



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

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

AGENCY: Air Quality TITLE-SERIES: 45-43
RULE TYPE: Legislative Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: 45-43 Cross-State Air Pollution Rule to Control Annual Nitrogen Oxides Emissions, Annual Sulfur Dioxide Emissions, and Ozone Season Nitrogen Oxides Emissions

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: W. Va. Code § 22-5-4

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

W. Va. Code §22-5-4(a)(4) authorizes the director to promulgate legislative rules relating to the control of air pollution. W. Va. Code §22-1-3(c) authorizes the director to incorporate by reference the federal counterpart regulation.

This rule incorporates by reference the federal Cross-State Air Pollution Rule (CSAPR), limiting the emissions of nitrogen oxides (NOX) and sulfur dioxide (SO2), through emissions trading programs. CSAPR was promulgated by the United States Environmental Protection Agency under § 110 of the federal Clean Air Act, as amended and 40 C.F.R. §§ 52.38 and 52.39 as a means of mitigating interstate transport of fine particulates, nitrogen oxides, ozone, and sulfur dioxide.

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/5/2018

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/10/2018

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: Yes

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: Yes

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

Legal advertisement of public notice published 6/8/18 in the Charleston Newspapers
Public notice published 6/8/18 in the WV State Register
Public notice posted on the Department of Environmental Protection website
Public notice posted on the Division of Air Quality website
Public notice sent to the DEP mailing list

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

This is a new state rule that incorporates by reference the federal Cross-State Air Pollution Rule (CSAPR), limiting the emissions of nitrogen oxides (NOX) and sulfur dioxide (SO₂), through emissions trading programs. CSAPR was promulgated by the United States Environmental Protection Agency under § 110 of the federal Clean Air Act, as amended and 40 C.F.R. §§ 52.38 and 52.39 as a means of mitigating interstate transport of fine particulates, nitrogen oxides, ozone, and sulfur dioxide. The trading programs include: the CSAPR NOX Annual Trading Program set forth in 40 C.F.R. part 97, subpart AAAAA; the CSAPR NOX Ozone Season Group 2 Trading Program set forth in 40 C.F.R. part 97, subpart EEEEE; and the CSAPR SO₂ Group 1 Trading Program set forth in 40 C.F.R. part 97, subpart CCCCC.

The purpose of this rule is to establish general procedures and criteria to implement these trading programs.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

This rule is exempt from the Regulatory Moratorium under Executive Order 2-18 under condition 3(f), implementing a federal mandate and no waiver is permitted.

Adoption of these federal trading program rules under 45 C.S.R. 43 will allow West Virginia to revise the State Implementation Plan (SIP) and correct identified deficiencies that are the bases for the CSAPR Federal Implementation Plans (FIPs) under 40 C.F.R. §§ 52.38 and 52.39, respectively.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

The proposed rule should not impact revenues of state government.

B. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

The proposed rule should not impact costs of state government, nor should it have an economic impact on the state or its residents. The proposed revisions to this rule should have no additional impact on the cost of state government beyond that resulting from currently applicable federal requirements.

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2018 Increase/Decrease (use "-")	2019 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

This rule is not expected to impact the costs of state government. The federal requirements being adopted by this rule are currently being met under federal implementation plans (FIP). The trading programs will continue to be administered by the EPA.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Tammy L Mowrer -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 45
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
AIR QUALITY

SERIES 43
CROSS-STATE AIR POLLUTION RULE TO CONTROL ANNUAL NITROGEN OXIDES
EMISSIONS, ANNUAL SULFUR DIOXIDE EMISSIONS, AND OZONE SEASON NITROGEN
OXIDES EMISSIONS

§45-43-1. General.

1.1. Scope. -- This rule establishes and adopts the federal Cross-State Air Pollution Rule (CSAPR), limiting the interstate transport of emissions of nitrogen oxides (NO_x) and sulfur dioxide (SO₂), through emissions trading programs. CSAPR was promulgated by the United States Environmental Protection Agency under section 110 of the federal Clean Air Act, as amended and 40 C.F.R. §§ 52.38 and 52.39 as a means of mitigating interstate transport of fine particulates, nitrogen oxides, ozone and sulfur dioxide.

1.1.a. This rule codifies general procedures and criteria to implement the CSAPR NO_x Annual Trading Program set forth in 40 C.F.R. part 97, subpart AAAAA. The Secretary hereby adopts these standards by reference. The Secretary also adopts associated reference methods, performance specifications and other test methods referenced by these standards.

1.1.b. This rule codifies general procedures and criteria to implement the CSAPR NO_x Ozone Season Group 2 Trading Program set forth in 40 C.F.R. part 97, subpart EEEEE. The Secretary hereby adopts these standards by reference. The Secretary also adopts associated reference methods, performance specifications and other test methods referenced by these standards.

1.1.c. This rule codifies general procedures and criteria to implement the CSAPR SO₂ Group 1 Trading Program set forth in 40 C.F.R. part 97, subpart CCCCC. The Secretary hereby adopts these standards by reference. The Secretary also adopts associated reference methods, performance specifications and other test methods referenced by these standards.

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

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Sunset Provision. -- Does not apply.

1.6. Incorporation By Reference. -- Federal Counterpart Regulation. The Secretary has determined that a federal counterpart rule exists, and in accordance with the Secretary's recommendation, with limited exception, this rule incorporates by reference 40 C.F.R. 97, subparts AAAAA, CCCCC and EEEEE, effective June 1, 2018.

§45-43-2. Definitions.

2.1. “Administrator” means the Administrator of the United States Environmental Protection Agency or the Director of the Clean Air Markets Division (or its successor determined by the Administrator) of the United States Environmental Protection Agency, the Administrator’s duly authorized representative under 40 C.F.R. part 97, subparts AAAAA, CCCCC, or EEEEE.

2.2. “Clean Air Act” (“CAA”) means the federal Clean Air Act, found at 42 U.S.C. § 7401 et seq.

2.3. “CSAPR” means Cross-State Air Pollution Rule.

2.4. “CSAPR NO_x Annual Trading Program” means a multi-state NO_x air pollution control and emission reduction program established in accordance with 40 C.F.R. part 97, subpart AAAAA and 40 C.F.R. § 52.38(a) (including such a program that is revised in a SIP revision approved by the Administrator under 40 C.F.R. § 52.38(a)(3) or (4) or that is established in a SIP revision approved by the Administrator under 40 C.F.R. § 52.38(a)(5)), as a means of mitigating interstate transport of fine particulates and NO_x.

2.5. “CSAPR NO_x Ozone Season Group 2 Trading Program” means a multi-state NO_x air pollution control and emission reduction program established in accordance with 40 C.F.R. part 97, subpart EEEEE and 40 C.F.R. §§ 52.38(b)(1), (b)(2)(i) and (iii), (b)(6) through (11), and (b)(13) (including such a program that is revised in a SIP revision approved by the Administrator under 40 C.F.R. § 52.38(b)(7) or (8) or that is established in a SIP revision approved by the Administrator under 40 C.F.R. § 52.38(b)(6) or (9)), as a means of mitigating interstate transport of ozone and NO_x.

2.6. “CSAPR SO₂ Group 1 Trading Program” means a multi-state SO₂ air pollution control and emission reduction program established in accordance with 40 C.F.R. part 97, subpart CCCCC and 40 C.F.R. §§ 52.39(a), (b), (d) through (f), and (j) through (l) (including such a program that is revised in a SIP revision approved by the Administrator under 40 C.F.R. § 52.39(f)), as a means of mitigating interstate transport of fine particulates and SO₂.

2.7. “Existing unit” for the purpose of allocation means:

2.7.a. A unit under the CSAPR NO_x Annual Trading Program or the CSAPR SO₂ Group 1 Trading Program that commenced commercial operation prior to January 1, 2010.

2.7.b. A unit under the CSAPR NO_x Ozone Season Group 2 Trading Program that commenced commercial operation prior to January 1, 2015.

2.8. “New unit” for the purpose of allocation means any unit that is not an existing unit.

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

2.10. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in 40 C.F.R. part 97, subparts AAAAA, CCCCC, and EEEEE. Words and phrases not defined therein shall have the meaning given to them in the federal Clean Air Act.

§45-43-3. Adoption of standards.

3.1. CSAPR NO_x Annual Trading Program -- The Secretary hereby adopts and incorporates by reference the provisions of 40 C.F.R. part 97, subpart AAAAA, including any applicable reference methods, performance specifications and other test methods, and monitoring, record keeping and reporting requirements which are required by that subpart, effective June 1, 2018, for the purposes of implementing the CSAPR NO_x Annual Trading Program, except as follows:

3.1.a. The provisions of 40 C.F.R. § 97.410 are not adopted or incorporated by reference;

3.1.b. The provisions of 40 C.F.R. §§ 97.411(b)(2) and (c)(5)(iii), 97.412(b) and 97.421 (h) and (j) are not adopted or incorporated by reference;

3.1.c. The provisions of 40 C.F.R. § 97.404(a)(1) that are otherwise adopted and incorporated by reference are modified by removing the phrase “The following units in a State (and Indian country within the borders of such State)” and adding in its place the phrase “The following units in West Virginia”; and

3.1.d. The provisions of 40 C.F.R. § 97.404(b)(1) that are otherwise adopted and incorporated by reference are modified by removing the phrase “Any unit in a State (and Indian country within the borders of such State)” and adding in its place the phrase “Any unit in West Virginia”.

3.2. CSAPR NO_x Ozone Season Group 2 Trading Program -- The Secretary hereby adopts and incorporates by reference the provisions of 40 C.F.R. part 97, subpart EEEEE, including any applicable reference methods, performance specifications and other test methods, and monitoring, record keeping and reporting requirements required by that subpart, effective June 1, 2018, for the purposes of implementing the CSAPR NO_x Ozone Season Group 2 Trading Program, except as follows:

3.2.a. The provisions of 40 C.F.R. § 97.810 are not adopted or incorporated by reference;

3.2.b. The provisions of 40 C.F.R. §§ 97.811(b)(2) and (c)(5)(iii), 97.812(b) and 97.821 (h) and (j) are not adopted or incorporated by reference;

3.2.c. The provisions of 40 C.F.R. § 97.804(a)(1) that are otherwise adopted and incorporated by reference are modified by removing the phrase “The following units in a State (and Indian country within the borders of such State)” and adding in its place the phrase “The following units in West Virginia”; and

3.2.d. The provisions of 40 C.F.R. § 97.804(b)(1) that are otherwise adopted and incorporated by reference are modified by removing the phrase “Any unit in a State (and Indian country within the borders of such State)” and adding in its place the phrase “Any unit in West Virginia”.

3.3. CSAPR SO₂ Group 1 Trading Program -- The Secretary hereby adopts and incorporates by reference the provisions of 40 C.F.R. part 97, subpart CCCCC, including any applicable reference methods, performance specifications and other test methods, and monitoring, record keeping and reporting requirements required by that subpart, effective June 1, 2018, for the purposes of implementing the CSAPR SO₂ Group 1 Trading Program, except as follows:

3.3.a. The provisions of 40 C.F.R. § 97.610 are not adopted or incorporated by reference;

3.3.b. The provisions of 40 C.F.R. §§ 97.611(b)(2) and (c)(5)(iii), 97.612(b) and 97.621 (h) and (j) are not adopted or incorporated by reference;

3.3.c. The provisions of 40 C.F.R. § 97.604(a)(1) that are otherwise adopted and incorporated by reference are modified by removing the phrase “The following units in a State (and Indian country within the borders of such State)” and adding in its place the phrase “The following units in West Virginia”; and

3.3.d. The provisions of 40 C.F.R. § 97.604(b)(1) that are otherwise adopted and incorporated by reference are modified by removing the phrase “Any unit in a State (and Indian country within the borders of such State)” and adding in its place the phrase “Any unit in West Virginia”.

§45-43-4. Requirements for the CSAPR NO_x Annual Trading Program.

4.1. No person may construct, reconstruct, modify, or operate or cause to be constructed, reconstructed, modified, or operated any source subject to the provisions of 40 C.F.R. part 97, subpart AAAAA which results or will result in a violation of this rule.

4.2. For each control period in 2019 and thereafter, the West Virginia NO_x Annual trading budget and new unit set-aside allocations of CSAPR NO_x Annual allowances, and the variability limit for the West Virginia NO_x Annual trading budget, are as follows:

4.2.a. The NO_x annual trading budget is 54,582 tons;

4.2.b. The new unit set-aside is 2,729 tons; and

4.2.c. The variability limit is 9,825 tons.

4.3. The West Virginia NO_x Annual trading budget provided under subsection 4.2:

4.3.a. Includes any tons in the new unit set-aside; and

4.3.b. Does not include any tons in the variability limit.

§45-43-5. Requirements for the CSAPR NO_x Ozone Season Group 2 Trading Program.

5.1. No person may construct, reconstruct, modify, or operate or cause to be constructed, reconstructed, modified, or operated any source subject to the provisions of 40 C.F.R. part 97, subpart EEEEE which results or will result in a violation of this rule.

5.2. For each control period in 2019 and thereafter, the West Virginia NO_x Ozone Season Group 2 trading budget and new unit-set aside for allocations of CSAPR NO_x Ozone Season Group 2 allowances, and the variability limit for the West Virginia NO_x Ozone Season Group 2 trading budget, are as follows:

5.2.a. The NO_x Ozone Season Group 2 trading budget is 17,815 tons;

5.2.b. The new unit set-aside is 356 tons; and

5.2.c. The variability limit is 3,741 tons.

5.3. The NO_x Ozone Season Group 2 trading budget provided under subsection 5.2:

5.3.a. Includes any tons in the new unit set-aside; and

5.3.b. Does not include any tons in the variability limit.

§45-43-6. Requirements for the CSAPR SO₂ Group 1 Trading Program.

6.1. No person may construct, reconstruct, modify, or operate or cause to be constructed, reconstructed, modified, or operated any source subject to the provisions of 40 C.F.R. part 97, subpart CCCCC which results or will result in a violation of this rule.

6.2. For each control period in 2019 and thereafter, the West Virginia SO₂ Group 1 trading budget

and new unit set-aside for allocations of CSAPR SO₂ Group 1 allowances, and the variability limit for the West Virginia SO₂ Group 1 trading budget are as follows:

6.2.a. The SO₂ Group 1 trading budget is 75,668 tons;

6.2.b. The new unit set-aside is 5,297 tons; and

6.2.c. The variability limit is 13,620 tons.

6.3. The West Virginia SO₂ Group 1 trading budget provided under subsection 6.2:

6.3.a. Includes any tons in the new unit set-aside; and

6.3.b. Does not include any tons in the variability limit.

§45-43-7. Secretary.

7.1. Any and all references in 40 C.F.R. part 97, subparts AAAAA, CCCCC, and EEEEE to the “Administrator” remain the “Administrator”.

§45-43-8. Permits.

8.1. Nothing contained in this adoption by reference shall be construed or inferred to mean that permit requirements in accordance with applicable rules shall be in any way be limited or inapplicable.

§45-43-9. Inconsistency Between Rules.

9.1. In the event of any inconsistency between this rule and any other rule of the Division of Air Quality, 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.