 17) which was inadvertently deleted from the rule during the 2006 legislative session. This language existed in the rule prior to the revisions in 2006.

COMMENT

Is this the same rule that went through last year?

DEP Response: Yes, except for two sections that had changes:

16.2.e – advertisement "15 days"

16.1.6.1 – "FOIA" issue that came out of the LRMRC.

Mr. Raney: Is this the product of the stakeholders group?

DEP Response: Yes.

Ms. Hallinan: What is a field rule?

DEP Response: Special spacing procedure for coalbed methane wells. It deals with pooling and royalty issues.

Division of Land Restoration

33CSR10 – Recycling Assistance Grant Program

SUMMARY
This rule sets out guidelines and procedures for providing assistance grants to local governments and other interested parties for the purpose of planning, initiating, expanding, or upgrading recycling programs, provide related public education programs, and assist in recycling market procurement efforts.

COMMENT

No questions.

60CSR3 – Voluntary Remediation and Redevelopment Rule

SUMMARY

This legislative rule establishes the eligibility, procedures, standards and legal documents required for voluntary and brownfield cleanups and updates risk protocol standards, including updates to the deminimis table. It also includes changes to the land use covenant section to incorporate the components of the Uniform Covenant Act.

COMMENT

Ms. Dooley: Are there grant dollars for brownfields?

DEP Response: Yes

The next scheduled Advisory Council Meeting will be on May 30, 2007 at 10:00 a.m. Mr. Huffman asked the Council members to notify the DEP of which rules they want to discuss so the right agency person can be at the meeting. He also asked them to submit comments prior to the meeting if possible.

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES
Wednesday – May 30, 2007
10:00 a.m. – 12:00 p.m.
601 57th Street, SE, Charleston, WV
West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

Rick Roberts
Karen Price
Bill Raney
Larry Harris - Teleconference
Jackie Hallinan

DEP:

Randy Huffman, Deputy Cabinet Secretary/Director –Division of Mining & Reclamation
Karen G. Watson, Assistant General Counsel
Lisa McClung, Director – Division of Water and Waste Management
John Benedict, Director – Division of Air Quality
Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office
Pam Nixon, Advocate
Jim Mason, DAQ
Mike Zeto, DWWM – EE
John Morgan, DWWM
Scott Mandirola, DWWM
Greg Adolfson, PIO

VISITORS:

Dave Yaussy
Brittany Carns
Joe Gollehon
Gregory Hoyer
Jeff Mauzy
Amy Christy

Randy Huffman, Deputy Cabinet Secretary - West Virginia Department of Environmental Protection called the meeting to order at 10:00 a.m. Advisory Council Member Larry Harris joined the meeting via teleconference. Deputy Cabinet Secretary Huffman then turned the meeting over to Karen Watson, Assistant General Counsel for the West Virginia Department of Environmental Protection. Karen informed the Council that the agency had received comments from several Council members and those comments would be appended to the minutes. (see attached) She explained the agency

had representatives from each of the programs to answer questions for the rules identified in those comments. She also explained the agency had made several changes in the rules as a result of those comments.

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

Proposed Rule 6 is now a basic open burning/ incinerator rule. Revised scope includes 'statutory air pollution,' addition of new language for posted operating instructions and open burning or incineration of animal or poultry carcasses during a declared state of emergency. Except for temporary Air Curtain Incinerators for land clearing debris (DOH jobs) and incineration of animal or poultry remains, most Air Curtain Incinerators will now be exempted under Rule 6 and placed under Rule 18.

COMMENT

Larry Harris: Had raised the issue of "low-level radioactive waste" in the last meeting.

DEP Response: DEP has removed the chemotherapeutic waste and low-level radioactive waste provisions from the proposed rule. The proposed rule does not in any way affect current medical waste incineration rules now on the books.

45CSR8 – Ambient Air Quality Standards

SUMMARY

NAAQS rules 45CSR8, 45CSR9 & 45CSR12 have been combined for the 2008 legislative session. Rule 8 is now the complete NAAQS incorporation by reference rule, and 45CSR9 & 45CSR12 will be repealed and replaced. Revisions to SO_2 & PM NAAQS include correction of SO_2 annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour $PM_{2.5}$ standards, and addition of measurement methods for $PM_{2.5}$. Revisions to CO & Ozone NAAQS include revocation of one-hour ozone standard except for Berkeley & Jefferson counties, identification of one-hour ozone maintenance areas, and addition of 8-hour primary and secondary ozone standards. Revisions to NO_2 and Lead NAAQS include addition of primary and secondary standards for lead, and addition of measurement methods for lead. Revisions also include general language updates, improved citing and consistency.

COMMENT

Karen Price: Section 4.2.c – $PM_{2.5}$ Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m^3. This should be 65 ug/m^3, pursuant to 40 CFR 50.7.

DEP Response: On October 17, 2006, the federal NAAQS regulation changed from 65 to 35.

Larry Harris: Restated his concern that the standards may not be stringent enough to protect public health. He also restated his question about the antidegradation language struck from the rule.

DEP Response: DEP cannot lower the NAAQS standards below that of federal levels unless the provisions for the stringency test in §22-1-3a are fully met. 45CSR14, in its entirety, has wholly replaced the intent of the relic anti-degradation language struck in proposed Rule 8.

45CSR39 – Control of Annual Nitrogen Oxides Emissions

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

Ozone Season CAIR NOx Rule - Incorporates revisions 40 CFR to Part 96.

Annual CAIR NOx Rule - Incorporates revisions to 40 CFR Part 96.

45CSR41 – Control of Annual Sulfur Dioxide Emissions

Annual CAIR SO_2 Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

Karen Price: Asked why the opt-in language was deleted from each of these rules.

DEP Response: has removed the opt-in provisions in the three CAIR rules so that West Virginia can say that CAIR equals NOx RACT for EGUs under the PM2.5 implementation rule.

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

The Greenhouse Gas Inventory Program Rule is authorized by SB337 passed in the 2007 legislative session. The rule establishes a program which requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount; inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions, capture and sequestration; provides for: a periodic compilation of a greenhouse gas inventory; a determination whether WV is a net sink or emitter; development of a registry for voluntary reductions; and a determination whether greenhouse gas can be developed as an asset for economic development.

COMMENT

Karen Price and Larry Harris: Both asked about the definitions of "anthropogenic" and "biogenic" in the rule and asked for examples of each.

DEP Response: An example of an anthropogenic source is the coal extraction process and an example of a biogenic source is the erosion of soil exposing a coal seam. The agency does not plan

to ask sources to report biogenic activities. In order to receive credit a source must report all of its emissions.

Karen Price: Can the reporting requirement in section 4.1 be made consistent with the emissions inventory requirements.

DEP Response: The date in the rule is March 31st and is the same as the emissions inventory date.

Karen Price: Does not believe fees should be required for greenhouse gas reporting.

DEP Response: The agency will consider the issue.

Karen Price: The last sentence in section 5.3 allowing the Secretary to request information is not authorized by statute.

DEP Response: It is authorized by the statute.

Karen Price: There should be a reasonable protocol for reporting emissions.

DEP Response: D AQ purposely wrote the rule in a manner flexible to the Secretary, as greenhouse gas reduction quantification protocols are still being developed at this time.

Karen Price: Is WV going to sign on to the climate registry or are we going to have our own?

DEP Response: In order to trade, we have to be consistent with other programs, but we do not want to be more specific in the rule.

Bill Raney: The exemption in section 3.2 includes language referring to sources covered by chapter 22-3 as well as sources required to report emissions. We are concerned this may take the exemption in the statute away.

DEP Response: While the agency did not want to require mining extraction to report emissions, thermal dryers associated with coal prep plants often have huge emissions of greenhouse gases. That is the reason the statute and rule only exempt sources permitted under chapter 22-3.

Division of Water and Waste Management

33CSR9 – Standards for Beneficial use of Filtrate from Water Treatment Plants

SUMMARY

This legislative rule establishes a mechanism and requirements for the permitting, siting, bonding, and use of water treatment plant sludge from water treatment plants that has beneficial properties. This rule applies to the beneficial use of water treatment plant sludge and to any person who seeks approval from the Secretary to beneficially use such sludge within the state. This rule is intended to enhance the resource recovery and recycling goals of article fifteen of chapter twenty-two of the West Virginia Code and to encourage the beneficial use of water treatment plant filtrate. Section 22-

15-23 of the West Virginia Code and this rule, and not the provisions of W. Va. Code § 22-15-10 or 33 CSR 1, shall govern the beneficial use of water treatment plant sludge. This rule does not apply to sewage sludge, products derived from sewage sludge, sludges regulated under 33 CSR 8, or materials regulated as hazardous waste under W. Va. Code §§22-18-1, et seq.

COMMENT

Larry Harris: DEP made changes to this rule during the Interims process last year, and the rule now requires a permit for both short-term and long-term applications. This is a good change. However, we feel that most of the information required in Section 7.3. Permit Application Requirements for long-term permits should also be required for short-term permits.

DEP Response: The requirements of section 7.3 were intended to be directed toward facilities that proposed to land apply filtrate as the beneficial use. It was intended to be applicable to both, if land application was the proposed method of reuse. Section 7.3 will be revised to more clearly reflect the applicability of the requirement for both long-term and short-term, if land application is the proposed beneficial reuse.

Rick Roberts and Larry Harris: Regarding the environmental effects of disposal of sludge are the values in Table 1 of the rule sufficient?

DEP Response: The Table 1 values are the same as the sewage sludge levels in DEP's other rules, and the agency believes they are supported by sound science.

Rick Roberts and Larry Harris: Mr. Harris expressed concern with the distinction between "beneficial reuse" and "disposal." Mr. Roberts believes that his concern is satisfied by the language in section 3.1.b.1.

Rick Roberts: The rule should include general permits as proposed.

Larry Harris: Only individual permits should be allowed under the rule.

DEP Response: There will be public notice in the general permit process.

33CSR30 – Underground Storage Tanks

SUMMARY

There are several new provisions to reflect the 2005 Federal Energy Act, including: secondary containment requirements for new or replaced thanks or piping; secondary containment requirements for new or replaced fuel dispenser systems; tank eligibility for delivery, deposit or acceptance – enables agency to prevent deposit or delivery to a tank that is not in compliance; and training requirements for individuals who operate, maintain or are responsible to address emergencies from spills or releases from underground storage tank systems.

COMMENT

Karen Price: Section 6.1. states "....including any person who accepts a delivery order, accepts payment, delivers or deposits product into an underground storage tank.....". The portion that states "...accepts payment..." should be removed from this section because those individuals within a company who accept payment or make payments most often do not know anything about the underground storage tank (UST), the operation of the UST, or the current regulatory status of the UST.

DEP Response: This language will give the agency a better handle on transporters and middle-men involved in the process.

Karen Price: Section 7.3.a.1. states "....the methodology for verifying attendance, the date, time and location of the course, the name of the offering organization, the credentials of the instructors, and a certification that the technology or methods.....".

1. The portion that states "..the date, time and location of the course,...." should be deleted. For large companies with many UST installations and locations there can be numerous individuals that need to be trained. Training will most likely occur on multiple dates, times, and locations that may not always be known until just prior to the training event. When new employees are hired training might occur on short notice and for one individual. The burden of having to report the dates, time and locations would hinder and slow down the training process and restrict a company's ability to comply.

2. The portion that states "...the credentials of the instructors..." should be removed. Credentials will vary from instructor to instructor new instructors might be utilized, and a company might not know which instructors will be used at the various training sessions until just prior to the training session. In addition, the course content is the main issue of concern and should be the main focus in obtaining State approval of a training program.

DEP Response: Regarding dates, times and location of the training the agency will not require the information prior to the training. As far as the credentials of the instructor the agency needs this information as part of its curriculum review, in this case before the training.

Karen Price: Section 7.3.a.2 - This section states that a nonrefundable application fee of $280 must be submitted with the application. Larger companies may have one training program, but administer the training on multiple dates, times and locations. Having to submit an application for approval of the training program each time the program is administered would be cost prohibitive, burdensome, and would hinder the training process.

DEP Response: The agency agrees and believes the rule only requires a one-time fee.

Rick Roberts: Regarding the $5.00 per ton fee, how does a source measure the tonnage? Perhaps the agency should consider using a cubic-yard approach.

DEP Response: The agency will consider.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

The proposed revisions reflect updates identified during the federally-mandated triennial review of the Water Quality Standards rule. These include proposed additions to the trout water list, new criteria for nutrients, revisions to criteria in Appendix E and a use redesignation in the Guyandotte River Basin.

COMMENT

Larry Harris: Does the use removal in section 7.2.d follow the federal Clean Water Act requirements?

DEP Response: Yes, the agency followed all the requirements, federal and state, and required extensive information from the company. The agency also conducted two public meetings.
Bill Raney: Mr. Raney repeated his concern with the listing of trout waters in the rule and the fact that the list has to be approved by the Legislature. Karen Price agreed with this comment. Jackie Hallinan and Larry Harris did not agree with this comment.

Karen Price: Questioned the need for Appendix D, because the Category C use applies to all state waters.

DEP Response: Agency will consider.

Karen Price: Will the agency consider not making use removals go through the legislative process.

DEP Response: The agency decided not to include any language pertaining to this issue at this point in time, but will be subjecting this issue to the public participation process in the coming months.

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

Antidegradation is a requirement of the federal Clean Water Act intended to preserve the existing quality of the State's waters and to prevent and/or minimize future degradation. The rule was first adopted in 2001 and establishes four levels, or tiers, of protection for state waters, Tiers 1, 2, 2.5 and 3. Each tier provides a graduated level of protection used during the NPDES permit issuance process. The proposed revisions to the rule carry forward the agency's antidegradation implementation efforts, and move the Tier 2.5 streams that had been on the "presumptive" list in Appendix C to a final proposed list in Appendix A. The agency is proposing a total of 156 streams be included on the list. The list of 156 waters is comprised of the 37 waters that did not receive objections in the formal objection period, those waters that contain reproducing trout and are 100% on public land, those waters listed as high quality on public land based on their high biological scores, and Loop Creek.

COMMENT

Larry Harris: Scientific criteria should be used to add or delete streams from the Tier 2.5 list.

Rick Roberts: Can the SRF program give priority to facilities impacted by the Tier 2.5 list?

DEP Response: Agency will take this under advisement.

Larry Harris: Is the nomination process adequate?

DEP Response: The agency believes the process is generally adequate and workable. If, however a large number of streams are nominated at one time, the individual notification requirements may be difficult and costly.

At this point in the meeting, Bill Raney submitted written comments regarding several mining rules. (see attached)

60CSR8 - Environmental Excellence Program

Greg Adolfson summarized the rule revisions. He said the changes would provide more flexibility for the agency to approve or disapprove of incentives in the program, as well as other flexibilities.

SUMMARY

Changes are being proposed to the Environmental Excellence Program Rule (60CSR8) to better align with and follow the momentum of the United States Environmental Protection Agency's National Environmental Performance Track Program. Additionally, the primary purpose for the changes is to give more flexibility to the Department of Environmental Protection Cabinet Secretary in areas such as: Eligibility Criteria for Participation (section 4); Environmental Performance Record (section 5); Environmental Management System (section 6); Public Participation (section 8); Incentives (section 9); Procedures for Application (section 10); and Annual Performance Report (section 14). Language, such as "may include, but will not be limited to, the following," has been added to allow for this flexibility.

COMMENT

Rick Roberts: Why is section 6.2 completely deleted?

DEP Response: The section is not completed deleted, just the 1996 standards. This will allow the agency to use the most current standards.

Bill Raney: How many companies are participating in the program?

DEP Response: There are two in the National Program, Toyota and Dow.

Jackie Hallinan: The program is a good idea.

Meeting was adjourned by Deputy Cabinet Secretary Randy Huffman.

Council Meeting – 5/30/07
Comments
Submitted
by Bill Raney

Bill...

Here are some preliminary comments provided by the Environmental-Technical Committee on the rules that will be reviewed by the Advisory Council:

Water Quality Standards Rule (47CSR2)

Only concern relates to the Trout Stream List:

Inclusion of a stream in the codified list contained in the rule forever locks in unrealistic WQS on that stream regardless of existing and/or future water quality. The lower standards are very problematic for the coal industry by targeting iron and aluminum.

WVCA believes the list is immaterial to protection of the existing use if it is indeed a trout stream.

WV DEP, in the NPDES permitting process, will apply appropriate trout stream effluent limitations if the agency believes a stream to have a trout population regardless of whether or not it in on the codified list contained in the water quality standards rule or not. The only difference is that in the permitting process, the applicant has the opportunity to present data and sampling to refute the agency's assertion that a stream is a trout stream, and has a right of appeal if they continue to disagree with agency's assignment of trout stream limits. The ability to dispute the trout stream designation is very important, especially since some of the data supporting the current initiative to expand the codified list is decades old.

If a trout stream is included on the codified list approved by the legislature, the only option for removing that designation is to once again pursue a legislative fix. Under those circumstances, it is easier to just challenge the entire expansion of the trout stream list.

The massive expansion of the trout stream list as currently proposed is much more restrictive than the standards found in surrounding states, where the regulatory agencies have developed different levels and categories of trout streams. West Virginia continues to treat all trout streams the same as though they were native, naturally-reproducing, cold water streams that deserve the highest levels of protection. This is simply not true, as many streams in West Virginia are stocked trout streams where the existing, in-stream water quality is lower than the established effluent guidelines for native trout streams.

Mining & Reclamation Rule (38 CSR 2)

Main concern relates to 14.15.c.2, regarding contemporaneous reclamation and valley fills:

This revision will penalize operators that are constructing "bottom-up" valley fills, the agency's preferred method of fill construction by unnecessarily restricting when such fill can be counted as "reclaimed" under the state's contemporaneous reclamation rules. These rules already vastly exceed the federal requirements and those of any other surrounding state, and this change will only make them worse.

Additionally, this proposed revision was deleted during the Legislative session in 2007.

401 Water Quality Certification Rule (47 CSR 5A)

The changes to this rule are totally un-necessary, and add further detail and complication to a state mitigation rule when the Legislature has specifically instructed the agency to better align its mitigation program with that of the Corps of Engineers. Several years ago, the Legislature passed a bill directing WV DEP to provide state mitigation credit for Corps mitigation. While this has occurred, we feel the revisions to this rule will drive the two programs further apart. Additionally, we know of no state statutory revision that necessitates these changes....the state mitigation program has functioned for years without this level of detail, and we question why it's needed now.

Further, we are concerned that the rule seeks to change definitions that should only be revised in the statute with Legislative approval. For example, the revisions jettison the long-used references to stream types and insert reference to ordinary high water mark. This appears to be an effort to expand the definition of "waters of the state" to all cover every erosional feature, regardless of whether or not it actually functions as a stream.

West Virginia Coal Association

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July 18, 2006

Mr. Charles Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street SE
Charleston, WV 25304

Re: Comments on Proposed Revisions to 47 CSR 5A

Dear Mr. Sturey:

Pursuant to the notice filed with the Secretary of State on June 15, 2006, the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to 47 CSR 5A, "Rules for Individual State Certification of Activities Requiring a Federal Permit".

WVCA is a non-profit state trade association representing the interests of the West Virginia coal industry on policy and regulatory issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's primary goal is to enhance the viability of West Virginia's coal industry by supporting efficient and environmentally responsible coal extraction and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA appreciates the opportunity to provide comments regarding the West Virginia Department of Environmental Protection's (WVDEP") proposed revisions to the state's Clean Water Act ("CWA") Section 401 certification rule.

General Comments

WVCA is very concerned about the WVDEP's proposal to add detail to its § 401 mitigation program, particularly at this time. The WVDEP has not articulated any problems with implementation of its existing mitigation program pursuant to this rule, and the WVCA sees no benefit to adding further detail and complexity now. Even more importantly, the WVCA understands the history of the WVDEP's § 401 mitigation program, and believes that the very basis for its development years ago no longer exists. The WVDEP's program has been fully replaced by the federal mitigation program which has developed into a comprehensive program and is the subject of new joint United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA") rules to update and conform their collective mitigation goals and requirements. The state's mitigation requirements, at least as they relate to mitigation for activities permitted by a CWA § 404 permit, have become obsolete and duplicative.

History of State § 401 Mitigation Requirements.

The state's mitigation program as maintained by the WVDEP and implemented through the § 401 rules is not a required component of the federal § 404 permitting program. The § 401 certification program is intended to insure that

issuance of a federal permit does not result in a violation of state water quality standards:

> CWA section 401 provides that states certify that federal activities or activities requiring federal approvals relative to CWA section 404 would not violate applicable effluent limitations, or other limitations, or other water quality requirements.[1]

Instead, the state has independently required mitigation as a condition of § 401 certification. Implementation of the state's mitigation program and requirements dates from a time when the Corps imposed no federal mitigation requirement on mining operations authorized by the § 404 General Permit for coal mining operations, Nationwide Permit 21("NWP 21"):

> [NWP] 21. Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM) or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. **The notification must include an OSM or state-approved mitigation plan** (emphasis added).[2]

Based on the requirements of the NWP 21, a state mitigation plan was required for a mining-related § 404 permit (usually a NWP 21) to be issued by the Corps:

> Prior to reissuance of NWP 21 in January 2002, the COE [Corps] considered mitigation adequate with the inclusion of an OSM or state-approved SMCRA onsite mitigation plan in the permit application.[3]

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[1] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. page II.C-42.
[2] Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Dec. 13, 1996. 61 Fed. Reg. 241.
[3] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page II.C-52

West Virginia implemented this program through the § 401 certification program which imposed monetary or in-lieu fee requirements on coal mining related § 404 permits.

In 2002, the Corps revised and reissued NWP 21 adding a condition that the Corps' District Engineer require federal mitigation, reviewed and approved by the Corps in accordance with its joint mitigation rules and regulations maintained with the EPA.[4] The revised and reissued NWP 21 allowed the Corps to consider state mitigation when determining federal mitigation, but removed the automatic acceptance of state-required mitigation as sufficient for § 404 authorization. From this point on, the state mitigation requirements as maintained in the § 401 certification process became duplicative because the Corps was requiring federal mitigation plans as part of the § 404 permitting process.

Federal Mitigation Requirements are Comprehensive.

Coal mining-related § 404 permitting and mitigation has evolved since the Corps's reissuance of NWP 21 in 2002. Most mining projects are now permitted using the Corps' Individual Permit process and mitigation plans are now developed based on the Corps's and EPA's combined preference for on-site, in-kind mitigation to restore the impacted aquatic resource.

As you know, coal mining operations are typically subject to the federal CWA § 404 program and the state § 401 certification program because of

[4] Final Notice of Issuance, Reissuance and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Jan. 15, 2002. 67 Fed Reg. 10.

activities undertaken in jurisdictional waters. The steeply-sloped terrain of West Virginia is permeated by small ephemeral and intermittent streams that serve to drain natural runoff into larger perennial stream systems. Any development in these areas--coal mining or otherwise--will result in some form of impact to small streams. Unlike many other activities subject to § 404 permitting and § 401 certification, mining activities are mostly temporary in nature, with the reclamation process providing a unique opportunity for reconstruction of impacted stream segments.[5] The Corps has recognized this opportunity for on-site, in-kind replacement/restoration of impacted aquatic resources and issued guidance encouraging this type of mitigation:

> This guidance acknowledges the uniqueness of regional and site-specific conditions, recognizes that features constructed in accordance with the Surface Mining Control and Reclamation Act may contribute to overall mitigation plans, and identifies several appropriate ways to accomplish appropriate mitigation projects.
>
> Surface mining operations can result in the creation of intermittent and and/or perennial streams depending on the on-site hydrologic conditions and the chosen method of dealing with groundwater and/or runoff. Applicants are encouraged to optimize these opportunities for on-site mitigation.
>
> ...Corps staff, Office of Surface Mining staff, and the mining operator should coordinate to explore options for incorporating...features required by SMCRA into compensatory mitigation plans. If successfully implemented, channels and other features will help maintain and potentially improve the physical, chemical and biological integrity of waters of the United States.[6]

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[5] See pages ____ of attachment "A", comments filed by WVCA concerning the draft federal mitigation rule.

[6] "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining." U.S. Army Corps of Engineers. May 7, 2004

In addition to the Corps's above-cited guidance for mining, on-site, in-kind mitigation remains the preferred means of performing mitigation for other authorized impacts to aquatic resources:

> In the interest of achieving functional replacement, in-kind compensation of aquatic resources will often be appropriate.[7]
>
> Mitigation should be required, when practicable, in areas adjacent or contiguous to the discharge site. On-site mitigation generally compensates for locally important functions, e.g., local flood control functions or unusual wildlife habitat.[8]
>
> Compensatory mitigation should generally be "in-kind" and occur as close to the site of the adverse impact as practicable in order to minimize losses to the local aquatic ecosystem.[9]

To satisfy the Corps's preference (enunciated in previously-cited Regulatory Guidance Letters issued by the Corps) for in-kind mitigation, or a functional replacement of the impacted resources, a Functional Assessment Protocol, referred to as the "Central Appalachian Protocol", has been used for several years now by the Huntington District to assist in assessing and assigning mitigation requirements for mining-related projects.[10]

Unfortunately, the WVDEP has to date largely ignored the mitigation guidance and requirements developed and imposed by the Corps, as well as the functional assessment protocol. The WVDEP has continued to implement its duplicative § 401 mitigation requirements, and typically requires mitigation above

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[7] Regulatory Guidance Letter No 01-1. U.S. Army Corps of Engineers, October 31, 2001.
[8] Regulatory Guidance Letter No 02-2. U S Army Corps of Engineers, December 24, 2002.
[9] Compensatory Mitigation Guidelines- Huntington District U.S Army Corps of Engineers, Huntington, WV District. January 30, 2004.
[10] See attached power point presentation---Central Appalachian Protocol.

and beyond that which is required by the Corps despite the mandate of W. Va. Code § 22-11-7a(a)(2)(C):

> The Director shall provide credit for any mitigation that is a required component of the permit issued by the United States Army Corps of Engineers pursuant to 33 U.S.C. § 1344 to the extent that it satisfies required mitigation pursuant to this section.

Because a comprehensive federal mitigation program is being implemented, the WVDEP's failure to provide credit for such mitigation ***as mandated*** is a serious concern to the WVCA. To the extent a state program is relevant at all, perhaps to address the limited circumstances where the state's definition of "waters of the state" is broader than the CWA definition of "waters of the United States," it should be narrowly tailored to address that need. The WVCA cannot support proposed revisions that are not so narrowly tailored.

WVCA urges WVDEP to postpone pursuit of these proposed revisions at this time and to more fully consider the need for its separate mitigation program in light of (1) the federal mitigation now required as part of a § 404 permit, (2) the possibility of creating inconsistencies with the draft federal Corps and EPA rule for mitigation, (3) the deletion of NWP 21 conditions relating to state mitigation, and (4) the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

Specific Comments

Page 4 4.2.f.2.A. Economic Info[redacted]tion about the coal mi[redacted]g operations, including, without limitation, the estimated nu[redacted]r of jobs created, the e[redacted]ated proportion of employees who will be residents of Wes[redacted]rginia, the estimated a[redacted]al payroll, the

estimated annual coal production (if applicable), the estimated life of the operation, the estimated severance tax for the operation, the estimated annual property tax, and such other economic information as may be requested by the agency.

WVCA questions why this level of information is needed for the § 401 certification process. Similar information is provided to the Corps under the § 404 permitting program and to the state through the Community Impact Statement. The justification for requiring duplicative information as part of the § 401 certification process is lacking. Further, we are puzzled as to why this information is required only for mining operations. Sections 404 and 401 of the CWA apply to all manner of filling activities, not just coal mining operations. If this information is needed by the WVDEP to properly implement the § 401 certification process, then it should be required for all dredge and fill activities. If it is not, then it should be removed from the proposed revisions. Without further explanation and justification, the WVCA does not support this proposed revision.

4.2.f.4. A Delineation of the Stream to be Impacted. The length, width and depth of the stream segment impacted shall be measured. Width and depth measurements shall be made at one hundred (100)foot intervals. The stream delineation shall indicate the ephemeral and intermittent/perennial segments to be impacted. The stream shall be measured from the farthest downstream disturbance, excluding stream crossings associated with haul roads for surface mining operations, upstream to the beginning of ~~an intermittent stream, as defined in 46 CSR 1-2.9 and/or 38 CSR 2-2.71.~~ the ordinary high water mark. The applicant shall provide a table listing the station number with the corresponding acreage, including the drainage area from the toe of the pond and the toe of the fill.

As proposed, this revision appears to extend the reach of the state's jurisdiction and expand the WVDEP's mitigation requirements under the § 401 certification program. While this change may be motivated by a desire to more closely align the state's mitigation requirements with those of the Corps, the

WVDEP's first and most needed step in that direction is compliance with W. Va. Code § 22-11-7a(a)(2)(C). Until the WVDEP revises its mitigation rules and policies to accept Corps-required mitigation, this proposed change will serve only to increase the amount of in-lieu fee mitigation provided to the state, with no resulting environmental benefit. Further, the proposed change appears to be counter to the authorizing statute which bears no mention of the "ordinary high water mark." The WVCA does not support this proposed revision.

6.2.b.1. Compensatory mitigation shall be required for all permanent and temporary stream impacts resulting from coal related activities in watersheds greater than or equal to two hundred and fifty (250) acres and/or when the activity results in a stream loss or impact exceeding one half (1/2) acre of stream. The drainage area and ½ acre assessments shall be measured starting from the toe of the most downstream permanent or temporary impact (excluding stream crossings) in which the activity occurs.

WVCA believes that this proposed revision extends the authority of the state beyond the authorizing, underlying statute:

> 1) If the applicant's surface coal mining operation will not impact waters of the state designated as national resource waters and streams where trout naturally reproduce and will not impact wetlands of the state in a manner inconsistent with all applicable state or federal standards as the case may be, as required by the federal Clean Water Act, and if the watershed above the toe of the farthest downstream permanent structure authorized pursuant to the United States Army Corps of Engineers permits issued in accordance with 33 U.S.C. §1344 and 33 C.F.R. Parts 323 or 330 is less than two hundred fifty acres, then the director may issue a water quality certification pursuant to the requirements of this section. If the watershed above the toe of the farthest downstream permanent structure impacted is equal to or greater than two hundred fifty acres, the director shall require that mitigation be undertaken. Additionally, the director may require mitigation for temporary impacts to waters of the state as specified in subdivision (2) of this subsection.

(2) If the watershed above the toe of the farthest downstream permanent structure authorized pursuant to the United States Army Corps of Engineers permits issued in accordance with 33 U.S.C. §1344 and 33 C.F.R. Parts 323 or 330 is greater than or equal to two hundred fifty acres and all other necessary requirements are met consistent with this section, the director shall further condition a water quality certification on a requirement that the applicant mitigate the expected water quality impacts under the following conditions…

The above-cited statute contains no reference to "1/2 acre" of stream. Apparently, the agency is attempting to further extend its jurisdiction or merely implementing past policies that existed with respect to coal and non-coal mitigation. Since the statute contains no reference to ½ acre of stream, **WVCA suggests the agency delete this proposed revision. If the agency truly believes that this change is necessary, it should seek a legislative revision to 22-11-7(a) and only then seek to modify the rule.**

~~6.2.d.1. Permanent impacts for coal related monetary mitigation will be assessed at $200,000 per acre of impacts in watersheds greater than or equal to two hundred and fifty (250) acres from the toe of the farthest downstream permanent structure, and/or exceeds a ½ acre of loss or impact of stream.~~ Monetary compensation for stream impacts resulting from coal related activities shall be assessed as follows:

6.2.d.1.APermanent impacts for coal related monetary mitigation will be assessed at $200,000 per acre of impacts

6.2.d.1.B Temporary coal related stream impacts resulting from structures (excluding stream crossings) that will be removed prior to final bond release will be assessed at $20,000 per acre of stream impact per each five-year period of impact and/or prorated for each year the impact occurs.

6.2.d.1.CTemporary coal related stream impacts resulting from stream crossings (i.e. culverting) and stream relocations where the stream impact is greater than or equal to two hundred one (201) lineal feet, but less than or equal to four hundred (400) lineal feet and is in place for five years or more, shall be assessed at $20,000 per acre for the first five (5) year period and prorated for each additional year the impact shall occur. A temporary stream impact resulting in more than four hundred (400) linear feet shall be monetary compensated at a rate of $20,000 per acre per each five (5) year term and/or prorated for

each year the impact occurs.

As noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, because § 404 permit mitigation plans cover both permanent and temporary impacts, there is no need for the duplicative state provision for monetary mitigation. As explained in our general comments, the Corps and EPA have continuously stressed a desire for on-site, in-kind mitigation. Using the "Central Appalachian Protocol", coal mining operations have been providing on-site, in-kind mitigation through the reclamation and stream reconstruction process. These projects have been embraced by the Corps and EPA through mining-specific regulatory guidance.

WVCA questions the need for these revisions, and urges WVDEP to re-evaluate the need for this provisions in light of the federal mitigation now required as part of a § 404 permit and the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

6.2.d.1.D Permanent wetland impacts for coal related monetary mitigation will be assessed at the rate $30,000 per acre of wetland replaced based on the ratios in section 6.2.c.

Again, as noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, § 404 permit mitigation plans cover

both permanent and temporary impacts to all impacted aquatic resources, including wetlands, and there is no need for the duplicative state provision for monetary mitigation for wetland impacts.

To the extent WVDEP nevertheless chooses to pursue this proposed revision, it has no justification for the $30,000 replacement value proposed. In addition, by proposing this specific amount, the WVDEP has excluded any opportunity to determine a monetary mitigation amount for wetlands on a case-by-case basis, which could be either higher or lower than $30,000 per acre.

In-lieu fee payment for wetlands impacts is a desirable option to have, but we question whether the agency will ultimately determine that wetland replacement as already specified in the rule is sufficient. The WVCA cannot support this proposed revision without additional justification and explanation, and again urges the WVDEP to re-evaluate the need for this provisions in light of the federal mitigation now required as part of a § 404 permit and the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

Sincerely,

Jason Bostic, Vice President
Regulatory & Technical Affairs

West Virginia Coal Association

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Ms. Gloria Shaffer
West Virginia Department of Environmental Protection
Division of Water and Waste Management
Water Quality Standards Program
601 57th Street SE
Charleston, WV 25304

Via Electronic Mail: Gjshaffer@wvdep.org

Re: Comments on 2007 Triennial Review of Water Quality Standards

Dear Ms. Shaffer:

Pursuant to the September 22, 2005 announcement by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's first triennial review of water quality standards.

WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's producing members account for 80 percent of the Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally

criteria. EPA is currently in the process of revising the nationally-recommended selenium criteria.[6] Because of the flawed nature of the current selenium criteria and its inappropriate application to flowing waters in West Virginia, WVCA is supportive of this federal initiative. However, we caution WV DEP to fully analyze the appropriateness of applying any federally-revised standard in West Virginia. Available information seems to indicate that a state-specific selenium standard for West Virginia may be warranted, as fish populations appear to be healthy and diverse in streams with identified selenium concentrations.[7] The pressing nature of selenium also warrants that WV DEP investigate a state-specific criteria for West Virginia since the federal revisions remains pending. The agency has recently completed draft TMDL documents that impose selenium allocations based on the existing water quality criteria, and will continue to develop and implement selenium TMDLs, adding urgency to this important issue.

Trout Streams

In the EQB's last triennial review, it proposed adding some 400 streams to the list of Trout Waters contained in the water quality standards rule. The EQB allowed only a 30-day comment period on this major expansion of the Trout Waters list. The EQB proposal was based only on the recommendations of the

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[6] See Attachment "F", October 29, 1999 Federal Register Notice published by EPA regarding revision of the selenium criteria and Attachment "G", December 17, 2004 Federal Register Notice announcing draft criteria and requesting public comments.

[7] See Attachment "H", relevant pages from comments filed by the National Mining Association and WVCA regarding the programmatic Mountaintop Mining/ Valley Fill Environmental Impact Statement and *Fish Communities and Their Responses to Environmental Factors in the Kanawha River Basin, West Virginia, Virginia, and North Carolina*. U.S. Geological Survey, 2001.

West Virginia Division of Natural Resources, with no accompanying data or information on whether or not the streams actually meet the requirements to be classified as trout waters. Based on the lack of information regarding the current status of the proposed trout waters and the limited opportunity for comment provided, the West Virginia Legislature rejected the revision.

The permitting ramifications of classifying streams as trout waters can be significant, as different water quality standards (uniformly more stringent) apply to trout streams. Incorrectly classifying a water as a trout stream can have serious economic impacts for property owners and NPDES dischargers along that streams and should not be taken lightly be WV DEP. Before the agency undertakes any effort as part of its 2007 triennial review to list any additional streams as trout waters, WV DEP should conduct scientific investigations of water quality and fish populations in order to ascertain if a water body meets the criteria required of a trout stream. The agency should also hold hearings in the communities where such streams are located to take comment from the persons most familiar with the conditions of these streams.

We appreciate the agency's consideration of these comments.

Respectfully Submitted,

Jason D. Bostic
West Virginia Coal Association

West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 ■ (304) 342-4153 ■ Fax 342-7651 ■ www.wvcoal.com

July 17, 2006

Mr. Charles Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street SE
Charleston, WV 25304

Re: Comments on Proposed Revisions to 38 CSR 2

Dear Mr. Sturey:

Pursuant to the notice filed with the Secretary of State on June 15, 2006, the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to 38 CSR 2, the state's Mining and Reclamation rules.

WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's membership accounts for over 80 percent of the Mountain State's underground and surface coal production. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal extraction and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA appreciates the opportunity to provide comments to the West Virginia

Department of Environmental Protection (WV DEP) regarding the proposed revisions to the state's mining and reclamation rule.

Specific Comments

3.2.g. Notice of Technical Completeness. After the Secretary deems a Surface Mine Application technically complete, the Secretary shall cause the applicant to advertise stating such. The notice shall state that the application has been deemed technically complete by the Secretary and include a fifteen (15) day public review period. Provided, however, Notice of Technical Completeness may not be necessary if the application was technically complete prior to the end of the comment period of the original advertisement and a decision is made within ninety (90) day of the end of the comment period or informal conference.

WVCA believes this revision is unnecessary. Existing state rules provide the agency with authority to require re-advertisement:

> 3.2.e. Re-advertisement. After a Surface Mine Application (SMA) has been advertised once a week for four successive weeks, and is determined by the Secretary to have had a limited number of minor changes that do not significantly affect the health, safety or welfare of the public and which do not significantly affect the method of operation, the reclamation plan, and/or the original advertisement, he may require one (1) additional advertisement to be published with a ten (10) day public comment period.

As the above-cited provision reveals, the agency has the authority to require the additional advertisement that appears to be the goal of the proposed revision. The language of 38 CSR 2.3.e restricts the applicability of the provision to "a limited number of minor changes that do not significantly affect the health, safety or welfare of the public and which do not significantly affect the method of operation, the reclamation plan, and/or the original advertisement...." for changes that are substantive WV DEP has always required re-advertisement. Additionally,

the proposed revisions exceed the corresponding federal requirements maintained by the Office of Surface Mining (OSM) at 30 CFR 773.6. Because the agency has already has the authority to require re-advertisement, WVCA suggests that WV DEP delete the proposed revision.

14.15.c.2. Areas within the confines of excess spoil disposal fills which are under construction provided the fill is being constructed in the "conventional" method, i.e., completed from the toe up, or those fills which are being constructed progressively in lifts from the toe up or are being progressively completed from the toe up by constructing benches and appropriate drainage control structures (ditches, flumes, channels, etc.) from the toe up as soon as the ~~area is available to do so;~~ first two lifts are in and are seeded and certified;

WVCA is extremely concerned about this proposed revision and believes that it will unnecessarily restrict operating flexibility and thereby discourage the construction of "bottom-up" valley fills. WVCA strongly suggests the agency delete this proposed revision. This entire section of rules already exceeds the corresponding federal requirements of OSM, but members of WVCA negotiated the rules in good faith to remedy an agency-perceived problem with valley fill construction. These rules have been scrutinized and approved by the West Virginia Legislature and OSM. WVCA is concerned as to why the agency believes this change is necessary, and would be willing to discuss other possible remedies to the situation.

Respectfully Submitted,

Jason D. Bostic, Vice-President
Regulatory & Technical Affairs

Surface Mining 38 CSR2 (agreement)
401 Certification 47 CSR5A
TROUT LISTING

45CSR42

2.5 Biogenic Sources = include COAL

TITLE 45

LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

3.2 turned an exemption into an inclusion
5.3 "shall provide information"

§45-42-1. General.

1.1. Scope. -- This rule establishes a greenhouse gas emissions inventory program in West Virginia which:

1.1.a. Requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount of greenhouse gases on an annual basis;

1.1.b Inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions and sequestration of greenhouse gas emissions;

1.1.c. Provides for a periodic compilation of a greenhouse gas emissions inventory and a determination whether West Virginia is a net sink or emitter of greenhouse gases;

1.1.d Provides for development of a registry to record voluntary reductions of greenhouse gas emissions; and

1.1.e. Provides for a determination whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for economic development.

1.2. Authority -- W.Va. Code §22-5-19

1.3. Filing Date --

1.4. Effective Date. -- June 1, 2008.

§45-42-2. Definitions.

2.1. "Air pollutants" means solids, liquids, or gases which, if discharged into the air, may result in statutory air pollution

2.2. "Air pollution" or "statutory air pollution" means and is limited to the discharge into the air by the act of man substances (liquid, solid, gaseous, organic or inorganic) in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property.

2.3. "Anthropogenic" means a direct result of human activities or the result of natural processes that have been influenced by human activities.

2.4 "Area source" means, for purposes of this rule, a collection of similar sources of air pollutants within a geographic area Area sources collectively represent individual sources that are small and numerous, and that typically have not been inventoried as a stationary or mobile source.

2.5. "Biogenic" means a naturally occurring biological source or process that is not significantly affected by human actions or activity.

Biogenic sources include COAL

2.6. "Capture" means the collection of greenhouse gas emissions from a stationary source.

2.7. "*De minimis*" means emissions from a stationary source that are equal to or less than ten thousand tons per year for carbon dioxide, four hundred seventy-six tons per year for methane, thirty-two and six tenths tons per year for nitrous oxide, eight hundred fifty-five thousandths tons per year for hydrofluorocarbons, one and nine hundredths tons per year for perfluorocarbons and forty-two hundredths tons per year for sulfur hexafluoride.

2.8. "Emission" means the release, escape or discharge of regulated air pollutants or greenhouse gases into the air.

2.9. "Greenhouse gas" means the gaseous compounds: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (SF_6).

2.10. "Mobile source" means a variety of onroad and nonroad vehicles, engines, locomotives, marine vessels, airplanes and other equipment that generate air pollutants and greenhouse gas emissions, and that move or can be moved from place to place.

2.11. "Regulated air pollutant" means, for purposes of this rule, any air pollutant regulated under rules promulgated by the Secretary pursuant to W.Va. Code §22-5-4.

2.12. "Reservoir" means a geological site where a greenhouse gas is securely stored.

2.13. "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.

2.14. "Sequestration" means the physical process by which emissions of a greenhouse gas are directly captured for storage in a reservoir, or the biologic process by which a greenhouse gas is indirectly removed from the atmosphere for storage in a sink.

2.15. "Sink" means any process, activity or mechanism which removes a greenhouse gas from the atmosphere. Forests are considered sinks because they remove carbon dioxide through photosynthesis.

2.16. "Source" means, for purposes of this rule, any process or activity which releases a greenhouse gas into the air.

2.17. "Stationary source" means any building, structure, facility, installation, stationary process or process equipment which emits or may emit any regulated air pollutant or greenhouse gas.

2.18. "Ton" means a short ton, or 2000 pounds.

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

§45-42-3. Applicability.

3.1. Any stationary source that emits one or more greenhouse gases on an annual basis greater than the *de minimis* amounts listed in the table below, and reports emissions of regulated air pollutants pursuant to the emissions inventory requirements of the Secretary under rule or W.Va. Code §22-5-4(a)(14), shall be an affected source required to report emissions of all greenhouse gases to the Secretary under section 4:

Greenhouse Gas Compound	tons/year
carbon dioxide	10,000
methane	476
nitrous oxide	32.6

Any facility, etc.

hydrofluorocarbons	0.855
perfluorocarbons	1.09

sulfur hexafluoride	0.42

Rec plants under Title IV

3.2. Stationary sources which are regulated by the Secretary under W.Va. Code §22-3-1 et seq. and do not report emissions of regulated air pollutants pursuant to the emissions inventory requirements under W.Va. Code §22-5-4(a)(14) are not required to, but may voluntarily report their greenhouse gas emissions under section 4.

3/4 Stationary sources

§45-42-4.Reporting Requirements.

4.1. By March 31, 2009, and March 31 of each year thereafter, affected sources shall report to the Secretary the quantity of all greenhouse gases emitted in the previous calendar year.

4.2. Affected sources shall only be required to report annual quantities of anthropogenic non-mobile source greenhouse gas emissions at the source, and shall not be required to report biogenic emissions of greenhouse gases.

4.3. The Secretary shall determine the form and format of the information reported by affected sources under subsection 4.1 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

4.4. Notwithstanding the provisions of subsection 4.3, to satisfy the greenhouse gas emission reporting requirements under this section, affected sources may submit greenhouse gas emissions inventory information from documented greenhouse gas inventories such as those provided to the Environmental Protection Agency's Climate Leaders Program, Chicago Climate Exchange Registry, the International Organization for Standardization and the SF_6 Emissions Reduction Partnership for Electric Power Systems. Greenhouse gas emissions inventory information from other widely recognized and verified greenhouse gas emissions inventory programs may be submitted by affected sources under this subsection, but shall be subject to approval by the Secretary on a case-by-case basis.

4.5. Reports of greenhouse gas emissions submitted to the Secretary under this section shall be signed by a responsible official and shall include the following certification statement: "I, the undersigned, hereby certify that the data transmitted to the West Virginia Department of Environmental Protection is true, accurate, and complete, based upon information and belief formed after reasonable inquiry."

§45-42-5.Greenhouse Gas Emissions Inventory.

5.1. The Secretary shall periodically compile an inventory of greenhouse gas emissions to:

5.1.a. Characterize the relative contributions of greenhouse gas emissions from stationary, area, mobile and biogenic sources in West Virginia; and

5.1.b. Determine the extent to which greenhouse gas emissions are offset by the rate of sequestration, and whether West Virginia is a net sink or emitter of greenhouse gases

5.2. The greenhouse gas emissions inventory shall include the emissions from stationary sources reported under section 4, and other relevant information regarding significant emissions, reductions, and sequestration of greenhouse gases from stationary, area, mobile

entire surface Area / underground Area is an AREA Source

and biogenic sources requested by the Secretary under subsections 5.3 and 5.4.

5.3. To inventory greenhouse gas emissions reductions, the Secretary shall consult with the citizenry and other entities such as industry trade groups that have information relating to greenhouse gas emissions reductions, and sequestration. Upon request of the Secretary, such entities shall provide relevant information relating to greenhouse gas emissions reductions; capture and sequestration.

5.4. The Department of Agriculture, the Division of Forestry, Marshall University, West Virginia University, West Virginia Geological and Economic Survey, and the Department of Transportation shall enter into interagency agreements with the Secretary and at the Secretary's request provide:

5.4.a. Relevant information relating to greenhouse gas emissions from area, mobile and biogenic sources;

5.4.b. Relevant information relating to greenhouse gas emissions reductions and sequestration; and

5.4.c. Any assistance the Secretary may request during the development of the greenhouse gas emissions inventory.

5.5. The Secretary shall determine the form and format of the information submitted by the entities under subsections 5.3 and 5.4 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

§45-42-6.Greenhouse Gas Emissions Registry Program.

6.1. The Secretary shall develop a registry for the recordation of voluntary reductions of greenhouse gas emissions.

6.2. The greenhouse gas emissions registry program shall be as consistent as possible with developing regional, national, or international programs designed to monitor, quantify and register reductions in greenhouse gas emissions with respect to:

6.2.a. Development of criteria, based on a set of standardized emissions accounting, reporting and verification protocols, to determine baseline emissions and quantification of voluntary reductions in emissions of greenhouse gases;

6.2.b. Public recognition of such voluntary emissions reductions;

6.2.c. Consideration of voluntary greenhouse gas emission reductions when determining baselines and reduction requirements under future federal greenhouse gas emission reduction programs; and

6.2.d. The ability of sources to participate in future greenhouse gas emission trading programs.

§45-42-7.Economic Development Potential.

7.1. Using information obtained, gathered or developed under this rule, the Secretary will determine whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for economic development in West Virginia.

§45-42-8.Inconsistency Between Rules.

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

13 results for: *Biogenic*

Displaying 1 best match. Browse all 13 results below

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Biogenic substance

Wikipedia, the free encyclopedia – Cite This Source

A **biogenic substance** is a substance produced by life processes. It may be either constituents, or secretions, of plants or animals.
Examples

Coal and oil are examples of constituents which have undergone changes over geologic time periods.

Chalk, and limestone are examples of secretions (marine animal shells) which are of geologic age.

Cotton and wood is are biogenic constituents of contemporary origin.

Pearls, silk and ambergris are examples of secretions of contemporary origin.

13 More from Wikipedia »

All 13 results for: *Biogenic*

13 from Wikipedia

From: "Charles Harris" <clharris@hsc.wvu edu>
To: <jhallinan@hallinanlaw.com>, <rick@lcpsd.com>, <braney@wvcoal.com>, <PWHITE@wvdep.org>, <karen@wvma com>, <wvml@wvml org>
Date: 5/24/2007 7:54:40 PM
Subject: Re: May 30, 2007 Meeting

Trish: I received some last minute comments on 33CSR8 that I would like to submit:

§33-9-2. Definitions -- Section 2 5 defines "Beneficial Use" as "the use of a non-hazardous material for a specific beneficial purpose where it is done in a manner that protects groundwater and surface water quality, soil quality, air quality, human health, and the environment." We are concerned that it has not been adequately demonstrated that this filtrate is non-hazardous, and point to the current "inter-sex" fish issue in the Potomac River drainage which illustrates that there are unanswered questions concerning unmonitored pollutants in sludge from both water and waste treatment facilities

§33-9-2. Definitions - Section 2.5 defines beneficial uses as including "use as a fertilizer substitute, soil amendment, cover material, fill material, mulch or horticultural product, or other purpose approved by the Secretary" However, Section 33-9-3, in sub-Section 3.1 b.1 requires that "The use proposed is a reuse, and not a disposal" We suggest that the use of this filtrate as fill material is actually simply a disposal and not a "reuse." We believe this material should not be used as fill material. This would also require a change to Section 33-9-5, sub-Section 5.2.

§33-9-5. Standards for Beneficial Use of Filtrate - sub-Section 5.3 states, "The Secretary may approve the use of filtrate as fill material within fifty (50) feet of surface water upon submission of information sufficient to show that the fill material will have no significant impact on the quality of runoff reaching the surface water" Even the U.S. Forest Service has adopted stronger stream buffers for sediment runoff DEP should develop stronger stream buffers for this rule, and there should be no discretion.

§33-9-7. -- DEP made changes to this rule during the Interims process last year, and the rule now requires a permit for both short-term and long-term applications. This is a good change. However, we feel that most of the information required in Section 7.3. Permit Application Requirements for long-term permits should also be required for short-term permits

§33-9-8. Draft Permits and Public Comment. Section 8.2 a. provides for a 30-day public comment period for long-term permits, but only a 15-day public comment period for short-term permits. We oppose the shortened public notice provisions for short-term permits. The 30-day comment period should apply in both instances.

§ 33-9-11. General permits. We oppose the development of a General Permit to cover the provisions of this rule. Specific individual permits are necessary to inform potentially affected parties of the application of this material.

Appendix A -- Frequency of Monitoring. The Legislative Rule-Making Review Committee last session accepted an amendment proposed by industry that reduced monitoring tests to once a year. While we would prefer even more frequent monitoring than proposed in this rule, we hope DEP will strongly oppose any attempts to reduce the monitoring provisions provided in this rule.

Charles L. Harris
Professor of Biochemistry
West Virginia University
School of Medicine
304-293-7749
>>> "Patricia White" <PWHITE@wvdep.org> 05/21/07 4:21 PM >>>
Please be advised of the following meeting:

Comments on DEP Rules for 2007

Communicated by Larry Harris, Public Advisory Council Member

I would like to commend the staff of the DEP for the hard work and expertise used in preparing and reviewing the rules with Council. As promised, I include below some of the technical and other issues raised during the May 21 meeting of the Council, omitting some questions that were answered at the meeting. Members of the environmental community who reviewed the rules raised some of the questions.

Some of the issues mentioned below are related to the act of valley fills and determining compensation for this process. I have pointed out my view to Council previously that the permitting of valley fills is essentially allowing the destruction of upper tributaries of watersheds. As such the process should be outlawed, in my view.

47CSR2 Water Quality

We learned that the B2 list is essentially the same as submitted previously and includes the definition of trout waters cited on page 2 of the rule.

Page 11: Why is the temperature regulation on Stony River being removed?

47CSR2 (7.2.d.9) — The removal of variances, etc. on the Blackwater seems to be a strength, but why do these rivers remain "reserved" on the list? Why not just remove them?

47CSR2 (7.2.d.34.1): Adds language for site-specific applicability of water use categories and water quality criteria: "Pats Branch from its confluence with the Guyandotte River to a point 1000 feet upstream shall not have Water Use Category A and Category D1 designation."

* Is this a use removal? Yes was the answer.
* If so, did this go through the appropriate public process and use attainability analysis to justify a use removal . Did the use and attainability

analysis follow the federal Clean Water Act provision. (i.e. how was this decision justified)? Not sure this was fully answered.

47CSR2 (Appendix E):

Are the changes in concentrations for cadmium, copper, and others in Appendix E consistent with EPA changes/ recommendations? Some of the changes in hardness calculations are in response to comments from our groups last year asking DEP to be consistent—so this is good.

47CSR5A

47 CSR 5A (State Certification)

***47CSR5A (4.2.f.4): seems to be weakening the system for determining stream miles (delineation). DEP inserts the language: "The stream shall be measured from the farthest downstream disturbance, excluding stream crossings associated with haul roads for surface mining operations, upstream to the beginning of the ordinary high water mark."

This will result in fewer stream miles being "delineated" as actual stream miles, it seems. Why would you move upstream (where there are fewer inputs) to find a high water mark? Thus, it also seems fewer miles of headwaters will be mitigated for impacts.

47CSR5A (6.2.b): Typo—"loses" should be "losses"

47CSR5A (6.2.d.1): Is there a discrepancy between how monetary compensation for coal versus non-coal impacts is assessed? It may be worth determining that coal is not getting a break, in comparison to non-coal.

For example—why is it lineal miles for coal and acreage for non-coal? If they are going to assess from the high water mark—as discussed above—will this not result in fewer stream miles and thus fewer miles to mitigate/compensate? Also, there is no assessment for non-coal related temporary impacts—why?

60 CSR5 Antidegradation

I made the suggestion that the list of Tier 2.5 streams (156 in the current rule) should be returned to the same number as began the legislative session, which is 309 streams. A scientific process that included expertise

from the WVDNR, which manages trout waters, arrived at the list of 309 streams. The list now submitted with the bill was reduced by the political process. Politics should not determine which streams merit protection from pollution; science should.

Other issues:

2.11 Explanation of the addition of this trading section is needed. Is this similar to EPA rules and consistent with the Clean Water Act?

3.9 Which advisory committee is this phrase referring to:

5.5b is removed. Why?

Is the procedure for nomination and addition of streams to the tier 2.5 list adequate?

Comments from Adam Webster (WVRC)

60CSR5 (2.11): It's good that DEP provides "upstream controls" and mentions "for the same parameter" in the first sentence of the "trading" definition. Overall, the definition is good, but it is important to remember that the intent of the definition is not to allow cross-pollutant trading. With this in mind, the second sentence—"More than one parameter of concern may be traded on a given stream"—needs to be worded more restrictively (i.e. despite what the first sentence says, the second sentence could be interpreted as if cross-pollutant trading is allowed).

*** 60CSR5 (5.2): Removes (strikes) the language: "Water segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters shall generally be afforded Tier 2 protection".

Does this suggest the default is Tier 1 (if data does not suggest otherwise)? If so,why?

60CSR5 (5.6.c): The deletion is a response to lawsuit. However, the new 5.6.c suggests they cannot assess assimilative capacity when dealing with pH,

DO, temperature, and fecal coliform. We feel that they can assess these parameters and should not treat them separately.

45CSR42 Greenhouse Gases

The fact that the DEP is beginning to deal with the process of greenhouse gases that lead to global warming is commendable. Some questions on the rule were raised by Dr. Kotcon:

The greenhouse gases emissions inventory rule (45-42-1) needs to be
>strengthened considerably. The sections on emissions inventory
>(section 5, pages 3-4) is so vague as to be meaningless, especially
>as it deals with sequestration for area sources and sinks. I do not
>see how any meaningful data can be generated with this language.
How would the carbon sequestration be estimated? Has there been studies estimating the biogenic incorporation of CO2 per acre of woodland, for example? The rule appears to be a vague in how it would be implemented.

Air Quality and Emission Rules (see below)

45CSR8 Ambient Air Quality Standards

Don Garvin pointed out that the the antidegradation language was removed from this rule, and it was explained that the agency feels these provisions are now covered in 45-CSR-14("Prevention of Significant Deterioration.") However, the language that was stricken does not appear in 45-CSR-14, and the stricken language is the ONLY statement in the rules of West Virginia's antidegradation policy for air quality. The environmental community still believes the stricken language should be restored.

Here is what should be reinstated:

§45-8-2. Anti-Degradation Policy.

2.1. Pursuant to the best interests of the State of West Virginia, it is the objective of the Secretary to obtain and maintain the cleanest air possible, consistent with the best available technology.

2.2. Where the present ambient air is of better quality than the established standards, the Secretary will develop long-range plans to protect the difference between the present quality and the established standards. The plans will be based upon the best available forecasts of probable land and air uses in these areas of high air quality.

2.3. The air quality of these areas will not be lowered unless it has been clearly demonstrated to the Secretary that such a change is justifiable as a result of necessary economic or social development and will not result in statutory air pollution. This will require that any industrial, public, or private project or development which could constitute a new source of air pollutants, within an area of such high air quality, provide the best practicable control available under existing technology as part of the initial project or development.

45CSR41 Control of Annual SO2 emissions

45CSR6 Control of Air Pollution from Refuse Combustion

45CSR39 Nitrogen Oxides

I raised the general concern whether the standards for air quality were consistent with the EPA guidelines or not. Further, were any recognized health authorities consulted when these levels were determined? I also raised the issue that West Virginia is increasing supplying electricity to the population east of our mountains. New transmission lines are proposed that are to be connected with coal burning power plants. Billy Jack Gregg, Consumer Advocate for the WV PSC has pointed out that the states receiving our generated power will not permit generation plants in their region. They are concerned about air pollution and its various effects. But they need power, so they turn to West Virginia. This helps the coal industry and generation plants, but puts the health of West Virginians in jeopardy. I feel that our air quality and emission limits should be even more stringent than the EPA calls for in order to protect our citizens. This should be particularly true for power plants that export electricity.

Dr. Kotcon has raised the following issues:

45-CSR-8 Ambient Air Quality Standards

The standards for PM2.5 and Ozone are not adequately protective. I recommend that the standards be lowered from 15 ug/m^3 to 13 ug/m^3 in section 4.2.b., and from 0.08 ppm to 0.07 ppm in section 4.4.b.

The air standards (45-8-1) retains the standards for PM2.5 and ozone
>that the EPA Clean Air Scientific Advisory Council has already
>determined to be inadequate. Keeping these old standards will kill
>dozens or hundreds of West Virginians each year.

>The rule on refuse combustion (45-6-1) attempts to revise the
>definition of low-level radioactive waste and revives the
>Below-Regulatory_Concern (BRC) issue from some years ago. It also
>creates a large number of exemptions for "temporary" pollution
>sources. I am not yet sure if this re-opens old battles over
>medical waste incineration, but this was a really hot issue a few
>years back.

Comment submitted by Karen Price at Council meeting 5/30/07

Questions/Comments on DEP's 2007 Proposed Rules

- **45 CSR 8 Ambient Air Quality Standards**

Section 4.2.c – $PM_{2.5}$ Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m^3. This should be 65 ug/m^3, pursuant to 40 CFR 50.7.

- **45 CSR 39, 45 CSR 40, 45 CSR 41**

The opt-in unit language is deleted from each of these rules. What is the purpose for the deletion of these provisions?

- **33 CSR 30, Underground Storage Tank Rules**

Section 6.1. states "....including any person who accepts a delivery order, accepts payment, delivers or deposits product into an underground storage tank....". The portion that states "....accepts payment...." should be removed from this section because those individuals within a company who accept payment or make payments most often do not know anything about the underground storage tank (UST), the operation of the UST, or the current regulatory status of the UST.

Section 7.3.a.1. states " ....the methodology for verifying attendance, the date, time and location of the course, the name of the offering organization, the credentials of the instructors, and a certification that the technology or methods....."

1. The portion that states "..the date, time and location of the course,...." should be deleted. For large companies with many UST installations and locations there can be numerous individuals that need to be trained. Training will most likely occur on multiple dates, times, and locations that may not always be known until just prior to the training event. When new employees are hired training might

occur on short notice and for one individual. The burden of having to repor the dates, time and locations would hinder and slow down the training process and restrict a company's ability to comply.

2. The portion that states "...the credentials of the instructors..." should be removed. Credentials will vary from instructor to instructor new instructors might be utilized, and a company might not know which instructors will be used at the various training sessions until just prior to the training session. In addition, the course content is the main issue of concern and should be the main focus in obtaining State approval of a training program.

Section 7.3.a.2 - This section states that a nonrefundable application fee of $280 must be submitted with the application. Larger companies may have one training program, but administer the training on multiple dates, times and locations. Having to submit an application for approval of the training program each time the program is administered would be cost prohibitive, burdensome, and would hinder the training process. The State should clarify or make provision for a company to submit one application for the training program that will be administered to all company UST facilities. This will make the $280 application fee reasonable and the application process less burdensome.

INDUSTRY'S REVISIONS

45CSR42

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

SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

§45-42-1.General.

1.1 Scope -- This rule establishes a greenhouse gas emissions inventory program in West Virginia which:

1.1.a. Requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount of greenhouse gases on an annual basis;

1.1.b Inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions and sequestration of greenhouse gas emissions;

1.1.c. Provides for a periodic compilation of a greenhouse gas emissions inventory and a determination whether West Virginia is a net sink or emitter of greenhouse gases;

1.1.d. Provides for development of a registry to record voluntary reductions of greenhouse gas emissions; and

1.1.e Provides for a determination whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for economic development.

1.2 Authority -- W Va Code §22-5-19.

1.3. Filing Date --

1.4. Effective Date -- June 1, 2008.

§45-42-2. Definitions.

2.1. "Air pollutants" means solids, liquids, or gases which, if discharged into the air, may result in statutory air pollution

2.2. "Air pollution" or "statutory air pollution" means and is limited to the discharge into the air by the act of man substances (liquid, solid, gaseous, organic or inorganic) in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property.

2.3. "Anthropogenic" means a direct result of human activities or the result of natural processes that have been influenced significantly by human activities.

2.4. "Area source" means, for purposes of this rule, a collection of similar sources of air pollutants within a geographic area. Area sources collectively represent individual sources that are small and numerous, and that typically have not been inventoried as a stationary or mobile source.

2.5. "Biogenic" means a naturally occurring biological source or process that is not significantly affected by human actions or activity.

2.6. "Capture" means the collection of greenhouse gas emissions from a stationary source

2.7. "*De minimis*" means emissions from a stationary source that are equal to or less than ten thousand tons per year for carbon dioxide, four hundred seventy-six tons per year for methane, thirty-two and six tenths tons per year for nitrous oxide, eight hundred fifty-five thousandths tons per year for hydrofluorocarbons, one and nine hundredths tons per year for perfluorocarbons and forty-two hundredths tons per year for sulfur hexafluoride.

2.8. "Emission" means the release, escape or discharge of regulated air pollutants or greenhouse gases into the air.

2.9. "Greenhouse gas" means the gaseous compounds: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (SF_6)

2.10. "Mobile source" means a variety of onroad and nonroad vehicles, engines, locomotives, marine vessels, airplanes and other equipment that generate air pollutants and greenhouse gas emissions, and that move or can be moved from place to place.

2.11. "Regulated air pollutant" means, for purposes of this rule, any air pollutant regulated under rules promulgated by the Secretary pursuant to W.Va. Code §22-5-4

2.12. "Reservoir" means a geological site where a greenhouse gas is securely stored.

2.13. "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

2.14. "Sequestration" means the physical process by which emissions of a greenhouse gas are directly captured for storage in a reservoir, or the biologic process by which a greenhouse gas is indirectly removed from the atmosphere for storage in a sink

2.15. "Sink" means any process, activity or mechanism which removes a greenhouse gas from the atmosphere Forests are considered sinks because they remove carbon dioxide through photosynthesis.

2.16 "Source" means, for purposes of this rule, any process or activity which releases a greenhouse gas into the air.

2.17 "Stationary source" means any building, structure, facility, installation, stationary process or process equipment which emits or may emit any regulated air pollutant or greenhouse gas.

2.18 "Ton" means a short ton, or 2000 pounds.

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

§45-42-3.Applicability.

3.1. Any stationary source that emits one or more greenhouse gases on an annual basis greater than the *de minimis* amounts listed in the table below, excluding biogenic emissions, and reports emissions of regulated air pollutants pursuant to the emissions inventory requirements of the Secretary under rule or W.Va. Code §22-5-4(a)(14), shall be an affected source required to report emissions of all greenhouse gases emitted above *de minimis* amounts to the Secretary under section 4:

Greenhouse Gas Compound	tons/year
carbon dioxide	10,000
methane	476

nitrous oxide	32.6
perfluorocarbons	1.09
sulfur hexafluoride	0.42
hydrofluorocarbons	0.855

3.2. Stationary sources which are regulated by the Secretary under W.Va. Code §22-3-1 et seq. and do not report emissions of regulated air pollutants pursuant to the emissions inventory requirements under W.Va. Code §22-5-4(a)(14) are not required to, but may voluntarily report their greenhouse gas emissions under section 4.

§45-42-4. Reporting Requirements.

4.1. ~~By March 31, 2009, and March 31 of each year thereafter, affected~~ Affected sources shall report to the Secretary the quantity of all greenhouse gases emitted above *de minimis* amounts in the previous calendar year at the same time such sources are to report emissions of regulated air pollutants pursuant to the emissions inventory requirements of the Secretary under rule or W.Va. Code §22-5-4(a)(14).

4.2. Affected sources shall only be required to report annual quantities of anthropogenic non-mobile source greenhouse gas emissions directly at the source, and shall not be required to report biogenic or mobile emissions of greenhouse gases, or indirect emissions of greenhouse gases, such as emissions occurring offsite from energy consumption.

4.3. The Secretary shall determine the form and format of the information reported by affected sources under subsection 4.1 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs

4.4. Notwithstanding the provisions of subsection 4.3, to satisfy the greenhouse gas emission reporting requirements under this section, affected sources may submit greenhouse gas emissions inventory information from documented greenhouse gas inventories such as those provided to the Environmental Protection Agency's Climate Leaders Program, Chicago Climate Exchange Registry, the International Organization for Standardization and the SF_6 Emissions Reduction Partnership for Electric Power Systems. Greenhouse gas emissions inventory information from other widely recognized and verified greenhouse gas emissions inventory programs may be submitted by affected sources under this subsection, but shall be subject to approval by the Secretary on a case-by-case basis

4.5. Reports of greenhouse gas emissions submitted to the Secretary under this section shall be signed by a responsible official and shall include the following certification statement: "I, the undersigned, hereby certify that the data transmitted to the West Virginia Department of Environmental Protection is true, accurate, and complete, based upon information and belief formed after reasonable inquiry."

4.6. Greenhouse gases reported under this section are not subject to fees under 45 CSR 30, unless the greenhouse gases are otherwise regulated by the Secretary.

§45-42-5. Greenhouse Gas Emissions Inventory.

5.1. The Secretary shall periodically compile an inventory of greenhouse gas emissions to:

5.1.a. Characterize the relative contributions of greenhouse gas emissions from stationary, area, mobile and biogenic sources in West Virginia; and

5.1 b. Determine the extent to which greenhouse gas emissions are offset by the rate of sequestration, and whether West Virginia is a net sink or emitter of greenhouse gases.

5.2. The greenhouse gas emissions inventory shall include the emissions from stationary sources reported under section 4, and other relevant information regarding significant emissions, reductions, and sequestration of greenhouse gases from stationary, area, mobile and biogenic sources requested by the Secretary under subsections 5.3 and 5.4.

5.3. To inventory greenhouse gas emissions reductions, the Secretary shall consult with the citizenry and other entities such as industry trade groups that have information relating to greenhouse gas emissions reductions, and sequestration. ~~Upon request of the Secretary, such entities shall provide relevant information relating to greenhouse gas emissions reductions, capture and sequestration~~.

5.4. The Department of Agriculture, the Division of Forestry, Marshall University, West Virginia University, West Virginia Geological and Economic Survey, and the Department of Transportation shall enter into interagency agreements with the Secretary and at the Secretary's request provide:

5.4.a. Relevant information relating to greenhouse gas emissions from area, mobile and biogenic sources;

5.4.b. Relevant information relating to greenhouse gas emissions reductions and sequestration; and

5.4.c. Any assistance the Secretary may request during the development of the greenhouse gas emissions inventory.

5.5. The Secretary shall determine the form and format of the information submitted by the entities under subsections 5.3 and 5.4 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

§45-42-6.Greenhouse Gas Emissions Registry Program.

6.1. The Secretary shall develop a registry for the recordation of voluntary reductions of greenhouse gas emissions.

6.2. The greenhouse gas emissions registry program shall be as consistent as possible with developing regional, national, or international programs designed to monitor, quantify and register reductions in greenhouse gas emissions with respect to:

6.2.a. Development of criteria, based on a set of standardized emissions accounting, reporting and verification protocols, to determine baseline emissions and quantification of voluntary reductions in emissions of greenhouse gases;

6.2.b. Public recognition of such voluntary emissions reductions;

6.2.c Consideration of voluntary greenhouse gas emission reductions when determining baselines and reduction requirements under future federal greenhouse gas emission reduction programs; and

6.2.d The ability of sources to participate in future greenhouse gas emission trading programs.

§45-42-7.Economic Development Potential.

7.1 Using information obtained, gathered or developed under this rule, the Secretary will determine whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for net economic development or will result in a deterrent to net economic development in West Virginia.

§45-42-8.Inconsistency Between Rules.

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

Summary of Industry's Suggested Changes and Comments on 45 CSR 42, Greenhouse Gas Emissions Inventory Program

- Section 2.3. The definition of "anthropogenic" should be revised to state that it is the "result of natural processes that have been influenced significantly by human activities". Adding the term "significantly" makes the definition consistent with the definition of "biogenic" which means a "naturally occurring biological source or process that is not significantly affected by human actions or activity."

- Section 3.1. Applicability. This section should be revised to clarify that only individual greenhouse gases emitted above the *de minimis* amounts are required to be reported. Otherwise, affected sources that trigger any of the *de minimis* amounts could be required to report emissions of all of the greenhouse gases even if they are below the *de minimis* amounts. We do not believe that this is DEP's intent. Also, this section should be revised to clarify that the *de minimis* amounts do not include biogenic emissions.

- Section 4.1. Reporting Requirements. This section should be revised to require reporting of greenhouse gases at the same time the air emissions inventory reporting is required. Sources should not be required to report their emissions at two different times. This section should also be clarified so that only greenhouse gases emitted above the *de minimis* amounts are required to be reported.

- Section 4.2 should be revised so that "mobile" emissions of greenhouse gases are not required to be reported. This section should also be revised to clarify that only direct emissions and not indirect greenhouse gas emissions (e.g., emissions occurring offsite from electricity consumption) are required to be reported. The references in section 4.3 to programs like Climate Leaders could lead sources to include indirect and direct emissions in their reporting. This would lead to double counting of electric generation greenhouse gas emissions and to higher source emissions compared to the *de minimis* amounts.

- Section 4.6 should be added so that sources will not be subject to fees for reporting greenhouse gas emissions, as the purpose of such reporting is to create an inventory, not to generate fees.

- Section 5.3. This section should be revised to delete the requirement that certain entities, including trade associations, must provide relevant information on greenhouse gas emissions, reductions, capture and sequestration to the Secretary upon request. This requirement is not found in the statute and could be interpreted to require such entities to report reductions, which is also not required under the statute.

- Section 7.1. Economic Development Potential This section should be revised to require the DEP to also determine whether reduction and sequestration will result in a deterrent to net economic development – not just whether it will be an asset.

- Additional questions/issues:

    - A reasonable protocol for reporting greenhouse gas emissions from stationary sources should be developed. Affected sources should not be required to report emissions from individual units within a stationary source if such emissions are insignificant. Affected stationary sources should have the option to report all of its greenhouse gas emissions in the aggregate.

    - Over 30 states have signed on to "The Climate Registry". Does West Virginia intend on signing on? The rule indicates that West Virginia will have its own registry independent of "The Climate Registry". Does DEP intend to rely upon any greenhouse gas registry programs, such as the Chicago Climate Exchange Registry, in developing the registry program?

MEMORANDUM

TO: Karen Price

FROM: David L Yaussy

DATE: May 29, 2007

SUBJECT: DEP Advisory Council Rules

A. Rules for Individual State Certification of Activities Requiring a Federal Permit.
Title 47, Series 5A.

No comment.

B. National Pollutant Discharge Elimination System (NPDES) Program.
Title 47, Series 10.

We would urge the DEP to update the rule. It still contains references to the Chief, rather than the Director (See, for example, Sections 5.13.d.1, 6.2 and 9.1.a.)

Has the DEP updated this rule to reflect changes in the Code of Federal Regulations that were made since it was last comprehensively updated?

C. Antidegradation Implementation Procedures.
Title 60, Series 5.

We agree that the State should do away with Section 6.2. There is no need for an initial presumptive listing procedure at this point. As for the 156 (I counted 157, but I may have miscounted) streams in Appendix A, we will disagree with all those listed except the 39 to which no objections were ever lodged.

D. Requirements Governing Water Quality Standards.

Title 57, Series 2.

There are a couple of minor errors – Section 2.2 has a "then" that should be "than" and Section 6.1 is missing text

We remain disappointed that the State continues to interpret its water quality standards to apply all uses in all streams at all times. Section 6.1 clearly provides that B and C are the only default, or universal, uses

Appendix D should be eliminated. Category C, Water Contact Recreation, is a default use, and listing all streams with that use assigned to them suggests that there are streams that do not have that designation.

Appendix A. The DEP is listing a huge number of trout streams with no justification for their listing. If streams meet the requirements of trout waters, they qualify as such; if they do not, there is no reason to list them. Unless the DEP can document that each stream has year round, multi-age populations, they should not be listed.

DLY:shb

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR41 - "Control of Annual Sulfur Dioxide Emissions"

Type of Rule: ___X__ Legislative _____Interpretive _____Procedural

Agency: Division of Air Quality

Address: 601 57th Street SE

Charleston, WV 25304

Phone Number: 926-0475 Email: tmowrer@wvdep.org

Fiscal Note Summary

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

Although the rule will increase the resources required for implementation compared to current regulations, the net difference should be marginal and offset by Title V 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	2008 Increase/Decrease (use "-")	2009 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	$ 0	$ 0	$ 0
Personal Services	$ 12,400	$ 7450	$ 7450
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Equipment	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

Rule Title: 45CSR41 - "Control of Annual Sulfur Dioxide Emissions"

3. Explanation of above estimates (including long-range effect):
Please include any increase or decrease in fees in your estimated total revenues.

Costs anticipated to be incurred during implementation of this rule in FY 2008 are approximately 16.7% of 1 FTE plus benefits and office costs. In fiscal years 2009 and upon full implementation, the personal costs decrease due to reduced agency responsibility 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 1, 2007

Signature of Agency Head or Authorized Representative

John A. Benedict, Director

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

SERIES 41
CONTROL OF ANNUAL SULFUR DIOXIDE EMISSIONS ~~TO MITIGATE INTERSTATE TRANSPORT OF FINE PARTICULATE MATTER AND SULFUR DIOXIDE~~

§45-41-1. General.

1.1. Scope. -- This rule establishes general provisions and the designated representative, permitting, allowance~~;~~ and monitoring~~, and opt-in~~ provisions for the state CAIR SO_2 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~~ HHH, and 40 CFR §51.124 for state implementation plans as a means of mitigating interstate transport of fine particulates and sulfur dioxide (SO_2). 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 SO_2 Trading Program by carrying out the functions set forth for the Administrator in this rule and 40 CFR Part 51.

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 AAA through ~~III~~, HHH resulting in several minor areas of nonconformity with 153CSR6.

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

1.4. Filing Date. -- ~~April 28, 2006~~.

1.5. Effective Date. -- ~~May 1, 2006~~.

1.7. Former Rules. -- This legislative rule amends 45CSR41 "Control of Annual Sulfur Dioxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Sulfur Dioxide" which was filed April 28, 2006, and which became effective May 1, 2006.

§45-41-2. Definitions.

2.1. "Account number" means the identification number given by the Administrator to each CAIR SO_2 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 SO_2 allowances issued under the Acid Rain Program, the determination by the Administrator of the amount of such CAIR SO_2 allowances to be initially credited to a CAIR SO_2 unit or other entity and, with regard to CAIR SO_2 allowances issued under ~~section 88~~ provisions of a state implementation plan that are approved under 40 CFR §§51.124(o)(1) or (2) or (r) or 97.288, the determination by the Secretary or a permitting authority of the amount of such CAIR SO_2 allowances to be initially credited to a CAIR SO_2 unit or other entity.

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 (if March 1 is not a business day), immediately following the control period and is the deadline by which a CAIR SO_2 allowance transfer must be submitted for recordation in a CAIR SO_2 source's compliance account in order to be used to meet the source's CAIR SO_2 emissions limitation for such control period in accordance with section 54.

2.7. "Alternate CAIR designated representative" means, for a CAIR SO_2 source and each CAIR SO_2 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~~ 15, to act on behalf of the CAIR designated representative in matters pertaining to the CAIR SO_2 Trading Program. If the CAIR SO_2 source is also a CAIR NO_X Annual source under 45CSR39, then this natural person will be the same person as the alternate CAIR designated representative under the CAIR NO_X Annual Trading Program. If the CAIR SO_2 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 SO_2 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. If the CAIR SO_2 source is also subject to the Hg Budget Trading Program, then this natural person will be the same person as the alternate Hg designated representative under the Hg Budget Trading Program under 45CSR37.

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~~ 75, 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~~ 75.

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~~ 15, sections 51 through 57, ~~and sections 80 though 88,~~ to transfer and otherwise dispose of CAIR SO_2 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 SO_2 source and each CAIR SO_2 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~~ 15, to represent and legally bind each owner and operator in matters pertaining to the CAIR SO_2 Trading Program. If the CAIR SO_2 source is also a CAIR NO_X Annual source under 45CSR39, then this natural person will be the same person as the CAIR designated representative under the CAIR NO_X Annual Trading Program. If the CAIR SO_2 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 SO_2 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. If the CAIR SO_2 source

is also subject to the Hg Budget Trading Program, then this natural person will be the same person as the alternate Hg designated representative under the Hg Budget Trading Program under 45CSR37.

2.13. "CAIR NO_X Annual source" means a source that includes one or more CAIR NO_X Annual units.

2.14. "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(o)(1) or (2) or established by the Administrator in accordance with 40 CFR Part 97, Subparts AA through II and 40 CFR §§51.123(p) and 52.35, as a means of mitigating interstate transport of fine particulates and nitrogen oxides.

2.15. ~~"CAIR NO_x Annual unit" means a unit that is subject to the CAIR NO_x Annual Trading Program under 45CSR§39-4 or a CAIR NO_x opt-in unit under sections 80 through 88 of 45CSR39~~ Reserved.

2.16. "CAIR NO_X Ozone Season source" means a source that ~~includes one or more CAIR NO_x Ozone Season units~~ is subject to the CAIR NO_X Ozone Season Trading Program.

2.17. "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(aa)(1) or (2) (and (bb)(1)), (bb)(2), or (dd) or established by the Administrator in accordance with 40 CFR Part 97, Subparts AAAA through IIII and 40 CFR §§51.123(ee) and 52.35, as a means of mitigating interstate transport of ozone and nitrogen oxides.

2.18. ~~"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 and a CAIR NO_x Ozone Season opt-in unit under sections 80 through 88 of 45CSR40~~ Reserved.

2.19. "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 SO_2 Trading Program requirements applicable to a CAIR SO_2 source, to each CAIR SO_2 unit at the source, and to the owners and operators and the CAIR designated representative of the source and each such unit.

2.20. "CAIR SO_2 allowance" means a limited authorization issued by the Administrator under the Acid Rain Program, ~~or by~~ the Secretary or a permitting authority under ~~section 88~~ provisions of a state implementation plan that are approved under 40 CFR §§51.124(o)(1) or (2) or (r) or 97.288, to emit sulfur dioxide during the control period of the specified calendar year for which the authorization is allocated or of any calendar year thereafter under the CAIR SO_2 Trading Program as follows:

2.20.a. For one CAIR SO_2 allowance allocated for a control period in a year before 2010, one ton of sulfur dioxide, except as provided in ~~section~~ subsection 54.2;

2.20.b. For one CAIR SO_2 allowance allocated for a control period in 2010 through 2014, 0.50 ton of sulfur dioxide, except as provided in ~~section~~ subsection 54.2; ~~and~~

2.20.c. For one CAIR SO_2 allowance allocated for a control period in 2015 or later, 0.35 ton of sulfur dioxide, except as provided in ~~section~~ subsection 54.2.; and

2.20.d. An authorization to emit sulfur dioxide that is not issued under the Acid Rain Program, ~~or under the~~ provisions of a state implementation plan that ~~is~~ are approved under 40 CFR §§51.124(o)(1) or (2) or (r) or 97.288 will not be a CAIR SO_2 allowance.

2.21. "CAIR SO_2 allowance deduction" or "deduct CAIR SO_2 allowances" means the permanent withdrawal of CAIR SO_2 allowances by the Administrator from a compliance account, e.g., in order to account for a specified number of

tons of total sulfur dioxide emissions from all CAIR SO_2 units at a CAIR SO_2 source for a control period, determined in accordance with sections 70 through ~~76~~ 75, or to account for excess emissions.

2.22. "CAIR SO_2 Allowance Tracking System" means the system by which the Administrator records allocations, deductions, and transfers of CAIR SO_2 allowances under the CAIR SO_2 Trading Program. This is the same system as the Allowance Tracking System under 40 CFR §72.2 by which the Administrator records allocations, deduction, and transfers of Acid Rain SO_2 allowances under the Acid Rain Program.

2.23. "CAIR SO_2 Allowance Tracking System account" means an account in the CAIR SO_2 Allowance Tracking System established by the Administrator for purposes of recording the allocation, holding, transferring, or deducting of CAIR SO_2 allowances. Such allowances will be allocated, held, deducted, or transferred only as whole allowances.

2.24. "CAIR SO_2 allowances held" or "hold CAIR SO_2 allowances" means the CAIR SO_2 allowances recorded by the Administrator, or submitted to the Administrator for recordation, in accordance with sections 51 through 57; and sections 60 through 62, ~~and section 80 through 88~~ or 40 CFR Part 73, in a CAIR SO_2 Allowance Tracking System account.

2.25. "CAIR SO_2 emissions limitation" means, for a CAIR SO_2 source, the tonnage equivalent, in SO_2 emissions in a control period, of the CAIR SO_2 allowances available for deduction for the source under ~~sections~~ subsections 54.1 and 54.2 for ~~a~~ the control period.

2.26. "CAIR SO_2 source" means a source that includes one or more CAIR SO_2 units.

2.27. "CAIR SO_2 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(o)(1) or (2) or established by the Administrator in accordance with 40 CFR Part 97, Subparts AAA through III and 40 CFR §§51.124(r) and 52.36, as a means of mitigating interstate transport of fine particulates and sulfur dioxide.

2.28. "CAIR SO_2 unit" means a unit that is subject to the CAIR SO_2 Trading Program under section 4 ~~or~~ and, except for purposes of section 5, ~~a CAIR SO_2 opt-in unit under sections 80 through 88~~.

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 combusting any amount of coal or coal-derived fuel, alone or in combination with any amount of any other fuel.

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 the calendar year in 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 then 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 duct burner, 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 SO_2 unit under section 4 on the later of November 15, 1990 or 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 of the unit, which shall continue to be treated as the same unit.

2.35.a.2. For a unit that is a CAIR SO_2 unit under section 4 on the later of November 15, 1990 or 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), such date shall remain the replaced unit's date of commencement of commercial operation, and 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; or 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 SO_2 unit under section 4 on the later of November 15, 1990 or 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 SO_2 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 of the unit, which shall continue to be treated as the same unit.

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), such date shall remain the replaced unit's date of commencement of commercial operation, and 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; or 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 SO_2 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 SO_2 emission rate (in lb/mmBtu) and the heat input of the unit (in mmBtu) 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.~~ 2.36.b. For a unit that ~~is a CAIR SO_2 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) after the date the unit commences operation as defined in subdivision 2.36.a, such date will remain the ~~unit's~~ date of commencement of operation of the unit, which shall continue to be treated as the same unit.

~~2.36.a.2.~~ 2.36.c. For a unit that is ~~a CAIR SO_2 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) after the date the unit commences operation as defined in subdivision 2.36.a, such date shall remain the replaced unit's date of commencement of operation, and, 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 SO_2 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 SO_2 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 SO_2 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 SO_2 emission rate (in lb/mmBtu) and the heat input of the unit~~

~~(in mmBtu) 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, 3.36.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 SO_2 Allowance Tracking System account, established by the Administrator for a CAIR SO_2 source subject to an Acid Rain emissions limitations under 40 CFR §73.31(a) or (b) or for any other CAIR SO_2 source under sections 51 through 57 ~~or sections 80 through 88~~, in which any CAIR SO_2 allowance allocations for the CAIR SO_2 units at the source are initially recorded and in which are held any CAIR SO_2 allowances available for use for a control period in order to meet the source's CAIR SO_2 emissions limitation in accordance with section 54.

2.39. "Continuous emission monitoring system" or "CEMS" means the equipment required under sections 70 through ~~76~~ 75 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 sulfur dioxide 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~~ 75:

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 sulfur dioxide monitoring system, consisting of a SO_2 pollutant concentration monitor and an automated data acquisition and handling system and providing a permanent, continuous record of SO_2 emissions, in parts per million (ppm); ~~and~~

2.39.c. A moisture monitoring system, as defined in 40 CFR §75.11(b)(2) and providing a permanent, continuous record of the stack gas moisture content, in percent H_2O; ~~and~~

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

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

2.40. "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" or "emission" 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~~ 75.

2.42. "Excess emissions" means any ton, or portion of a ton, of sulfur dioxide emitted by the CAIR SO_2 units at a CAIR SO_2 source during a control period that exceeds the CAIR SO_2 emission limitation for the source, provided that any portion of a ton of excess emissions will be treated as one ton of excess emissions.

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. "General account" means a CAIR SO_2 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. "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~~ 75 and excluding the heat derived from preheated combustion air, recirculated flue gases, or exhaust from other sources.

2.49. "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.

2.50. "Hg Budget Trading Program" means a multi-state Hg air pollution control and emission reduction program approved and administered by the Administrator in accordance 40 CFR Part 60, Subpart HHHH and 40 CFR §60.24(h)(6), or established by the Administrator, as a means of reducing national Hg emissions.

~~2.50.~~ 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:

~~2.50.a.~~ 2.51.a. For the life of the unit;

~~2.50.b.~~ 2.51.b. For a cumulative term of no less than 30 years, including contracts that permit an election for early termination; or

~~2.50.c.~~ 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.

~~2.51.~~ 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 of the initial installation of the unit 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~~.

~~2.52.~~ 2.53. "Monitoring system" means any monitoring system that meets the requirements of sections 70 through ~~76~~ 75, including a continuous emissions monitoring system, an alternative monitoring system, or an excepted monitoring system under 40 CFR Part 75.

~~2.53.~~ 2.54. "Most stringent state or federal SO_2 emission limitation" means, with regard to a

unit, the lowest SO_2 emission 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.

~~2.54.~~ 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 of such installation 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 of such completion as specified by the person conducting the physical change.

~~2.55.~~ 2.56. "Operator" means any person who operates, controls, or supervises a CAIR SO_2 unit or a CAIR SO_2 source and will include, but not be limited to, any holding company, utility system, or plant manager of such a unit or source.

~~2.56.~~ 2.57. "Owner" means any of the following persons:

~~2.56.a.~~ 2.57.a. With regard to a CAIR SO_2 source or a CAIR SO_2 unit at a source, respectively:

~~2.56.a.1.~~ 2.57.a.1. Any holder of any portion of the legal or equitable title in a CAIR SO_2 unit at the source or the CAIR SO_2 unit;

~~2.56.a.2.~~ 2.57.a.2. Any holder of a leasehold interest in a CAIR SO_2 unit at the source or the CAIR SO_2 unit; or

~~2.56.a.3.~~ 2.57.a.3. Any purchaser of power from a CAIR SO_2 unit at the source or the CAIR SO_2 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 SO_2 unit; or

~~2.56.b.~~ 2.57.b. With regard to any general account, any person who has an ownership interest with respect to the CAIR SO_2 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 SO_2 allowances.

2.58. "Permitting authority" means the state air pollution control agency, local agency, other state agency, or other agency authorized by the Administrator to issue or revise permits to meet the requirements of the CAIR SO_2 Trading Program in accordance with 40 CFR Part 96, Subpart CCC or, if no such agency has been so authorized, the Administrator.

~~2.57.~~ 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.

~~2.58.~~ 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.

~~2.59.~~ 2.61. "Recordation", "record", or "recorded" means, with regard to CAIR SO_2 allowances, the movement of CAIR SO_2 allowances by the Administrator into or between CAIR SO_2 Allowance Tracking System accounts, for purposes of allocation, transfer, or deduction.

~~2.60.~~ 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. "Replacement", "replace", or "replaced" means, with regard to a unit, the demolishing of a unit, or the permanent shutdown and permanent disabling of a unit, and the construction of another unit (the replacement unit) to be used instead of the demolished or shutdown unit (the replaced unit).

~~2.61.~~ 2.64. "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:

~~2.61.a.~~ 2.64.a. Atmospheric or pressurized fluidized bed combustion;

~~2.61.b.~~ 2.64.b. Integrated gasification combined cycle;

~~2.61.c.~~ 2.64.c. Magnetohydrodynamics;

~~2.61.d.~~ 2.64.d. Direct and indirect coal-fired turbines;

~~2.61.e.~~ 2.64.e. Integrated gasification fuel cells; or

~~2.61.f.~~ 2.64.f. As determined by the Administrator in consultation with the Secretary of Energy, a derivative of one or more of the technologies under subdivisions ~~2.61.a~~ 2.64.a through ~~2.61.e~~ 2.64.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.

~~2.62.~~ 2.65. "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.

~~2.63.~~ 2.66. "Serial number" means, for a CAIR SO_2 allowance, the unique identification number assigned to each CAIR SO_2 allowance by the Administrator.

~~2.64.~~ 2.67. "Sequential use of energy" means:

~~2.64.a.~~ 2.67.a. For a topping-cycle cogeneration unit, the use of reject heat from electricity production in a useful thermal energy application or process; or

~~2.64.b.~~ 2.67.b. For a bottoming-cycle cogeneration unit, the use of reject heat from useful thermal energy application or process in electricity production.

2.68. "Solid waste incineration unit" means a stationary, fossil fuel-fired boiler or stationary, fossil fuel-fired combustion turbine that is a "solid waste incineration unit" as defined in section 129(g)(1) of the Clean Air Act.

~~2.65.~~ 2.69. "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."

~~2.66.~~ 2.70. "State" means one of the states or the District of Columbia that adopts the CAIR SO_2 Trading Program pursuant to 40 CFR §§51.124(o)(1) or (2).

~~2.67.~~ 2.71. "Submit" or "serve" means to send or transmit a document, information, or correspondence to the person specified in accordance with the applicable regulation:

~~2.67.a.~~ 2.71.a. In person;

~~2.67.b.~~ 2.71.b. By United States Postal Service; or

~~2.67.c.~~ 2.71.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.

~~2.68.~~ 2.72. "Title V operating permit" means a permit issued under 45CSR30.

~~2.69.~~ 2.73. "Ton" means 2,000 pounds. For the purpose of determining compliance with the CAIR SO_2 emission limitation, total tons of sulfur dioxide 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~~ 75, 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.

~~2.70.~~ 2.74. "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.

~~2.71.~~ 2.75. "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.

~~2.72.~~ 2.76. "Total energy output" means, with regard to a cogeneration unit, the sum of useful power and useful thermal energy produced by the cogeneration unit.

~~2.73.~~ 2.77. "Unit" means a stationary, fossil fuel-fired boiler or combustion turbine or other stationary, fossil fuel-fired combustion device.

~~2.74.~~ 2.78. "Unit operating day" means a calendar day in which a unit combusts any fuel.

~~2.75.~~ 2.79. "Unit operating hour" or "hour of unit operation" means an hour in which a unit combusts any fuel.

~~2.76.~~ 2.80. "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).

~~2.77.~~ 2.81. "Useful thermal energy" means, with regard to a cogeneration unit, thermal energy that is:

~~2.77.a.~~ 2.81.a. Made available to an industrial or commercial process (not a power production process), excluding any heat contained in condensate return or makeup water;

~~2.77.b.~~ 2.81.b. Used in a heating application (e.g., space heating or domestic hot water heating); or

~~2.77.c.~~ 2.81.c. Used in a space cooling application (i.e., thermal energy used by an absorption chiller).

~~2.78.~~ 2.82. "Utility power distribution system" means the portion of an electricity grid owned or operated by a utility and dedicated to delivering electricity to customers.

~~2.79.~~ 2.83. 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.

§45-41-3. Measurements, Abbreviations and Acronyms. -- Measurements, abbreviations and acronyms used in this rule are defined as follows:

Btu -- British thermal unit.

CO_2 -- carbon dioxide.

NO_X -- nitrogen oxides.

Hg -- mercury.

hr -- hour.

kW-- kilowatt electrical.

kWh -- kilowatt hour.

mmBtu -- million Btu.

MW_e -- megawatt electrical.

MWh -- megawatt hour.

O_2 -- oxygen.

ppm -- parts per million.

lb -- pound.

scfh -- standard cubic feet per hour.

SO_2 -- sulfur dioxide.

H_2O -- water.

yr -- year.

§45-41-4. Applicability. -- ~~The~~ Except as provided in subsection 4.2, the following units in West Virginia ~~will~~ shall be CAIR SO_2 units, and any source that includes one or more such units ~~will~~ shall be a CAIR SO_2 source, subject to the requirements of sections ~~5~~ 1 through ~~76~~ 75:

4.1. Electric generating units. -- ~~Except as provided in subsection 4.2, a~~ Any stationary fossil fuel-fired boiler or stationary, fossil fuel-fired combustion turbine serving at any time, since the later of November 15, 1990 or the start-up of ~~a~~ the unit's combustion chamber, a generator with nameplate capacity of more than 25 MW_e producing electricity for sale~~; and~~.

4.2. ~~Cogeneration~~ Exempt units. -- Except as provided in subsection 4.3, any unit in West Virginia that is a CAIR SO_2 unit under subsection 4.1 or subdivision 4.3.a and meets any of the following requirements shall not be a CAIR SO_2 unit:

4.2.a. ~~For a~~ Any unit ~~that qualifies~~ qualifying as a cogeneration unit during the 12-month period starting on the date the unit first produces electricity and ~~continues~~ continuing to qualify as a cogeneration unit, ~~a cogeneration unit~~ and not serving at any time, since the later of November 15, 1990 or the start-up of the unit's combustion chamber, 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.~~

4.2.b. Any unit commencing operation before January 1, 1985 and qualifying as a solid waste incineration unit with an average annual fuel consumption of non-fossil fuel for 1985-1987 exceeding 80 percent (on a Btu basis) and an average annual fuel consumption of non-fossil fuel for any 3 consecutive calendar years after 1990 exceeding 80 percent (on a Btu basis); and

4.2.c. Any unit commencing operation on or after January 1, 1985 and qualifying as a solid waste incineration unit with an average annual fuel consumption of non-fossil fuel for the first 3 calendar years of operation exceeding 80 percent (on a Btu basis) and an average annual fuel consumption of non-fossil fuel for any 3 consecutive calendar years after 1990 exceeding 80 percent (on a Btu basis).

4.3. Loss of exemption. -- Any unit in West Virginia that is not a CAIR SO_2 unit under subsection 4.1, or which qualified for an exemption under subsection 4.2, but subsequently meets any of the following provisions, shall lose its exemption and become a CAIR SO_2 unit under subsection 4.1:

4.3.a. If a stationary boiler or stationary combustion turbine that, under subsection 4.1, is not a CAIR SO_2 unit begins to combust fossil fuel or to serve a generator with nameplate capacity of more than 25 MW_e producing electricity for sale, the unit shall become a CAIR SO_2 unit as provided in subsection 4.1 on the first date on which it both combusts fossil fuel and serves such generator;

4.3.b. If a unit qualifies as a cogeneration unit during the 12-month period starting on the date the unit first produces electricity and meets the requirements of subdivision 4.2.a for at least one calendar year, but subsequently no longer

meets all such requirements, the unit shall become a CAIR SO_2 unit starting on the earlier of January 1 after the first calendar year during which the unit first no longer qualifies as a cogeneration unit or January 1 after the first calendar year during which the unit no longer meets all of the requirements under subdivision 4.2.a; and

4.3.c. If a unit qualifies as a solid waste incineration unit and meets the requirements of subdivisions 4.2.b or 4.2.c for at least 3 consecutive calendar years, but subsequently no longer meets all such requirements, the unit shall become a CAIR SO_2 unit starting on the earlier of January 1 after the first calendar year during which the unit first no longer qualifies as a solid waste incineration unit or January 1 after the first 3 consecutive calendar years after 1990 for which the unit has an average annual fuel consumption of fossil fuel of 20 percent or more.

§45-41-5. Retired Unit Exemption.

5.1. General exemption provisions.

5.1.a. Any CAIR SO_2 unit that is permanently retired ~~and is not a CAIR SO_2 opt-in unit under sections 80 through 88~~ will be exempt from the CAIR SO_2 Trading Program, except for the provisions of this section, ~~section 2, section 3, section 4~~ sections 2 through 4, subdivisions 6.3.d through 6.3.g, ~~section 7, and~~ sections 7 through 15, and sections 51 through 62.

5.1.b. The exemption under subdivision 5.1.a will become effective the day on which the CAIR SO_2 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 sulfur dioxide, starting on the date that the exemption takes effect.

5.2.b. 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~~ subsection 5.1 must retain, at the source that includes the unit, records demonstrating that the unit is permanently retired. The 5-year period for keeping records may be extended for cause, at any time before the end of the period, in writing by the Secretary or the Administrator. The owners and operators bear the burden of proof that the unit is permanently retired.

5.2.c. The owners and operators and, to the extent applicable, the CAIR designated representative of a unit exempt under ~~subdivision 5.1.a~~ subsection 5.1 must comply with the requirements of the CAIR SO_2 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.d. A unit exempt under ~~subdivision 5.1.a~~ subsection 5.1 and located at a source that is required, or but for this exemption would be required, to have a Title V operating permit must not resume operation unless the 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, 2010 or the date on which the unit resumes operation.

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

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

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

5.2.e.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.f. For the purpose of applying monitoring, reporting, and recordkeeping requirements under sections 70 through ~~76~~ 75, a unit that loses its exemption under ~~subdivision 5.1.a~~ subsection 5.1 will be treated as a unit that commences ~~operation and~~ commercial operation on the first date on which the unit resumes operation.

§45-41-6. Standard Requirements.

6.1. Permit requirements.

6.1.a. The CAIR designated representative of each CAIR SO_2 source required to have a Title V operating permit and each CAIR SO_2 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~~ section 21; 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 SO_2 source required to have a Title V operating permit and each CAIR SO_2 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~~ The owners and operators of a CAIR SO_2 source that is not otherwise required to have a Title V operating permit and each CAIR SO_2 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 SO_2 source and such CAIR SO_2 unit.

6.2. Monitoring, reporting, and recordkeeping requirements.

6.2.a. The owners and operators, and the CAIR designated representative, of each CAIR SO_2 source and each CAIR SO_2 unit at the source will comply with the monitoring, reporting, and recordkeeping requirements of sections 70 through ~~76~~ 75.

6.2.b. The emission measurements recorded and reported in accordance with sections 70 through ~~76~~ 75 will be used to determine compliance by each CAIR SO_2 source with the CAIR SO_2 emission limitation under subsection 6.3.

6.3. Sulfur dioxide emission requirements.

6.3.a. As of the allowance transfer deadline for the 2010 control period and each control period thereafter, the owners and operators of each CAIR SO_2 source and each CAIR SO_2 unit at the source must hold, in the source's compliance account, a tonnage equivalent in CAIR SO_2 allowances available for compliance deductions for the control period, as determined in accordance with subsections 54.1 and 54.2 in an amount not less than the tons of total sulfur dioxide emissions for the control period from all CAIR SO_2 units at the source, as determined in accordance with sections 70 through ~~76~~ 75.

6.3.b. A CAIR SO_2 unit will be subject to the requirements under subdivision 6.3.a for the control period starting on the later of January 1, 2010 or the deadline for meeting the unit's monitor certification requirements under ~~subdivision~~ subdivisions 70.2.a, ~~subsection~~ 70.2.b, or ~~subsection~~ 70.2.e and for each control period

thereafter.

6.3.c. A CAIR SO_2 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 SO_2 allowance was allocated.

6.3.d. CAIR SO_2 allowances will be held in, deducted from, or transferred into or among CAIR SO_2 Allowance Tracking System accounts in accordance with sections 51 through 62.

6.3.e. A CAIR SO_2 allowance is a limited authorization to emit sulfur dioxide in accordance with the CAIR SO_2 Trading Program. No provision of the CAIR SO_2 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 SO_2 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 SO_2 allowance to or from a CAIR SO_2 ~~unit's~~ source's compliance account is incorporated automatically in any CAIR permit of the source ~~that includes the CAIR SO_2 unit~~.

6.4. Excess emissions requirements.--

~~6.4.a.~~ If a CAIR SO_2 source emits sulfur dioxide during any control period in excess of the CAIR SO_2 emission limitation, then:

~~6.4.a.1.~~ 6.4.a. The owners and operators of the source and each CAIR SO_2 unit at the source will surrender the CAIR SO_2 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.~~ 6.4.b. 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 SO_2 source and each CAIR SO_2 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 SO_2 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~~ 75, provided that to the extent that sections 70 through ~~76~~ 75 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 SO_2 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 SO_2 Trading Program or to demonstrate compliance with the requirements of the CAIR SO_2 Trading Program.

6.5.b. The CAIR designated representative of a CAIR SO_2 source and each CAIR SO_2 unit at

the source will submit the reports required under the CAIR SO_2 Trading Program, including those under sections 70 through ~~76~~ 75.

6.6. Liability.

6.6.a. Each CAIR SO_2 source and each CAIR SO_2 unit must meet the requirements of the CAIR SO_2 Trading Program.

6.6.b. Any provision of the CAIR SO_2 Trading Program that applies to a CAIR SO_2 source or the CAIR designated representative of a CAIR SO_2 source will also apply to the owners and operators of such source and of the CAIR SO_2 units at the source.

6.6.c. Any provision of the CAIR SO_2 Trading Program that applies to a CAIR SO_2 unit or the CAIR designated representative of a CAIR SO_2 unit will also apply to the owners and operators of such unit.

6.7. Effect on other authorities. -- No provision of the CAIR SO_2 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~~ and the CAIR designated representative of a CAIR SO_2 source or CAIR SO_2 unit from compliance with any other provision of the applicable, approved state implementation plan, a federally enforceable permit, order, or the CAA.

§45-41-7. Computation of Time.

7.1. Unless otherwise stated, any time period scheduled, under the CAIR SO_2 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 SO_2 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 SO_2 Trading Program, falls on a weekend or a state or federal holiday, the time period will be extended to the next business day.

§45-41-8. Appeal Procedures.

8.1. The appeal procedures for decisions of the Administrator under the CAIR SO_2 Trading Program are set forth in 40 CFR Part 78.

§45-41-10. Authorization and Responsibilities of the CAIR Designated Representative.

10.1. Except as provided under section 11, each CAIR SO_2 source, including all CAIR SO_2 units at the source, will have one and only one CAIR designated representative, with regard to all matters under the CAIR SO_2 Trading Program concerning the source or any CAIR SO_2 unit at the source.

10.2. The CAIR designated representative of the CAIR SO_2 source will be selected by an agreement binding on the owners and operators of the source and all CAIR SO_2 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 SO_2 source represented and each CAIR SO_2 unit at the source in all matters pertaining to the CAIR SO_2 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 SO_2 Allowance Tracking System account will be established for a CAIR SO_2 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 SO_2 units at the source.

10.5. Each submission under the CAIR SO_2 Trading Program will be submitted, signed, and certified by the CAIR designated representative for each CAIR SO_2 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 SO_2 source or a CAIR SO_2 unit only if the submission has been made, signed, and certified in accordance with subsection 10.5.

§45-41-11. 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, 15 and 51 ~~and 82~~, whenever the term "CAIR designated representative" is used in sections ~~4~~ 1 through ~~88~~ 75, the term will be construed to include the CAIR designated representative or any alternate CAIR designated representative.

§45-41-12. 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 SO_2 source and the CAIR SO_2 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 SO_2 source and the CAIR SO_2 units at the source.

12.3. Changes in owners and operators.

12.3.a. In the event ~~a new~~ an owner or

operator of a CAIR SO_2 source or a CAIR SO_2 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 SO_2 source or a CAIR SO_2 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.

§45-41-13. 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 SO_2 source, and each CAIR SO_2 unit at the source, for which the certificate of representation is submitted, including identification and nameplate capacity of each generator served by each such unit;

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 SO_2 source and of each CAIR SO_2 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 SO_2 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 SO_2 Trading Program on behalf of the owners and operators of the source and of each CAIR SO_2 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 SO_2 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 SO_2 unit, or where a utility or industrial customer purchases power from a CAIR SO_2 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 SO_2 unit at the source; and CAIR SO_2 allowances and proceeds of transactions involving CAIR SO_2 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 SO_2 allowances by contract, CAIR SO_2 allowances and proceeds of transactions involving CAIR SO_2 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.

§45-41-14. 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 SO_2 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 SO_2 allowance transfers.

§45-41-15. Delegation by CAIR Designated Representative and Alternate CAIR Designated Representative.

15.1. A CAIR designated representative may delegate, to one or more natural persons, his or her authority to make an electronic submission to the Administrator provided for or required under this rule.

15.2. An alternate CAIR designated representative may delegate, to one or more natural persons, his or her authority to make an electronic submission to the Administrator provided for or required under this rule.

15.3. In order to delegate authority to make an electronic submission to the Administrator in accordance with subsections 15.1 or 15.2, the CAIR designated representative or alternate CAIR designated representative, as appropriate, must submit to the Administrator a notice of delegation, in a format prescribed by the Administrator, that includes the following elements:

15.3.a. The name, address, e-mail address, telephone number, and facsimile transmission number (if any) of such CAIR designated representative or alternate CAIR designated representative;

15.3.b. The name, address, e-mail address, telephone number, and facsimile transmission number (if any) of each such natural person (referred to as an "agent");

15.3.c. For each such natural person, a list of the type or types of electronic submissions under subsections 15.1 or 15.2 for which authority is delegated to him or her; and

15.3.d. The following certification statements by such CAIR designated representative or alternate CAIR designated representative:

15.3.d.1. "I agree that any electronic submission to the Administrator that is by an agent identified in this notice of delegation and of a type listed for such agent in this notice of delegation and that is made when I am a CAIR designated representative or alternate CAIR designated representative, as appropriate, and before this notice of delegation is superseded by another notice of delegation under subsection 15.4 shall be deemed to be an electronic submission by me."

15.3.d.2. "Until this notice of delegation is superseded by another notice of delegation under subsection 15.4, I agree to maintain an e-mail account and to notify the Administrator immediately of any change in my e-mail address unless all delegation of authority by me under section 15 is terminated."

15.4. A notice of delegation submitted under subsection 15.3 shall be effective, with regard to the CAIR designated representative or alternate CAIR designated representative identified in such notice, upon receipt of such notice by the Administrator and until receipt by the Administrator of a superseding notice of delegation submitted by such CAIR designated representative or alternate CAIR designated representative, as appropriate. The superseding notice of delegation may replace any previously identified agent, add a new agent, or eliminate entirely any delegation of authority.

15.5. Any electronic submission covered by the certification in paragraph 15.3.d.1 and made in accordance with a notice of delegation effective under subsection 15.4 shall be deemed to be an electronic submission by the CAIR designated representative or alternate CAIR designated representative submitting such notice of delegation.

§45-41-20. General CAIR SO_2 Trading Program Permit Requirements.

20.1. For each CAIR SO_2 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 section 5 and sections 20 through 24 ~~and sections 80 through 88~~.

20.2. Each CAIR permit will contain, with regard to the CAIR SO_2 source and the CAIR SO_2 units at the source covered by the CAIR permit, all applicable CAIR SO_2 Trading Program requirements, CAIR NO_X Annual Trading Program requirements, and CAIR NO_X Ozone Season 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.

§45-41-21. Submission of CAIR Permit Applications.

21.1. Duty to apply. -- The CAIR designated representative of any CAIR SO_2 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 SO_2 unit at the source at least 18 months (or such lesser time provided by the Secretary) before the later of January 1, 2010 or the date on which the CAIR SO_2 unit commences commercial operation.

21.2. Duty to reapply. -- For a CAIR SO_2 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 SO_2 unit at the source to renew the CAIR permit in accordance with 45CSR30.

§45-41-22. Information Requirements for CAIR Permit Applications.

22.1. A complete CAIR permit application will include the following elements concerning the CAIR SO_2 source for which the application is submitted, in a format prescribed by the Secretary:

22.1.a. Identification of the CAIR SO_2 source;

22.1.b. Identification of each CAIR SO_2 unit at the CAIR SO_2 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.

§45-41-23. 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 SO_2 allowance to or from the compliance account of the CAIR SO_2 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 SO_2 source's Title V operating permit or other federally enforceable permit as applicable.

§45-41-24. 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.

§45-41-30. Reserved.

§45-41-40. Reserved.

§45-41-50. Reserved.

§45-41-51. Establishment of Accounts.

51.1. Compliance accounts. -- ~~Except as provided in subsection 84.5, upon~~ Upon receipt of a complete certificate of representation under section 13, the Administrator will establish a compliance account for the CAIR SO_2 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 SO_2 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 SO_2 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 SO_2 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 SO_2 Trading Program on behalf of such persons and that each such person will be fully bound by

my representations, actions, inactions, or submissions and by any order or decision issued to me by the Administrator or a court regarding the general account."; 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 and alternate 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 SO_2 allowances held in the general account in all matters pertaining to the CAIR SO_2 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 SO_2 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 SO_2 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~~ the 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 under subsection 51.2. 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 SO_2 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 under subsection 51.2. 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 SO_2 allowances in the general account.

51.6.c. In the event a ~~new~~ person having an ownership interest with respect to CAIR SO_2 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 SO_2 allowances in the general account, including the addition of ~~persons~~ a new person, 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 SO_2 allowances in the general account to include the change.

51.7. Objections concerning CAIR authorized account representative and alternate 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 under subsection 51.2 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~~ alternate 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~~ alternate CAIR authorized account representative or the finality of any decision or order by the Administrator under the CAIR SO_2 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~~ alternate CAIR authorized account representative for a general account, including private legal disputes concerning the proceeds of CAIR SO_2 allowance transfers.

51.8. Delegation by CAIR authorized account representative and alternate CAIR authorized account representative.

51.8.a. A CAIR authorized account representative may delegate, to one or more natural persons, his or her authority to make an electronic submission to the Administrator provided for or required under sections 51 through 62.

51.8.b. An alternate CAIR authorized account representative may delegate, to one or

more natural persons, his or her authority to make an electronic submission to the Administrator provided for or required under sections 51 through 62.

51.8.c. In order to delegate authority to make an electronic submission to the Administrator in accordance with subdivisions 51.8.a and 51.8.b, the CAIR authorized account representative or alternate CAIR authorized account representative, as appropriate, must submit to the Administrator a notice of delegation, in a format prescribed by the Administrator, that includes the following elements:

51.8.c.1. The name, address, e-mail address, telephone number, and facsimile transmission number (if any) of such CAIR authorized account representative or alternate CAIR authorized account representative;

51.8.c.2. The name, address, e-mail address, telephone number, and, facsimile transmission number (if any) of each such natural person (referred to as an "agent");

51.8.c.3. For each such natural person, a list of the type or types of electronic submissions under subdivisions 51.8.a and 51.8.b for which authority is delegated to him or her;

51.8.c.4. The following certification statement by such CAIR authorized account representative or alternate CAIR authorized account representative: "I agree that any electronic submission to the Administrator that is by an agent identified in this notice of delegation and of a type listed for such agent in this notice of delegation and that is made when I am a CAIR authorized account representative or alternate CAIR authorized representative, as appropriate, and before this notice of delegation is superseded by another notice of delegation under 45CSR§41-51.8.d shall be deemed to be an electronic submission by me."; and

51.8.c.5. The following certification statement by such CAIR authorized account representative or alternate CAIR authorized account representative: "Until this notice of delegation is superseded by another notice of delegation under 45CSR§41-51.8.d, I agree to maintain an e-mail account and to notify the Administrator immediately of any change in my e-mail address unless all delegation of authority by me under 45CSR§41-51.8 is terminated.".

51.8.d. A notice of delegation submitted under subdivision 51.8.c shall be effective, with regard to the CAIR authorized account representative or alternate CAIR authorized account representative identified in such notice, upon receipt of such notice by the Administrator and until receipt by the Administrator of a superseding notice of delegation submitted by such CAIR authorized account representative or alternate CAIR authorized account representative, as appropriate. The superseding notice of delegation may replace any previously identified agent, add a new agent, or eliminate entirely any delegation of authority.

51.8.e. Any electronic submission covered by the certification in paragraph 51.8.c.4 and made in accordance with a notice of delegation effective under subdivision 51.8.d shall be deemed to be an electronic submission by the CAIR designated representative or alternate CAIR designated representative submitting such notice of delegation.

~~51.8.~~ 51.9. Account identification. -- The Administrator will assign a unique identifying number to each account established under subsections 51.1 or 51.2.

§45-41-52. Responsibilities of CAIR Authorized Account Representative.

52.1. Following the establishment of a CAIR SO_2 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 SO_2 allowances in the account, will be made only by the CAIR authorized account representative for the account.

§45-41-53. Recordation of CAIR SO_2 allowances.

53.1. After a compliance account is established under subsection 51.1 or 40 CFR §73.31(a) or (b), the Administrator will record in the compliance account any CAIR SO_2 allowance allocated to any CAIR SO_2 unit at the source for each of the 30 years starting the later of 2010 or the year in which the compliance account is established and any CAIR SO_2 allowance allocated for each of the 30 years starting the later of 2010 or the year in which the compliance account is established and transferred to the source in accordance with sections 60 through 62 or Subpart D of 40 CFR Part 73.

53.2. In 2011 and each year thereafter, after Administrator has completed all deductions under ~~section~~ subsection 54.2, the Administrator will record in the compliance account any CAIR SO_2 allowance allocated to any CAIR SO_2 unit at the source for the new 30th year (i.e., the year that is 30 years after the calendar year for which such deductions are or could be made) and any CAIR SO_2 allowance allocated for the new 30th year and transferred to the source in accordance with sections 60 through 62 or Subpart D of 40 CFR Part 73.

53.3. After a general account is established under ~~section~~ subsection 51.2 or 40 CFR §73.31(c), the Administrator will record in the general account any CAIR SO_2 allowance allocated for each of the 30 years starting the later of 2010 or the year in which the general account is established and transferred to the general account in accordance with sections 60 through 62 or Subpart D of 40 CFR Part 73.

53.4. In 2011 and each year thereafter, after the Administrator has completed all deductions under ~~section~~ subsection 54.2, the Administrator will record in the general account any CAIR SO_2 allowance allocated for the new 30th year (i.e., the year that is 30 years after the calendar year for which such deductions are or could be made) and transferred to the general account in accordance with sections 60 through 62 or Subpart D of 40 CFR Part 73.

~~53.5. Serial numbers for allocated CAIR SO_2 allowances. -- When recording the allocation of CAIR SO_2 allowances issued by the Secretary under section 88, the Administrator will assign each such CAIR SO_2 allowance a unique identification number that will include digits identifying the year of the control period for which the CAIR SO_2 allowance is allocated.~~

§45-41-54. Compliance with CAIR SO_2 emission limitation.

54.1. Allowance transfer deadline. -- The CAIR SO_2 allowances are available to be deducted for compliance with a source's CAIR SO_2 emission limitation for a control period in a given calendar year only if the CAIR SO_2 allowances:

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

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 SO_2 allowance transfer correctly submitted for recordation under ~~section~~ sections 60 and 61 by the allowance transfer deadline for the control period~~; and~~

~~54.1.c. Are not necessary for deduction~~ deductions ~~for excess emissions for a prior control period under subsection 54.4 or for deduction under 40 CFR Part 77~~.

54.2. Deductions for compliance. -- Following the recordation, in accordance with section 61, of CAIR SO_2 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 SO_2 allowances available under subsection 54.1 in order to determine whether the source meets the CAIR SO_2 emission limitation for the control period as follows:

54.2.a. For a CAIR SO_2 source subject to an Acid Rain emissions limitation, the Administrator will, in the following order:

54.2.a.1. Deduct the amount of CAIR

SO_2 allowances, available under subsection 54.1 ~~and not issued by the Secretary under section 88,~~ that is required under 40 CFR §§73.35(b) and (c). If there are sufficient CAIR SO_2 allowances to complete this deduction, the deduction will be treated as satisfying the requirements of 40 CFR §§73.35(b) and (c).

54.2.a.2. Deduct the amount of CAIR SO_2 allowances~~, available under subsection 54.1 and not issued by the Secretary under section 88,~~ that is required under 40 CFR §§73.35(d) and 77.5. If there are sufficient CAIR SO_2 allowances to complete this deduction, the deduction will be treated as satisfying the requirements of 40 CFR §§73.35(d) and 77.5.

54.2.a.3. Treating the CAIR SO_2 allowances deducted under paragraph 54.2.a.1 as also being deducted under this paragraph, deduct CAIR SO_2 allowances available under subsection 54.1 ~~(including any issued by the Secretary under section 88)~~ in order to determine whether the source meets the CAIR SO_2 emission limitation for the control period, as follows:

54.2.a.3.A. Until the tonnage equivalent of the CAIR SO_2 allowances deducted equals, or exceeds in accordance with subdivisions 54.3.a and 54.3.b, the number of tons of total sulfur dioxide emissions, determined in accordance with sections 70 through ~~76~~ 75, from all CAIR SO_2 units at the source for the control period; or

54.2.a.3.B. If there are insufficient CAIR SO_2 allowances to complete the deductions in subparagraph 54.2.a.3.A, until no more CAIR SO_2 allowances available under subsection 54.1 ~~(including any issued by the Secretary under section 88)~~ remain in the compliance account.

54.2.b. For a CAIR SO_2 source not subject to an Acid Rain emissions limitation, the Administrator will deduct CAIR SO_2 allowances available under subsection 54.1 ~~(including any issued by the Secretary under section 88)~~ in order to determine whether the source meets the CAIR SO_2 emission limitation for the control period, as follows:

54.2.b.1. Until the tonnage equivalent of the CAIR SO_2 allowances deducted equals, or exceeds in accordance with subdivisions 54.3.a and 54.3.b, the number of tons of total sulfur dioxide emissions, determined in accordance with sections 70 through ~~76~~ 75, from all CAIR SO_2 units at the source for the control period; or

54.2.b.2. If there are insufficient CAIR SO_2 allowances to complete the deductions in paragraph 54.2.b.1, until no more CAIR SO_2 allowances available under subsection 54.1 ~~(including any issued by the Secretary under section 88)~~ remain in the compliance account.

54.3. Identification of CAIR SO_2 allowances by serial number.

54.3.a. The CAIR authorized account representative for a source's compliance account may request that specific CAIR SO_2 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 SO_2 source and the appropriate serial numbers.

54.3.b. First-in, first-out. -- The Administrator will deduct CAIR SO_2 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 SO_2 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 SO_2 allowances that were allocated to the units at the source for a control period before 2010, in the order of recordation;

54.3.b.2. Any CAIR SO_2 allowances that were allocated to any ~~unit~~ entity for a control period before 2010 and transferred and recorded in the compliance account pursuant to sections 60 through 62 or Subpart D of 40 CFR Part 73, in the

order of recordation;

54.3.b.3. Any CAIR SO_2 allowances that were allocated to the units at the source for a control period during 2010 through 2014, in the order of recordation;

54.3.b.4. Any CAIR SO_2 allowances that were allocated to any ~~unit~~ entity for a control period during 2010 through 2014 and transferred and recorded in the compliance account pursuant to sections 60 through 62 or Subpart D of 40 CFR Part 73, in the order of recordation;

54.3.b.5. Any CAIR SO_2 allowances that were allocated to the units at the source for a control period in 2015 or later, in the order of recordation; and

54.3.b.6. Any CAIR SO_2 allowances that were allocated to any ~~unit~~ entity for a control period in 2015 or later and transferred and recorded in the compliance account pursuant to sections 60 through 62 or Subpart D of 40 CFR Part 73, 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 SO_2 source has excess emissions, the Administrator will deduct from the source's compliance account the tonnage equivalent in CAIR SO_2 allowances, allocated for the control period in the immediately following calendar year ~~(including any issued by the Secretary under section 88)~~, equal to, or exceeding in accordance with subdivisions 54.3.a and 54.3.b, ~~three times the number of tons of the source's excess emissions~~ the sum of the following amount: three times the number of tons of the source's excess emissions minus, if the source is subject to an Acid Rain emissions limitation, the amount of the CAIR SO_2 allowances required to be deducted under paragraph 54.2.a.2.

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 SO_2 source or the CAIR SO_2 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~~ and 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 SO_2 Trading Program and make appropriate adjustments of the information in the submissions.

54.6.b. The Administrator may deduct CAIR SO_2 allowances from or transfer CAIR SO_2 allowances to a source's compliance account based on the information in the submissions, as adjusted under subdivision 54.6.a, and record such deductions and transfers.

§45-41-55. Banking.

55.1. CAIR SO_2 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 SO_2 allowance that is held in a compliance account or a general account will remain in such account unless and until the CAIR SO_2 allowance is deducted or transferred under sections 54, 56, or sections 60 through 62.

§45-41-56. 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 SO_2 Allowance Tracking System account. Within 10 business days of making such correction, the Administrator will notify the CAIR authorized account representative for the account.

§45-41-57. 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~~ sections 60 and 61 for any CAIR SO_2 allowances in the account to one or more other CAIR SO_2 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 SO_2 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 SO_2 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.

§45-41-60. Submission of CAIR SO_2 Allowance Transfers.

60.1. A CAIR authorized account representative seeking recordation of a CAIR SO_2 allowance transfer will submit the transfer to the Administrator. To be considered correctly submitted, the CAIR SO_2 allowance transfer must include the following elements, in a format specified by the Administrator:

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

60.1.b. The serial number of each CAIR SO_2 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.

60.2. The CAIR authorized account representative for the transferee account can meet the requirements in subdivision 60.1.c by submitting, in a format prescribed by the Administrator, a statement signed by the CAIR authorized account representative and identifying each account into which any transfer of allowances, submitted on or after the date on which the Administrator receives such statement, is authorized. Such authorization will be binding on any CAIR authorized account representative for such account and will apply to all transfers into the account that are submitted on or after such date of receipt, unless and until the Administrator receives a statement signed by the CAIR authorized account representative retracting the authorization for the account.

60.3. The statement under subsection 60.2 will include the following: "By this signature I authorize any transfer of allowances into each account listed herein, except that I do not waive any remedies under state or federal law to obtain correction of any erroneous transfers into such accounts. This authorization will be binding on any CAIR authorized account representative for such account unless and until a statement signed by the CAIR authorized account representative retracting this authorization for the account is received by the Administrator."

§45-41-61. U.S. EPA Recordation.

61.1. Within 5 business days (except as necessary to perform a transfer in perpetuity of CAIR SO_2 allowances allocated to a CAIR SO_2 unit or as provided in subsection 61.2) of receiving a CAIR SO_2 allowance transfer, the Administrator will record a CAIR SO_2 allowance transfer by moving each CAIR SO_2 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 SO_2 allowance identified by serial number in the transfer; and

61.1.c. The transfer is in accordance with

the limitation on transfer under 40 CFR §§74.42 and 74.47(c), as applicable.

61.2. CAIR SO_2 allowance transfer that is submitted for recordation after the allowance transfer deadline for a control period and that includes any CAIR SO_2 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 SO_2 allowance transfer submitted for recordation fails to meet the requirements of subsection 61.1, the Administrator will not record such transfer.

§45-41-62. Notification.

62.1. Notification of recordation. -- Within 5 business days of recordation of a CAIR SO_2 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 SO_2 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 SO_2 allowance transfer for recordation following notification of non-recordation.

§45-41-70. General Monitoring and Reporting Requirements. -- The owners and operators, and to the extent applicable, the CAIR designated representative of a CAIR SO_2 unit, must comply with the monitoring, recordkeeping and reporting requirements as provided in sections 70 through ~~76~~ 75 and Subparts F and G 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 SO_2 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 SO_2 unit but that is monitored under 40 CFR §75.16(b)(2) must comply with the same monitoring, recordkeeping and reporting requirements as a CAIR SO_2 unit.

70.1. Requirements for installation, certification and data accounting. -- The owner or operator of each CAIR SO_2 unit will:

70.1.a. Install all monitoring systems required under sections 70 through ~~76~~ 75 for monitoring SO_2 mass emissions and individual unit heat input (including all systems required to monitor SO_2 concentration, stack gas moisture content, stack gas flow rate, CO_2 or O_2 concentration, and fuel flow rate, as applicable, in accordance with 40 CFR §§75.11 and 75.16);

70.1.b. Successfully complete all certification tests required under section 71 and meet all other requirements of sections 70 through ~~76~~ 75 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~~ Except as provided in subsection 70.5, 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 SO_2 unit that commences commercial operation before July 1, 2008, by January 1, 2009;

70.2.b. For the owner or operator of a CAIR SO_2 unit that commences commercial operation on or after July 1, 2008, by the later of the following dates:

70.2.b.1. January 1, 2009; 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 SO_2 unit for which construction of a new stack or flue or installation of add-on SO_2 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 SO_2 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 and 70.2.b, and solely for purposes of subdivision 6.3.b, for the owner or operator of a CAIR SO_2 opt-in unit under sections 80 through 88, by the date on which the CAIR SO_2 opt-in unit enters the CAIR SO_2 Trading Program as provided in subsection 84.7.~~

70.3. Reporting data.

~~70.3.a. Except as provided in subdivision 70.3.b, the~~ -- The owner or operator of a CAIR SO_2 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 SO_2 concentration, ~~SO_2 emission rate (in lb/mmBtu),~~ stack gas flow rate, stack gas moisture content, fuel flow rate, and any other parameters required to determine SO_2 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, as applicable.

~~70.3.b. The owner or operator of a CAIR SO_2 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 of, or Appendix D 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 SO_2 unit will use any alternative monitoring system, alternative reference method, or any other alternative to any requirement of sections 70 through ~~76~~ 75 without having obtained prior written approval in accordance with section 75.

70.4.b. No owner or operator of a CAIR SO_2 unit will operate the unit so as to discharge, or allow to be discharged, SO_2 emissions to the atmosphere without accounting for all such emissions in accordance with the applicable provisions of sections 70 through ~~76~~ 75 and 40 CFR Part 75.

70.4.c. No owner or operator of a CAIR SO_2 unit will disrupt the continuous emission monitoring system, any portion thereof, or any other approved emission monitoring method, and thereby avoid monitoring and recording SO_2 mass emissions discharged into the atmosphere or heat input, 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~~ 75 and 40 CFR Part 75.

70.4.d. No owner or operator of a CAIR SO_2 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~~ 75, 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~~ 75 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.

70.5. Long-term cold storage. -- The owner or operator of a CAIR SO_2 unit is subject to the applicable provisions of 40 CFR Part 75 concerning units in long-term cold storage.

§45-41-71. Initial Certification and Recertification Procedures.

71.1. The owner or operator of a CAIR SO_2 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 Appendices B and D 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 §75.16(b)(2)(ii) for apportioning the SO_2 mass emissions measured in a common stack or a petition under 40 CFR §75.66 for an alternative to a requirement in 40 CFR §§75.11 or 75.16 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 SO_2 Trading Program~~ Reserved.

71.4. Except as provided in subsection 71.1, the owner or operator of a CAIR SO_2 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 Appendix D 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~~ 75 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 SO_2 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 system under subdivision 70.1.a is 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 SO_2 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 SO_2 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 SO_2 pollutant concentration monitor and disapproved flow monitor, respectively, the maximum potential concentration of SO_2 and the maximum potential flow rate, as defined in sections 2.1.1.1 and 2.1.4.1 of Appendix A to 40 CFR Part 75;

71.4.c.5.A.2. For a disapproved moisture monitoring system and disapproved diluent gas monitoring system, respectively, the minimum potential moisture percentage and either the maximum potential CO_2 concentration or the minimum potential O_2 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; and

71.4.c.5.A.3. 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.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 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).

§45-41-72. Out of Control Periods.

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

§45-41-73. Notifications.

73.1. The CAIR designated representative for a CAIR SO_2 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~~.

§45-41-74. 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 in Subparts F and G of 40 CFR Part 75, and the requirements of subsection 10.5.

74.2. Monitoring plans. -- The owner or operator of a CAIR SO_2 unit must comply with the requirements of 40 CFR §75.62 ~~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 SO_2 mass emissions data and heat input data for the CAIR SO_2 unit, in an electronic quarterly report in a format prescribed by the Administrator, for each calendar quarter beginning with:

74.4.a.1. For a unit that commences commercial operation before July 1, 2008, the calendar quarter covering January 1, 2009 through March 31, 2009; ~~or~~

74.4.a.2. For a unit that commences commercial operation on or after July 1, 2008, the calendar quarter corresponding to the earlier of the date of provisional certification or the applicable deadline for initial certification under subsection 70.2, unless that quarter is the third or fourth quarter of 2008, in which case reporting will commence in the quarter covering January 1, 2009 through March 31, 2009;

74.4.b. The 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 §75.64; and

74.4.c. For CAIR SO_2 units that are also subject to an Acid Rain emissions limitation or the CAIR NO_X Ozone Season Trading Program, ~~or~~ CAIR NO_X Annual Trading Program, or Hg Budget Trading Program, quarterly reports will include the applicable data and information required by Subparts F through ~~H~~ I of 40 CFR Part 75 as applicable, in addition to the SO_2 mass emission data, heat input data, and other information required by sections 70 through ~~76~~ 75.

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~~ 75 and 40 CFR Part 75, including the quality assurance procedures and specifications; and

74.5.b. For a unit with add-on SO_2 emission controls and for all hours where SO_2 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 SO_2 emissions.

§45-41-75. Petitions.

75.1. The CAIR designated representative of a CAIR SO_2 unit that is subject to an Acid Rain emissions limitation may submit a petition under 40 CFR §75.66 to the Administrator requesting approval to apply an alternative to any requirement of sections 70 through ~~76~~ 75. Application of an alternative to any requirement of sections 70 through ~~76~~ 75 is in accordance with sections 70 through ~~76~~ 75 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 SO_2 unit that is not subject to an Acid Rain emissions limitation may submit a petition under 40 CFR §75.66 to the Secretary and the Administrator requesting approval to apply an alternative to any requirement of sections 70 through ~~76~~ 75. Application of an alternative to any requirement of sections 70 through ~~76~~ 75 is in accordance with sections 70 through ~~76~~ 75 only to the extent that the petition is approved in writing by both the Secretary and the Administrator.

~~§45-41-76. Additional Requirements to Provide Heat Input Data.~~

~~76.1. The owner or operator of a CAIR SO_2 unit that monitors and reports SO_2 mass emissions using a SO_2 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~~ **Reserved**.

~~§45-41-80. CAIR SO_2 Opt-In Unit Applicability.~~ ~~-- A CAIR SO_2 opt-in unit must be a unit that:~~

~~80.1. Is located in West Virginia;~~

~~80.2. Is not a CAIR SO_2 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 and is not an opt-in source under 40 CFR Part 74;~~

~~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.~~

~~§45-41-81. 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 SO_2 opt-in unit will be treated as a CAIR SO_2 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 SO_2 unit before issuance of a CAIR opt-in permit for such unit.~~

~~§45-41-82. CAIR Designated Representative.~~

~~82.1. Any CAIR SO_2 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 SO_2 units will have the same CAIR designated representative and alternate CAIR designated representative as such CAIR SO_2 units.~~

~~§45-41-83. 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 SO_2 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 SO_2 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. Is not and, so long as the unit is a CAIR opt-in unit, will not become, an opt-in source under 40 CFR Part 74;~~

~~83.1.b.4. Vents all of its emissions to a stack; and~~

~~83.1.b.5. 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.c. A statement, in a format specified by the Secretary, whether the CAIR designated representative requests that the unit be allocated CAIR SO_2 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 SO_2 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 SO_2 Trading Program in accordance with section 86 or the unit becomes a CAIR SO_2 unit under section 4, the CAIR SO_2 opt-in unit will remain subject to the requirements for a CAIR SO_2 opt-in unit, even if the CAIR designated representative for the CAIR SO_2 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.

§45-41-84. 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 SO_2 emission rate and heat input of the unit 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 SO_2 emission 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 SO_2 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 SO_2 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 SO_2 emission 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 SO_2 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 SO_2 emission 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 SO_2 emission 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 SO_2 emission rate. -- The unit's baseline SO_2 emission rate will equal:

84.4.a. If the unit's SO_2 emission 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 SO_2 emission rate (in lb/mmBtu) for the control period;

84.4.b. If the unit's SO_2 emission 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 SO_2 emission controls during any such control periods, the average of the amounts of the unit's SO_2 emission 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 SO_2 emission 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 SO_2 emission controls during any such control periods, the average of the amounts of the unit's SO_2 emission rate (in lb/mmBtu) for such control period during which the unit has add-on SO_2 emission controls.

84.5. Issuance of CAIR opt-in permit. -- After calculating the baseline heat input and the baseline SO_2 emission 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 SO_2 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 SO_2 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 SO_2 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 SO_2 opt-in permit for the unit.

84.7. Date of entry into CAIR SO_2 Trading Program. -- A unit for which an initial CAIR opt-in permit is issued by the Secretary will become a CAIR SO_2 opt-in unit, and a CAIR SO_2 unit, as of the later of January 1, 2010 or January 1 of the first control period during which such CAIR opt-in permit is issued.

84.8. Repowered CAIR SO_2 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 SO_2 opt-in unit of CAIR SO_2 allowances under subsection 88.3 and such unit is repowered after its date of entry into the CAIR SO_2 Trading Program under subsection 84.7, the repowered unit will be treated as a CAIR SO_2 opt-in unit replacing the original CAIR SO_2 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 SO_2 emission rate as the original CAIR SO_2 opt-in unit, and the original CAIR SO_2 opt-in unit will no longer be treated as a CAIR opt-in

unit or a CAIR SO_2 unit.

§45-41-85. 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 SO_2 emission rate under subsection 84.4;

85.1.e. A statement whether the unit is to be allocated CAIR SO_2 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 SO_2 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 SO_2 allowances to or from the compliance account of the source that includes a CAIR SO_2 opt-in unit covered by the CAIR opt-in permit.

§45-41-86. Withdrawal from CAIR SO_2 Trading Program. -- Except as provided under subsection 86.7, a CAIR SO_2 opt-in unit may withdraw from the CAIR SO_2 Trading Program, but only if the Secretary issues a notification to the CAIR designated representative of the CAIR SO_2 opt-in unit of the acceptance of the withdrawal of the CAIR SO_2 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 SO_2 Trading Program, the CAIR designated representative of the CAIR SO_2 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 SO_2 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 SO_2 opt-in unit covered by a request under subsection 86.1 may withdraw from the CAIR SO_2 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 SO_2 opt-in unit must meet the requirement to hold CAIR SO_2 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 SO_2 opt-in unit CAIR SO_2 allowances equal in number to and allocated for the same or a prior control period as any CAIR SO_2 allowances allocated to the CAIR SO_2 opt-in unit under section 88 for any control period for which the withdrawal is to be effective. If there are no remaining CAIR SO_2 units at the source, the Administrator will close the compliance account, and the owners and operators of the CAIR SO_2 opt-in unit may submit a CAIR SO_2 allowance transfer for any remaining CAIR SO_2 allowances to another CAIR SO_2 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 SO_2 allowances required), the Secretary will issue a notification to the CAIR designated representative of the CAIR SO_2 opt-in unit of the acceptance of the withdrawal of the CAIR SO_2 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 SO_2 opt-in unit that the CAIR SO_2 opt-in unit's request to withdraw is denied. Such CAIR SO_2 opt-in unit will continue to be a CAIR SO_2 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 SO_2 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 SO_2 opt-in unit until the effective date of the termination and will comply with all requirements under the CAIR SO_2 Trading Program concerning any control periods for which the unit is a CAIR SO_2 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 SO_2 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 SO_2 Trading Program. -- Once a CAIR SO_2 opt-in unit withdraws from the CAIR SO_2 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 SO_2 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 SO_2 opt-in unit will not be eligible to withdraw from the CAIR SO_2 Trading Program if the CAIR designated representative of the CAIR SO_2 opt-in unit requests, and the Secretary issues a CAIR SO_2 opt-in permit providing for, allocation to the CAIR SO_2 opt-in unit of CAIR SO_2 allowances under subsection 88.3.

§45-41-87. Change in Regulatory Status.

87.1. Notification. -- If a CAIR SO_2 opt-in unit becomes a CAIR SO_2 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 SO_2 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 SO_2 opt-in unit becomes a CAIR SO_2 unit under section 4, the Secretary will revise the CAIR SO_2 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 SO_2 opt-in unit becomes a CAIR SO_2 unit under section 4.

87.2.b. The Administrator will deduct from the compliance account of the source that includes a CAIR SO_2 opt-in unit that becomes a CAIR SO_2 unit under section 4, CAIR SO_2 allowances equal in number to and allocated for the same or a prior control period as:

87.2.b.1. Any CAIR SO_2 allowances allocated to the CAIR SO_2 opt-in unit under section 88 for any control period after the date on which the CAIR SO_2 opt-in unit becomes a CAIR SO_2 unit under section 4; and

87.2.b.2. If the date on which the CAIR SO_2 opt-in unit becomes a CAIR SO_2 unit under section 4 is not December 31, the CAIR SO_2 allowances allocated to the CAIR SO_2 opt-in unit under section 88 for the control period that includes the date on which the CAIR SO_2 opt-in unit becomes a CAIR SO_2 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 SO_2 opt-in unit becomes a CAIR SO_2 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 SO_2 unit that becomes a CAIR SO_2 unit under section 4 contains the CAIR SO_2 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 SO_2 opt-in unit becomes a CAIR SO_2 unit under section 4, the CAIR SO_2 opt-in unit will be treated, solely for purposes of CAIR SO_2 allowance allocations under section 42, as a unit that commences operation on the date on which the CAIR SO_2 opt-in unit becomes a CAIR SO_2 unit under section 4 and will be allocated CAIR SO_2 allowances under section 42.

87.2.e. Notwithstanding subdivision 87.2.d, if the date on which the CAIR SO_2 opt-in unit becomes a CAIR SO_2 unit under section 4 is not January 1, the following number of CAIR SO_2 allowances will be allocated to the CAIR SO_2 opt-in unit (as a CAIR SO_2 unit) under section 42 for the control period that includes the date on which the CAIR SO_2 opt-in unit becomes a CAIR SO_2 unit under section 4:

87.2.e.1. The number of CAIR SO_2 allowances otherwise allocated to the CAIR SO_2 opt-in unit (as a CAIR SO_2 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 SO_2 opt-in unit becomes a CAIR SO_2 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.

§45-41-88. CAIR SO_2 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 SO_2 allowances to the CAIR SO_2 opt-in unit, and submit to the Administrator the allocation for the control period in which a CAIR SO_2 opt-in unit enters the CAIR SO_2 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 SO_2 Trading Program under subsection 84.7, and October 31 of each year thereafter, the Secretary will allocate CAIR SO_2 allowances to the CAIR SO_2 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 SO_2 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 SO_2 opt-in unit is to be allocated CAIR SO_2 allowances, the Secretary will allocate in accordance with the following procedures:

88.2.a. The heat input (in mmDtu) used for calculating the CAIR SO_2 allowance allocation will be the lesser of:

88.2.a.1. The CAIR SO_2 opt-in unit's baseline heat input determined under subsection 84.3; or

88.2.a.2. The CAIR SO_2 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 SO_2 opt-in unit enters the CAIR SO_2 Trading Program under subsection 84.7;~~

~~88.2.b. The SO_2 emission rate (in lb/mmBtu) used for calculating CAIR SO_2 allowance allocations will be the lesser of:~~

~~88.2.b.1. The CAIR SO_2 opt-in unit's baseline SO_2 emission rate determined under subsection 84.4 and multiplied by 70 percent; or~~

~~88.2.b.2. The most stringent state or federal SO_2 emission limitation applicable to the CAIR SO_2 opt-in unit at any time during the control period for which CAIR SO_2 allowances are to be allocated; and~~

~~88.2.c. The Secretary will allocate CAIR SO_2 allowances to the CAIR SO_2 opt-in unit with a tonnage equivalent equal to, or less than by the smallest amount, the heat input under subdivision 88.2.a, multiplied by the SO_2 emission rate under subdivision 88.2.b, divided by 2,000 lb/ton.~~

~~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 SO_2 opt-in unit of CAIR SO_2 allowances under this subsection (subject to the conditions in subsections 84.8 and 86.7), the Secretary will allocate to the CAIR SO_2 opt-in unit as follows:~~

~~88.3.a. For each control period in 2010 through 2014 for which the CAIR SO_2 opt-in unit is to be allocated CAIR SO_2 allowances, the heat input (in mmBtu) used for calculating CAIR SO_2 allowance allocations will be determined as described in subdivision 88.2.a. The SO_2 emission rate (in lb/mmBtu) used for calculating CAIR SO_2 allowance allocations will be the lesser of:~~

~~88.3.a.1. The CAIR SO_2 opt-in unit's baseline SO_2 emission rate determined under subsection 84.4; or~~

~~88.3.a.2. The most stringent state or federal SO_2 emission limitation applicable to the CAIR SO_2 opt-in unit at any time during the control period in which the CAIR SO_2 opt-in unit enters the CAIR SO_2 Trading Program under subsection 84.7;~~

~~88.3.b. The Secretary will allocate CAIR SO_2 allowances to the CAIR SO_2 opt-in unit with a tonnage equivalent equal to, or less than by the smallest amount, the heat input under subdivision 88.3.a, multiplied by the SO_2 emission rate under subdivision 88.3.a, divided by 2,000 lb/ton;~~

~~88.3.c. For each control period in 2015 and thereafter for which the CAIR SO_2 opt-in unit is to be allocated CAIR SO_2 allowances, the heat input (in mmBtu) used for calculating the CAIR SO_2 allowance allocations will be determined as described in subdivision 88.2.a. The SO_2 emission rate (in lb/mmBtu) used for calculating the CAIR SO_2 allowance allocation will be the lesser of:~~

~~88.3.c.1. The CAIR SO_2 opt-in unit's baseline SO_2 emission rate determined under subsection 84.4 multiplied by 0.10 (10 percent); or~~

~~88.3.c.2. The most stringent state or federal SO_2 emission limitation applicable to the CAIR SO_2 opt-in unit at any time during the control period for which CAIR SO_2 allowances are to be allocated; and~~

~~88.3.d. The Secretary will allocate CAIR SO_2 allowances to the CAIR SO_2 opt-in unit with a tonnage equivalent equal to, or less than by the smallest amount, the heat input under subdivision 88.3.c, multiplied by the SO_2 emission rate under subdivision 88.3.c, divided by 2,000 lb/ton.~~

~~88.4. Recordation.~~

~~88.4.a. The Administrator will record, in the compliance account of the source that includes the CAIR SO_2 opt-in unit, the CAIR SO_2 allowances allocated by the Secretary to the CAIR SO_2 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 SO_2 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 SO_2 opt-in unit, the CAIR SO_2 allowances allocated by the Secretary to the CAIR SO_2 opt-in unit under subdivision 88.1.b~~ **Reserved**.

§45-41-90. 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~~ the inconsistency will be resolved by the determination of the Secretary and ~~such~~ the determination will be based upon the application of the more stringent provision, term, condition, method or rule.