



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

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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: 45-33  
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No  
RULE NAME: Acid Rain Provisions and Permits

**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 establishes and adopts general provisions and the operating permit program requirements for affected sources and affected units under the Acid Rain Program promulgated by the United States Environmental Protection Agency (EPA) under Title IV of the Clean Air Act, as amended (CAA). The Secretary adopted these standards by reference and adopted associated reference methods, performance specifications and other test methods which are appended to these standards.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/24/2020

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/28/2020

COMMENTS RECEIVED: Yes

(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 6/26/20 in the Charleston Newspapers  
Public notice published 6/26/20 in the WV State Register  
Notice posted on the Department of Environmental Protection website <https://dep.wv.gov/pio/Pages/Rules.aspx>  
Notice posted on the Division of Air Quality website  
<https://dep.wv.gov/daq/publicnoticeandcomment/Pages/default.aspx>  
Public notice sent to the DEP email list 6/29/20

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 rule establishes and adopts general provisions and the operating permit program requirements for affected sources and affected units under the Acid Rain Program promulgated by the United States Environmental Protection Agency (EPA) under Title IV of the Clean Air Act, as amended (CAA). The Secretary adopts these standards by reference and adopts associated reference methods, performance specifications and other test methods which are appended to these standards.

The purpose of this rule is to maintain consistency with current federal regulations and to fulfill West Virginia's obligations under the CAA for programs it has delegation of.

Revisions to this rule include: (1) inserting the sunset provision in subsection 1.5; (2) revising the definition of Clean Air Act for consistency with other DAQ rules; and (3) incorporating by reference a revision to federal counterpart regulation, 40 CFR Part 75, Continuous Emissions Monitoring published at 85FR22362 on April 22, 2020.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

The EPA approved West Virginia Title V program encompasses this rule. Maintaining this rule by keeping it current with the federal counterpart regulations allows the State to retain primacy of the Title V program. Upon authorization and promulgation, 45CSR33 will be submitted to the EPA to fulfill federal obligations under the CAA.

The EPA amended the emissions reporting regulations applicable to sources that monitor and report emissions under the Acid Rain Program. The amendments provide that if an affected unit fails to complete a required quality-assurance, certification or recertification, fuel analysis, or emission rate test by the applicable deadline under the regulations because of travel, plant access, or other safety restrictions implemented to address the current COVID-19 national emergency and if the units actual monitored data would be considered valid if not for the delayed test, the unit may temporarily continue to report actual monitored data instead of substitute data. Sources must maintain documentation, notify EPA when a test is delayed and later completed, and certify to EPA that they meet the criteria for using the amended reporting procedures. Substitute data must be reported if those criteria are not met or if monitored data are missing or are invalid for any non-emergency-related reason. Units are required to complete any delayed tests as soon as practicable after relevant emergency-related restrictions no longer apply, and the emergency period for which a unit can report valid data under the amendments is limited to the duration of the COVID-19 national emergency plus a grace period of 60 days to complete delayed tests, but no later than the date of expiration of the amendments. This action was necessary during the COVID-19 national emergency to protect on-site power plant operators and other essential personnel

from unnecessary risk of exposure to the coronavirus. The amendments do not suspend emissions monitoring or reporting requirements or alter emissions standards under any program, and EPA expected the amendments would not cause any change in emissions levels. The rule therefore would not result in any harm to public health or the environment that might occur from increased emissions, and to the extent that the amendments facilitate plant operators efforts to comply with travel and plant access restrictions imposed to protect public health during the COVID-19 emergency, the amendments would have a positive impact on public health by assisting efforts to slow the spread of the disease.

Most sources subject to Part 75 participate in EPA trading programs that require surrender of sulfur dioxide (SO<sub>2</sub>) or nitrogen oxides (NO<sub>x</sub>) emission allowances for each ton of reported emissions, so the increase in reported emissions following a missed test deadline results in an increase in the quantity of allowances that must be surrendered, with a corresponding increase in the sources allowance costs. In ordinary circumstances, this regulatory approach appropriately provides operators with a strong incentive to conduct all required tests by the applicable deadlines. While affected sources typically perform Part 75 continuous monitoring activities using highly automated monitoring systems overseen by plant staff, most sources conduct certain required Part 75 tests using outside contractor personnel. Some tests also require calibration gases to be obtained from outside facilities or require fuel samples to be analyzed at outside laboratories. Consequently, current travel, plant access, and other safety restrictions related to the novel coronavirus disease (COVID-19) emergency, as well as shutdowns of external facilities that provide necessary supplies or services, may make compliance with Part 75 testing requirements difficult for some sources.

This rule is exempt from the Regulatory Moratorium of Executive Order 2-18 under condition 3(g), updating state rules to comply with federal law requirements.

**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 revision to this rule should not impact revenues of state government.

**B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:**

The proposed revisions to this rule should not impact special revenue accounts.

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

The proposed revisions to this rule should not impact costs of state government, nor should it have an economic impact on the state or its residents.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2020 Increase/Decrease (use "-")	2021 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

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

The proposed revisions to this rule will have a minimal effect on the costs to the Division of Air Quality because they impose no additional requirements beyond current federal requirements.

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

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

Yes

Jason E Wandling -- 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 33  
ACID RAIN PROVISIONS AND PERMITS

**§45-33-1. General.**

1.1. Scope. -- This rule establishes and adopts general provisions and the operating permit program requirements for affected sources and affected units under the Acid Rain Program promulgated by the United States Environmental Protection Agency under Title IV of the Clean Air Act, as amended (CAA). The Secretary hereby adopts these standards by reference. The Secretary also adopts associated reference methods, performance specifications and other test methods which are appended to these standards.

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

1.3. Filing Date. -- ~~April 30, 2010.~~

1.4. Effective Date. -- ~~June 1, 2010.~~

1.5. Sunset Provision. -- Does not apply.

1.6. Incorporation by Reference. -- Federal Counterpart Regulation. The Secretary has determined that a federal counterpart regulation exists, and in accordance with the Secretary's recommendation this rule incorporates by reference the following provisions: 40 CFR Part 72, "Permits Regulation"; 40 CFR Part 74, "Sulfur Dioxide Opt-Ins"; 40 CFR Part 75, "Continuous Emissions Monitoring"; 40 CFR Part 76, "Nitrogen Oxides Reduction Program"; and 40 CFR Part 77, "Excess Emissions"; effective June 1, ~~2009~~ 2020.

~~1.6. Former Rules.~~ ~~This legislative rule amends 45CSR33 "Acid Rain Provisions and Permits" which was filed April 28, 2006, and which became effective May 1, 2006.~~

**§45-33-2. Definitions.**

2.1. "Administrator" means the Administrator of the United States Environmental Protection Agency.

2.2. "Clean Air Act" ("CAA") means the federal Clean Air Act, as amended, 42 U.S.C. §7401, et seq.

2.3. "Permitting Authority" means the Secretary of the West Virginia Department of Environmental Protection.

2.4. "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.

2.5. Other words and phrases used in this rule, unless otherwise indicated, will have the meaning ascribed to them in 40 CFR §72.2. Words and phrases not defined therein will have the meaning given to them in federal Clean Air Act.

**§45-33-3. Requirements.**

3.1. No person may construct, modify, or operate or cause to be constructed, modified, or operated an affected source which results or will result in a violation of this rule.

**§45-33-4. Adoption of Standards.**

4.1. The Secretary hereby adopts and incorporates by reference the following provisions of the United States Environmental Protection Agency Acid Rain Program effective June 1, ~~2009~~ 2020: 40 CFR Part 72, “Permits Regulation”, including all Subparts and Appendices; 40 CFR Part 74, “Sulfur Dioxide Opt-Ins”, including all Subparts; 40 CFR Part 75, “Continuous Emissions Monitoring”, including all Subparts and Appendices; 40 CFR Part 76, “Nitrogen Oxides Emissions Reduction Program”, including all Appendices; and 40 CFR Part 77, “Excess Emissions”. These provisions are adopted for the purposes of implementing an acid rain program that meets the requirements of Title IV of the federal CAA, as amended.

**§45-33-5. Inconsistency Between Rules.**

5.1. The provisions of this rule must not be construed as exempting persons subject to this rule from compliance with any other provisions of the CAA, including the provisions of Title I of the CAA relating to applicable National Ambient Air Quality Standards, the State Implementation Plan, or any other rules of the West Virginia Department of Environmental Protection, except as expressly provided under Title IV of the CAA; provided however, that in the event of any inconsistency between the provisions of this rule and any provisions of 45CSR30, the provisions of this rule will take precedence and will govern the issuance, denial, revision, reopening, renewal, and appeal of the Acid Rain provision of an operating permit.