

45CSR1
ALTERNATIVE EMISSION LIMITATIONS DURING STARTUP AND SHUTDOWN
OPERATIONS
RESPONSE TO COMMENTS

The WV Department of Environmental Protection (DEP), Division of Air Quality (DAQ) commenced the public comment period for proposed legislative rule 45CSR1 on June 2, 2023. The public comment period concluded July 6, 2023, after satisfying the 30-day period. A public hearing was held virtually on July 6, 2023. The purpose of the public comment period and hearing was to accept oral and written comments on the proposed revisions to 45CSR1.

There were five written comments received during the public comment period from: Mr. Charlie Burd, Executive Director of Gas and Oil Association of West Virginia, Inc (GO WV), Mr. Duane Nichols of Mon Valley Clean Air Coalition (MVCAC), Mr. Jason Bostic, Executive Vice President, West Virginia Coal Association, (WVCA), Ms. Rebecca McPhail, President of West Virginia Manufacturers Association, and Mr. James Kotcon, Conservation Chair of WV Chapter of Sierra Club (WV SC). Three persons provided oral comments during the public hearing, some of which also provided written comments: Ms. Betsy Lawson, Mr. Duane Nichols of Mon Valley Clean Air Coalition (MVCAC), Mr. James Kotcon, Conservation Chair of WV Chapter of Sierra Club (WV SC). A summary of the consolidated comments and responses are provided below.

The original comments received and the public hearing transcript are provided as part of the formal rulemaking record.

The following requirements were revised or added after reviewing and considering the comments received:

- §45-1-6.1 was revised in response to Comment 23.
- §45-1-8 was added in response to Comment 3B, 9, 10, 15, and 17.
- §45-1-8.1 was added in response to Comment 3B, 9, 10, 15, and 17.
- §45-1-8.2 was added in response to Comment 3B, 9, 10, 15, and 17.
- §45-1-8.3 was added in response to Comment 3B, 9, 10, 15, and 17.
- §45-1-8.4 was added in response to Comment 3B, 9, 10, 15, and 17.

Commenter 1: Ms. Betsy Lawson

COMMENT 1: I live about a mile from a new fracking site. Emission limitations are meaningless if there are not any inspectors around to inspect when they start up and when they shut down. I wonder if the DEP has enough inspectors to go around to all these different sites and make sure that the limitations are being inspected.

RESPONSE 1: Although every natural gas production well site is unique, each facility requires an air quality permit if it meets the permitting applicability requirements under 45CSR13 and would be subject to the following regulations which are subject to the scope of 45CSR1 regarding alternative emissions limitations:

- Gas Production Units (GPUs), in-line heaters, heater treaters, and glycol dehydration reboilers would be subject to 45CSR2 and 45CSR10.
- Flares, enclosed combustion devices, or completion combustion devices would be subject to 45CSR6.

If the facility is unable to meet the emission limitations required under 45CSR2, 45CSR6, and 45CSR10, they will be subject to 45CSR1 and will be required to apply for an alternative emission limitation in accordance with 45CSR1. All permitted natural gas production facilities are entered into a database and inspected by the Compliance and Enforcement Section of the Division of Air Quality; however, every startup or shutdown event is not required to be observed. The DAQ is working to fill open vacancies, including any that may be open in the Compliance and Enforcement Section.

Air quality in West Virginia is monitored in accordance with the Ambient Air Monitoring Network Plan that describes the location of air quality monitors throughout the state that are established in accordance with criteria established by the U.S. EPA. Further information about air monitoring may be found on the DAQ website at <https://dep.wv.gov/daq/air-monitoring/Pages/default.aspx>.

Commenters 2 and 3: Gas and Oil Association of WV and WV Manufacturers Association

COMMENT 2: Maintenance. For purposes of these comments, we believe that emissions during maintenance activities should be entitled to the same defenses available to startup, shutdown and malfunction events, and therefore include maintenance activities within our comments on SSM events.

RESPONSE 2: According to the U.S. EPA, startup, shutdown and malfunction events are not entitled to affirmative defense¹. Maintenance events were allowed under the 2017 version of 45CSR1; however, the inclusion of maintenance events was specifically identified as one of the reasons the U.S. EPA disapproved West Virginia’s request to add 45CSR1 into the State Implementation Plan (SIP). The final disapproval rule² refers to the comprehensive explanation of disapproval reasons found in the December 22, 2022 notice of proposed rulemaking, where it states the following in reference to the maintenance activities:

45CSR1–3.5 also allows an AEL to be developed for “maintenance,” while the 2015 SSM SIP Action notes that maintenance is generally included in “phases of normal operation at a source, for which the source can be designed, operated, and maintained in order to meet the applicable emission limitations and during which a source should be expected to control and minimize emissions. Accordingly, exemptions for emissions during these periods of normal source operation are not consistent with CAA requirements.” Because maintenance is a different normal mode of operation, any AEL developed for maintenance periods “must meet the substantive requirements applicable to the type of SIP provision at issue, must meet the applicable level of stringency for that type of emission limitation and must be legally and practically enforceable.”³

Should a source require an alternative operating scenario for maintenance events, it has the option of requesting an alternative operating scenario through the existing permitting rules, such as 45CSR13.

¹ 80 Fed. Reg. 33841 (June 12, 2015).

² 88 Fed. Reg. 23356 (April 17, 2023).

³ 87 Fed. Reg. 78619 (December 22, 2022).

In the DAQ Response to Comment Document, SSM refers to Startup, Shutdown and Malfunction. There is no change to the proposed rule as a result of this comment.

COMMENT 3: SSM Defenses Remain a Necessary Part of the West Virginia Air Program.

RESPONSE 3: Please refer to Responses 3A through 3C below.

COMMENT 3A: For many units, emissions from SSM events are substantially different from those of normal operating conditions and should be treated differently. For example, ramping up an engine or boiler from a cold start can result in substantial short-term emissions increases. These are expected emissions, in line with the units' designs normal operating conditions, and are generally unavoidable. In the absence of a significant impact on air quality, they should be disregarded, or averaged with all emissions over a reasonable period of time.

RESPONSE 3A: The DAQ acknowledges that emissions during startup and shutdown events may be substantially different from those of normal operating conditions and should be treated differently. This is the primary reason the DAQ promulgated 45CSR1 in 2017 to ensure there was a process and mechanism by which affected sources could apply for alternative emission limitations during those events. It is also the primary reason that 45CSR1 is proposed for the 2024 legislative session to correct the deficiencies identified in the U.S. EPA denial of West Virginia's request to add 45CSR1 into the SIP.

COMMENT 3B: While startups, shutdowns and maintenance are generally predictable, malfunctions, by their nature, are not. When unit malfunctions occur as a result of factors beyond an operator's control, emission increases that exceed permitted limits should not be treated as noncompliance events. The rules we are commenting on should allow for reasonable methods of establishing that a qualifying malfunction has occurred and will not result in a notice of violation.

RESPONSE 3B: The U.S. EPA disagreed that malfunctions should not be treated as noncompliance events when it issued its 2015 SSM SIP Call⁴. Furthermore, the U.S. EPA issued a finding of failure to submit action⁵ to West Virginia for not responding to the 2015 SSM SIP Call and not removing affirmative defense, director discretion, and other provisions from state rules identified in the 2015 SSM SIP Call.

West Virginia DAQ is required to respond to the finding of failure to submit by removing these provisions in a timely manner to avoid mandatory sanctions by the EPA and the imposition of a Federal Implementation Plan (FIP) whereby the state would lose primacy of the state rules that are the backbone of the Air Quality Program in West Virginia. As stated in Section 22-5-1 of the West Virginia State Code, it is the public policy of this state to fulfill its primary responsibility for assuring air quality pursuant to the Federal Clean Air Act, as amended.

The DAQ is responsible for ensuring the State maintains primacy of its rules and programs which were established among other things to attain the National Ambient Air Quality Standards (NAAQS). The NAAQS establish primary standards which provide public health protection, including protecting the health of "sensitive" populations such as asthmatics, children, and the elderly and secondary standards which provide public welfare protection, including protection against decreased visibility and damage to animals, crops, vegetation, and buildings. The state rules identified in the finding of failure to submit and in the 2015 SSM SIP Call were established to attain the NAAQS as follows: 45CSR2, 45CSR3, 45CSR5,

⁴ 80 Fed. Reg. 33841 (June 12, 2015)

⁵ 88 Fed. Reg. 23353 (April 17, 2023)

45CSR6, and 45CSR7 established emission limitations for particulate matter; 45CSR10 established emission limitations for sulfur oxides, and 45CSR21 established emission limitations for volatile organic compounds which is a precursor to ozone. It is worth noting that the U.S. EPA did not identify any instances where the NAAQS were violated as a result of the SSM provisions identified in the 2015 SSM SIP Call, nor any instance in which the EPA or a citizen was precluded from taking civil action in West Virginia because of any SSM provision in any state rule. Additionally, West Virginia is one of a very few states that are in attainment with all of the NAAQS.

For these reasons, the DAQ is moving forward with the proposed removal of the SSM exemption provisions to ensure the state complies with the federal requirements; however, in response to this comment it is adding provisions under section 8 as follows to address disposition of the rule and severability in the event the federal regulations are withdrawn by the U.S. EPA, are overturned by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress.

§45-1-8. Disposition of Rule; Severability.

8.1. In the event the U.S. EPA's June 12, 2015 "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Finding of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," at 80 Fed. Reg. 33840 (2015 SSM SIP Call) is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress, the Secretary may terminate any permit or section of an existing permit issued pursuant to this rule.

8.2. In the event the U.S. EPA's April 17, 2023 "Air Plan Disapproval; West Virginia; Revision to the West Virginia State Implementation Plan To Add the Startup, Shutdown, Maintenance Rule 45CSR1—Alternative Emission Limitations During Startup, Shutdown, and Maintenance Operations," at 88 Fed. Reg. 23356 (45CSR1 2023 Disapproval) is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress, the Secretary may terminate any permit or section of an existing permit issued pursuant to this rule.

8.3. In the event the U.S. EPA's April 17, 2023 "West Virginia; Finding of Failure To Submit State Implementation Plan Revision in Response to the 2015 Findings of Substantial Inadequacy and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction," at 88 Fed. Reg. 23353 (2023 FFS) is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress, the Secretary may terminate any permit or section of an existing permit issued pursuant to this rule.

8.4. In the event the 2015 SSM SIP Call, 45CSR1 2023 Disapproval, and/or the 2023 FFS is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress, the Secretary may sever requirement §45-1-3.1 and revert to the June 1, 2017 requirements found at §§45-1-3.2 and -4.1.

COMMENT 3C: Air permit conditions and limits tend to vary widely, and we do not know precisely how the rule changes will affect our members. Nevertheless, an informal survey of our members reveals that many have conditions in their permits similar to this:

The daily average PM emissions rate is determined by calculating the arithmetic average of all hourly emission rates each boiler operating day, except for data obtained during startup, shutdown, or malfunction periods. Daily averages are only calculated for boiler operating days that have non-out-of-control data for at least 18 hours of unit operation.

Without conditions such as these, emission source owners are at risk of noncompliance, without any way to prevent it.

RESPONSE 3C: Please refer to the RESPONSE 3B above.

COMMENT 4: The Commenters Support Efforts to Reject EPA's Over-regulation of SSM Events.

We are aware that the subject rulemakings are being undertaken at the behest of the US EPA, which has threatened to impose sanctions on West Virginia if it does not amend its State Implementation Plan to remove exemptions from permit limits for emissions from startup, shutdown and malfunction events. See 88 Fed. Reg. 23353 (April 17, 2023). While we believe that a challenge to the 2023 SIP Call would have been appropriate, we understand that the appeal period has passed.

We encourage the DAQ to do all it can to resist EPA's 2023 SIP Call. The Commenters note with appreciation that the state of West Virginia is one of the plaintiffs in a group of consolidated cases challenging the original 2015 SIP Call relating to SSM events, *Environ. Comm. Fl. Elec. Power v. EPA, et al.*, No. 15-1239 (D.C. Cir.). It is our understanding that the case was argued to a D.C. Circuit panel in March of 2022. We hope that the state will also engage, if possible, in ongoing Sierra Club litigation which is attempting to push greater SSM restrictions on the states.

We also commend the DAQ and Laura Crowder for the January 23, 2023 response to EPA's December 22, 2022 proposed Air Plan Disapproval, the precursor to the 2023 SIP Call. It and the DAQ's letters of November 6, 2014 and May 13, 2013 objecting to earlier stages of EPA's assault on SSM defenses are excellent explanations of the error of EPA's approach to SSM regulation, in the context of West Virginia's air program.

RESPONSE 4: Thank you for your comment, a response is not necessary.

COMMENT 5: AELs Should Be Available for Maintenance Activities. Previously, maintenance activities qualified for SSM exemptions, but that appears to have changed. In 45CSR7, an operator could previously get relief for emissions from startup and shutdown events (Section 10.4), malfunctions (Section 9.1) and maintenance (Section 10.3). In the proposed Rule 7, operators can still get relief for startup and shutdown emissions, but there is no provision for maintenance activities and malfunctions. In 45CSR1, Alternative Emissions Limitations (AELs) are available for startups and shutdowns, but no mention is made of malfunctions and maintenance.

While it might be argued that malfunctions do not qualify for AELs because they cannot be anticipated with precision, that is not the case with maintenance. It is not entirely clear whether the rule changes mean that

maintenance activities are not considered SSM events, and therefore are not subject to permit limits, or they are considered SSM events, and must be the subject of an AEL if the operator is to avoid a noncompliance event. We believe the former should be the DAQ's position, but we request clarification on that matter.

RESPONSE 5: Please refer to RESPONSE 2.

COMMENT 6: 45CSR1 refers to malfunctions in the definitions, but there is no explanation of how they are regulated under the rule.

RESPONSE 6: As mentioned elsewhere by the commenters, malfunctions are not predictable. As such, it is not feasible for a source to submit a permit application to establish an AEL in advance of a potential malfunction. No change is necessary.

COMMENT 7: Guidance on Acceptable AELs Is Needed. If AELs will be required whenever a SSM could result in temporary permit exceedances, it would be helpful to have some guidance from the DAQ on what constitutes an acceptable AEL. There are many types of engines and boilers that are functionally similar, and therefore would benefit from similar AELs. We urge the DAQ to work with industry to establish generic AELs that are both useful and replicable.

RESPONSE 7: The DAQ concurs and welcomes the opportunity to work with industry to establish AELs for narrowly defined sources with similar design, operating and control characteristics as a means to establish a consistent alternative emission limitation for any identified specific narrowly defined category of sources using specific pollution control strategies, consistent with §45-1-3.8.

COMMENT 8: AELs Should Be No More Stringent Than Manufacturers' Standards. SSM exceedances are often anticipated by an emission source's manufacturer, and starting up and shutting down emissions units in accordance with a manufacturer's guidelines may require certain steps and procedures that, by their nature, make compliance with emission limits impossible. No AEL should impose emissions restrictions that are lower than the emissions that are expected when starting up or shutting down the unit according to the manufacturer's standards, consistent with the unit's age and normal operating history.

RESPONSE 8: The DAQ understands operators must follow manufacturer's guidelines. Please also see RESPONSE 7.

COMMENT 9: Clarification Is Needed on When the Rule Revisions Become Effective. The timing of the rule changes is not clear. We assume that the changes to the rule become effective once adopted, after legislative approval, although the DAQ may intend that they not become enforceable until EPA approves the rule changes as SIP amendments. Some guidance on how the DAQ plans to implement the rule revisions would be appreciated.

RESPONSE 9: Following legislative approval of the rule, the effective date at the state level will be established when the final rule is filed with the Secretary of State and in accordance with the administrative law requirements. The revised rule becomes effective at the federal level following approval of the revised rule into the SIP by the U.S. EPA in accordance with the effective date of the final rule published in the Federal Register.

To provide further clarification regarding the effective date of this rule, the DAQ has added provisions under §45-1-8 to address disposition of the rule and severability in the event the federal regulations are

withdrawn by the U.S. EPA, are overturned by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress. Please refer to RESPONSE 3B for the proposed language.

COMMENT 10: Clarification is needed on how the rule revisions will be enforced. Some emissions unit owners may not even know that they are relying on SSM exemptions, and all will need time to evaluate options, and to adjust their emissions calculations and reporting. For example, if one standard will apply to all periods of operation, including startup, shutdown, malfunction and maintenance operation, then the testing required to establish the operational monitoring standards should be allowed to include those events in the establishment of the acceptable monitoring ranges. If the EPA is unwilling to allow that position, and I admit there would be some difficulties with the testing scenarios required, then the EPA should allow alternative emission limitations for the three events [startup, shutdown and maintenance activities] and continue the requirement for documenting emissions during periods of malfunction as well as the steps taken to control the malfunction.

It would be unreasonable to begin enforcing the amendments immediately upon adoption of the rules, given the complexities of the emissions analysis that will be required. The DAQ should use enforcement discretion to make certain that all emission unit operators are aware of restrictions on existing SSM defenses, testing of emissions in light of SSM events, the options available for adopting AELs, permit amendment procedures to take into account SSM events, and provide other relevant information, before proceeding to enforcement.

RESPONSE 10: In the 2015 SSM SIP Call, the U.S. EPA addresses enforcement discretion provisions by stating:

In order to be clear about this important point on a going-forward basis, the EPA is reiterating that SIP provisions cannot contain enforcement discretion provisions that would bar enforcement by the EPA or citizens for any violation of SIP requirements if the state elects not to enforce.⁶

The DAQ encourages the commenters to help bring awareness to their member organizations regarding the potential impacts of the proposed rulemaking and the DAQ will work with the commenters to provide assistance.

Additionally, the DAQ promulgated 45CSR1 in 2017 to provide a mechanism for sources to have an AEL during periods of startup or shutdown if the source is unable to comply with its emission limitation during those events. Rule 1 is proposed for revision in the 2024 legislative session to address the deficiencies the U.S. EPA identified in its disapproval to add Rule 1 into the SIP.

Consistent with the U.S. EPA finding of failure to submit action, the DAQ is moving forward with the proposed removal of the SSM discretionary provisions to ensure the state complies with the federal requirements.

Please also see RESPONSE 2 and RESPONSE 3B.

⁶ 80 Fed. Reg. 33923 (June 12, 2015)

COMMENT 11: Further Discussion with the Regulated Community Is Needed. Given the uncertain nature of these changes, we hope that the DAQ will continue to talk with the regulated community about the matters raised in these comments, and others that are certain to arise during the course of rulemaking, and thereafter. The Commenters stand ready to engage with the DAQ at its convenience to continue this conversation.

RESPONSE 11: The DAQ welcomes the opportunity to talk with the regulated community about the matters raised in these comments, and others that are certain to arise during the course of rulemaking and appreciates the commenters willingness to continue the conversation.

Commenter 4: Mon Valley Clean Air Coalition

COMMENT 12: This hearing is very useful and appreciate this opportunity to speak, we have an opportunity to learn so much. Public hearings play a vital role in the regulatory process. However, because of that learning, we need the opportunity to revise our comments or extend them immediately after the public hearing. Written comment periods need to end no earlier than three days after a verbal comment period, to give all concerned time to revise and extend their thoughts, ideas, and written comments.

RESPONSE 12: The purpose of a public hearing is different than that of a public meeting. A public hearing is regulatory in nature with the sole purpose of receiving oral comments on the record in addition to or in lieu of written comments, unlike a public meeting that includes an interactive and educational component in addition to taking comments. The requirement for public hearings is to provide a full 30-day public notice period prior to the public hearing. The rulemaking timeline is dictated by Office of the Secretary of State and does not require a public hearing, although the DAQ does so to meet other federal regulatory requirements. The public comment period commenced June 2, 2023 and concluded July 6, 2023, allowing more than 30-days required by federal regulations.

COMMENT 13: Startup and Shutdown Emission Limits. Startup and shut down are important times in industrial operations, in power plants, and other facilities that involve emissions. We believe that tight control on startup particularly is important because most processes are not actually developed in the laboratory, in the pilot plant, or in a demonstration phase to adequately provide environmentally safe performance. So attention to the limits-- when we say that, we're going to change the startup and shut down emission limits, it needs to mean that we're going to tighten them, that we're going to be more well-defined in our expectations so that the engineers, the owners, the operators of facilities know what is expected of them.

RESPONSE 13: Thank you for your comment, a response is not necessary.

COMMENT 14: Malfunctions. Operations that are deviating from some prescribed or expected operation. And thereto, the control system design, the training and preparation of the operators, the skill set, the number of procedures that the company have already defined to respond to or recover from nonstandard operation depends on this agency providing well-defined strict regulations.

RESPONSE 14: Thank you for your comment, a response is not necessary.

Commenter 5: West Virginia Coal Association (WVCA)

COMMENT 15: Exhaust all remedies before continuing rulemaking. WVCA fully understands and appreciates that the proposed revisions to 45CSR5 and 45CSR1 are in response to review of the state air program by the federal Environmental Protection Agency (EPA). Specifically, the proposed changes are based on threatened action by the EPA to impose a Federal Implementation Plan (FIP) if DAQ does not resolve its State Implementation Plan (SIP) regarding provisions related to excess emissions during periods of SSM. However, EPA's position on the SIP may be invalid. Once these state rules are changed, it may be difficult to "un-ring the bell." At a minimum, it would require another rulemaking action, including legislative review and approval. While we fully support DAQ's efforts to head off a FIP, the interim period should be used to exhaust all remedies other than pursuing final passage of the revised regulations by the West Virginia Legislature. In short, we encourage DAQ to use the time before the Legislative session to ensure that the proposed changes are in the best interest of West Virginia.

RESPONSE 15: The DAQ appreciates the commenter's concerns. Given the automatic time clock for federal sanctions and issuance of a FIP specified in the Clean Air Act for the EPA to approve West Virginia's response, the DAQ is confident in its actions to pursue the proposed SSM rules to address both the 2015 SSM SIP Call and the 2023 Finding of Failure to Submit federal actions. A more complete discussion is provided in RESPONSE 3B above.

As stated in previous responses, the DAQ welcomes the opportunity to work with industry during the interim period prior to final passage of the state rules by the legislature.

The DAQ is moving forward with the proposed removal of all SSM provisions to ensure the state complies with the federal requirements; however, in response to this and other similar comments, it is adding provisions under section 8 as follows to address disposition of the rule and severability in the event the federal regulations are withdrawn by the U.S. EPA, are overturned by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress.

§45-1-8. Disposition of Rule; Severability.

8.1. In the event the U.S. EPA's June 12, 2015 "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Finding of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," at 80 Fed. Reg. 33840 (2015 SSM SIP Call) is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress, the Secretary may terminate any permit or section of an existing permit issued pursuant to this rule.

8.2. In the event the U.S. EPA's April 17, 2023 "Air Plan Disapproval; West Virginia; Revision to the West Virginia State Implementation Plan To Add the Startup, Shutdown, Maintenance Rule 45CSR1—Alternative Emission Limitations During Startup, Shutdown, and Maintenance Operations," at 88 Fed. Reg. 23356 (45CSR1 2023 Disapproval) is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress, the Secretary may terminate any permit or section of an existing permit issued pursuant to this rule.

8.3. In the event the U.S. EPA's April 17, 2023 "West Virginia; Finding of Failure To Submit State Implementation Plan Revision in Response to the 2015 Findings of Substantial Inadequacy and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction," at 88 Fed. Reg. 23353 (2023 FFS) is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress, the Secretary may terminate any permit or section of an existing permit issued pursuant to this rule.

8.4. In the event the 2015 SSM SIP Call, 45CSR1 2023 Disapproval, and/or the 2023 FFS is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress, the Secretary may sever requirement §45-1-3.1 and revert to the June 1, 2017 requirements found at §§45-1-3.2 and -4.1.

COMMENT 16: Changes may have broader implications than intended. WVCA understands the proposed changes are in line with EPA's requested actions. However, the changes may have broader implications than intended. As worded, the revisions may overwrite any provisions related to SSM events in a facility's permit, even if they are not specifically intended. Certain federal regulatory programs contain language related to applicability of requirements during SSM events. For example, 40 CFR §60.8(c) states the following regarding performance tests:

Performance tests shall be conducted under such conditions as the Administrator shall specify to the plant operator based on representative performance of the affected facility.... Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard.

Similar provisions appear in other regulatory programs. It appears that the changes to the West Virginia SIP would override these federal exceptions, especially considering language in the proposed rules indicating that inconsistencies between regulatory provisions are to "be based upon the application of the more stringent provision, term, condition, method or rule."

RESPONSE 16: The U.S. EPA is also under an obligation to resolve its SSM actions under federal regulations and has been doing so when the federal regulation is due for its periodic review under the Clean Air Act. Furthermore, the U.S. EPA has issued guidance memorandums stating that the 2015 SSM Policy prevails until it has revised all exemptions in its underlying federal regulations to comply with its 2015 SSM Policy. As mentioned in other comments, the DAQ welcomes the opportunity to work with industry to discuss and develop source specific AELs.

Further, please refer to RESPONSE 15 above.

COMMENT 17: Permit Modification and/or SIP Revision. We are unclear whether a proposed change to add an alternate emissions limitation (AEL) for a specific permittee requires both a SIP revision and a permit modification. The language of 45 CSR § 3.2 appears to indicate that both are required. If EPA

can review a draft permit incorporating an AEL, we do not understand the need to revise the SIP, which may necessitate a state rule change proposed by DAQ to the Legislature and Governor (rulemaking review) for approval prior to submittal to EPA. This process may take more than a year to complete, during which a permittee could face violations while awaiting a resolution.

RESPONSE 17: The WVCA interpretation is correct. A source must modify its permit with an AEL if it cannot meet the underlying emission limitation during startup or shutdown events and the DAQ must submit any new AEL established under 45CSR1 to the U.S. EPA as a revision to the SIP for approval by the U.S. EPA⁷.

Although the DAQ disagrees with the U.S. EPA interpretation that AELs must be included as a provision of the SIP in order for the condition to be federally enforceable and provided comment on this point in its January 23, 2023 comments to the Administrator titled *Docket ID No. EPA-R03-OAR-2022-0956; Air Plan Disapproval; West Virginia; Revision to the West Virginia State Implementation Plan To Add the SSM Rule 45CSR1 - Alternative Emission Limitations During Startup, Shutdown, and Maintenance Operations* [87 Fed. Reg. 78617, December 22, 2022], it nonetheless must satisfy the perceived deficiency identified in the U.S. EPA disapproval to add 45CSR1 into the SIP. Therefore, this requirement was added as a proposed revision to 45CSR1.

In response to this comment, the DAQ added provisions under §45-1-8 to address disposition of the rule and severability in the event the federal regulations are withdrawn by the U.S. EPA, are overturned by a court of competent jurisdiction, and/or is invalidated by an act of the West Virginia Legislature or United States Congress. Please refer to RESPONSE 15 for the text of §45-1-8.

COMMENT 18: Intermittent Sources. Hypothetically, an intermittent source (such as a coal preparation and handling facility) could suffer tremendous harm, as startup and shutdown events very often have higher emissions than during continuous operations. This would encourage a permittee to operate a source longer than necessary to avoid startup and shutdown periods, overall resulting in higher annual emissions than if the source were allowed limited periods of higher emissions during startup and shutdown.

RESPONSE 18: Thank you for your comment, a response is not necessary.

COMMENT 19: Timing and Complexity. The WVCA acknowledges that the time to review the proposed state rule changes is limited. Given the complexity of the exchange between WV DEP and EPA regarding the SSM provisions, it is quite possible that we may not fully understand the proposed changes.

RESPONSE 19: Thank you for your comment. As mentioned in response to other comments, the DAQ welcomes the opportunity for continued engagement with the regulated community to ensure adequate opportunities exist for improved understanding of the proposed changes.

COMMENT 20: Communication. WVCA appreciates DAQs efforts to maintain state primacy for these programs and welcomes the opportunity to discuss the proposed rules with DAQ so that we may better evaluate the potential impacts on our members.

⁷ Agency Approved rule §45-1-3.2.3.

RESPONSE 20: Thank you for your comment. As mentioned in response to other comments, the DAQ welcomes the opportunity for continued communication so the WVCA may better evaluate potential impacts on your members.

Commenter 6: WV Siera Club

COMMENT 21: In general, we support the proposed changes as important steps to limit pollution emissions. Many facilities emit large amounts of pollution during Startup, Shutdown and Malfunction (SSM) events, often at levels that have disproportionate impacts on air quality and that greatly exceed the annual permit limits for normal operations.

RESPONSE 21: Thank you for your comment, a response is not necessary.

COMMENT 22: The “Summary of changes in the rule” indicates that “malfunctions” was removed from the title of the rule, but the word removed is “maintenance”.

RESPONSE 22: Thank you for your comment. This will be corrected in the Agency Approved filing of the rule with the Secretary of State.

COMMENT 23: Malfunctions. The revisions do not appear to address Alternative Emissions Limits (AELs) during “malfunctions”. Although section 2.6 defines malfunction, and section 2.11 defines SSM to include malfunction, it is not clear how emissions during a malfunction are monitored or limited, or how these apply to enforcement, and the current draft of the rule does not address these. Likewise, the language regarding SSM in other rules (e.g., 45-CSR-2-9) addresses malfunctions but is vague as to how emissions limits would be enforced. The failure to include emissions during malfunctions would expose citizens to air pollution that may threaten their health, and leaves these citizens with few options other than “hold your breath”. It also reduces any incentive for owners or operators to minimize such malfunctions. We recommend that the rule be revised to incorporate monitoring and reporting requirements and enforceable limits for emissions during malfunctions. The rule should explicitly state that excess emissions resulting from malfunctions should be treated as a violation. We note that regulators and citizens can use discretion as to whether events were preventable, and that a federal court would be unlikely to award penalties if events were truly unavoidable. However, treating such excess emissions as a violation provides a necessary incentive for owners and operators to exercise due diligence to prevent upsets that are actually preventable.

RESPONSE 23: As mentioned elsewhere in this document, malfunctions are not predictable. As such, it is not feasible for a source to submit a permit application to establish an AEL in advance of a potential malfunction which is why requirements for malfunction AELs are not included in the rule.

Malfunction exemptions were removed from the underlying rules in the proposed revisions to 45CSR2, 45CSR3, 45CSR5, 45CSR6, 45CSR7, 45CSR10, and 45CSR21. Monitoring, Recordkeeping, and Reporting (MRR) requirements are established in section 6. Additional MRR requirements are provided in the underlying rules. For clarification, the first sentence of §45-1-6.1 was revised to read as follows:

The owner or operator shall maintain records during SSM periods ~~of startup, shutdown, and maintenance~~.

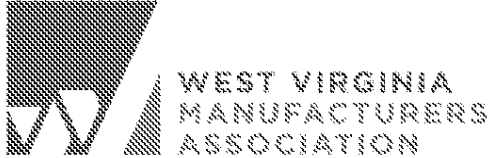
COMMENT 24: Section 3.2.3 requires the Secretary to submit AELs to EPA as a SIP revision. We believe that states may not unilaterally amend provisions in an approved SIP through permit provisions.

We support this provision as a necessary check on industry efforts to allow higher emissions limits through amorphous definitions of such events.

RESPONSE 24: Thank you for your comment, a response is not necessary.

COMMENT 25: Section 4.1 requires an owner or operator to apply for an AEL if they cannot comply with the limits required in other rules. Section 4.2.3 requires the owner or operator to describe the alternative control strategy proposed for SS. However, nothing appears to require an owner or operator to adopt the lowest achievable emissions rate for the pollution controls proposed in applying for the AEL. While section 5.1.5 requires that “all practicable steps are taken to minimize the impact of emissions ...”, we recommend that the rule specifically base the AEL on the lowest achievable, or best available technology, as appropriate for that area.

RESPONSE 25: Lowest achievable emission rates (LAER) are reserved for nonattainment new source review permit requirements and would be permitted under 45CSR19, where the LAER requirements reside. West Virginia is currently in attainment with all NAAQS. The purpose of 45CSR1 is not to determine the stringency of any particular AEL; the stringency would be consistent with that required for the underlying rules.



July 6, 2023

Via E-mail: laura.m.jennings@wv.gov

Ms. Laura Jennings
WV Department of Environmental Protection
Division of Air Quality
601 57th Street, S.E.
Charleston, WV 25304

Re: Comments on WV DEP Rules

Dear Ms. Jennings:

EPA has issued a State Implementation Plan Call (the 2023 SIP Call) requiring the West Virginia Department of Environmental Protection's Division of Air Quality (DAQ) to revise certain air rules to eliminate exemptions from permit or regulatory emissions limits during startup, shutdown or malfunction (SSM) events. The rules affected are 45 CSR 2 (control of particulate from indirect heat exchangers), 45 CSR 3 (hot mix asphalt plants), 45 CSR 5 (emissions from coal facilities), 45 CSR 6 (refuse combustion), 45 CSR 7 (particulate from manufacturing processes), 45 CSR 10 (emissions of sulfur oxide) and 45 CSR 21 (emissions of volatile organic compounds). The West Virginia Manufacturers Association and the Gas and Oil Association of WV, Inc. (the Commenters) offer the following comments on the proposed rule changes.

I. General Comments

A. SSM Defenses Remain a Necessary Part of the West Virginia Air Program.

For many units, emissions from SSM events¹ are substantially different from those of normal operating conditions, and should be treated differently. For example, ramping up an engine or boiler from a cold start can result in substantial short term emissions increases. These are expected emissions, in line with the units' designs normal operating conditions, and are generally unavoidable. In the absence of a significant impact on air quality, they should be disregarded, or averaged with all emissions over a reasonable period of time.

While startups, shutdowns and maintenance are generally predictable, malfunctions, by their nature, are not. When unit malfunctions occur as a result of factors beyond an operator's

¹ For purposes of these comments, we believe that emissions during maintenance activities should be entitled to the same defenses available to startup, shutdown and malfunction events, and therefore include maintenance activities within our comments on SSM events.

control, emission increases that exceed permitted limits should not be treated as noncompliance events. The rules we are commenting on should allow for reasonable methods of establishing that a qualifying malfunction has occurred, and will not result in a notice of violation.

Air permit conditions and limits tend to vary widely, and we do not know precisely how the rule changes will affect our members. Nevertheless, an informal survey of our members reveals that many have conditions in their permits similar to this:

The daily average PM emissions rate is determined by calculating the arithmetic average of all hourly emission rates each boiler operating day, except for data obtained during startup, shutdown, or malfunction periods. Daily averages are only calculated for boiler operating days that have non-out-of-control data for at least 18 hours of unit operation.

Without conditions such as these, emission source owners are at risk of noncompliance, without any way to prevent it

B. The Commenters Support Efforts to Reject EPA's Over-regulation of SSM Events.

We are aware that the subject rulemakings are being undertaken at the behest of the US EPA, which has threatened to impose sanctions on West Virginia if it does not amend its State Implementation Plan to remove exemptions from permit limits for emissions from startup, shutdown and malfunction events. *See* 88 Fed. Reg. 23353 (April 17, 2023).² We encourage the DAQ to do all it can to resist EPA's 2023 SIP Call.

The Commenters note with appreciation that the state of West Virginia is one of the plaintiffs in a group of consolidated cases challenging the original 2015 SIP Call relating to SSM events, *Environ. Comm. Fl. Elec. Power v. EPA, et al.*, No. 15-1239 (D.C. Cir.). It is our understanding that the case was argued to a D.C. Circuit panel in March of 2022. We hope that the state will also engage, if possible, in ongoing Sierra Club litigation which is attempting to push greater SSM restrictions on the states.

We also commend the DAQ and Laura Crowder for the January 23, 2023 response to EPA's December 22, 2022 proposed Air Plan Disapproval, the precursor to the 2023 SIP Call. It and the DAQ's letters of November 6, 2014 and May 13, 2013 objecting to earlier stages of EPA's assault on SSM defenses are excellent explanations of the error of EPA's approach to SSM regulation, in the context of West Virginia's air program.

² While we believe that a challenge to the 2023 SIP Call would have been appropriate, we understand that the appeal period has passed.

II. Specific Comments

A. AELs Should Be Available for Maintenance Activities.

Previously, maintenance activities qualified for SSM exemptions, but that appears to have changed. In 45 CSR 7, an operator could previously get relief for emissions from startup and shutdown events (Section 10.4), malfunctions (Section 9.1) and maintenance (Section 10.3). In the proposed Rule 7, operators can still get relief for startup and shutdown emissions, but there is no provision for maintenance activities and malfunctions. In 45 CSR 1, Alternative Emissions Limitations (AELs) are available for startups and shutdowns, but no mention is made of malfunctions³ and maintenance.

While it might be argued that malfunctions do not qualify for AELs because they cannot be anticipated with precision, that is not the case with maintenance. It is not entirely clear whether the rule changes mean that maintenance activities are not considered SSM events, and therefore are not subject to permit limits, or they are considered SSM events, and must be the subject of an AEL if the operator is to avoid a noncompliance event. We believe the former should be the DAQ's position, but we request clarification on that matter.

B. Guidance on Acceptable AELs Is Needed.

If AELs will be required whenever a SSM could result in temporary permit exceedances, it would be helpful to have some guidance from the DAQ on what constitutes an acceptable AEL. There are many types of engines and boilers that are functionally similar, and therefore would benefit from similar AELs. We urge the DAQ to work with industry to establish generic AELs that are both useful and replicable.

C. AELs Should Be No More Stringent Than Manufacturers' Standards.

SSM exceedances are often anticipated by an emission source's manufacturer, and starting up and shutting down emissions units in accordance with a manufacturer's guidelines may require certain steps and procedures that, by their nature, make compliance with emission limits impossible. No AEL should impose emissions restrictions that are lower than the emissions that are expected when starting up or shutting down the unit according to the manufacturer's standards, consistent with the unit's age and normal operating history.

³ 45 CSR 1 refers to malfunctions in the definitions, but there is no explanation of how they are regulated under the rule.

D. Clarification Is Needed on When the Rule Revisions Become Effective.

The timing of the rule changes is not clear. We assume that the changes to the rule become effective once adopted, after legislative approval, although the DAQ may intend that they not become enforceable until EPA approves the rule changes as SIP amendments. Some guidance on how the DAQ plans to implement the rule revisions would be appreciated.

E. Clarification is Needed on how the Rule Revisions Will be Enforced.

Some emissions unit owners may not even know that they are relying on SSM exemptions, and all will need time to evaluate options, and to adjust their emissions calculations and reporting. For example, if one standard will apply to all periods of operation, including startup, shutdown, malfunction and maintenance operation, then the testing required to establish the operational monitoring standards should be allowed to include those events in the establishment of the acceptable monitoring ranges. If the EPA is unwilling to allow that position, and I admit there would be some difficulties with the testing scenarios required, then the EPA should allow alternative emission limitations for the three events [startup, shutdown and maintenance activities] and continue the requirement for documenting emissions during periods of malfunction as well as the steps taken to control the malfunction.

It would be unreasonable to begin enforcing the amendments immediately upon adoption of the rules, given the complexities of the emissions analysis that will be required. The DAQ should use enforcement discretion to make certain that all emission unit operators are aware of restrictions on existing SSM defenses, testing of emissions in light of SSM events, the options available for adopting AELs, permit amendment procedures to take into account SSM events, and provide other relevant information, before proceeding to enforcement.

F. Further Discussion with the Regulated Community Is Needed.

Given the uncertain nature of these changes, we hope that the DAQ will continue to talk with the regulated community about the matters raised in these comments, and others that are certain to arise during the course of rulemaking, and thereafter. The Commenters stand ready to engage with the DAQ at its convenience to continue this conversation.

Sincerely,

/s/ Rebecca McPhail, President
West Virginia Manufacturers Association

/s/ Charlie Burd, Executive Director
Gas and Oil Association of WV, Inc.



Jennings, Laura M <laura.m.jennings@wv.gov>

Tonight's Hearing

Duane Nichols <nichols330@gmail.com>
To: Laura.M.Jennings@wv.gov
Cc: depadvocate@wv.gov

Thu, Jul 6, 2023 at 4:59 PM

Written comment periods need to end no earlier than three days after a verbal comment period, to give all concerned time to revise and extend their thoughts, ideas, and written comments.

This is both logical and necessary for a rational a rational approach to the public role.

Duane Nichols, MVCAC

Sent from my iPad



**SIERRA
CLUB**

Sierra Club
West Virginia Chapter

P.O. Box 4142
Morgantown, WV 26504

July 6, 2023

Laura Jennings
WVDEP – Division of Air Quality
601 57th St., SE
Charleston, WV 25304
Via e-mail to: Laura.M.Jennings@wv.gov

Re: Comments on Air Quality draft rules

Dear Ms. Jennings:

Please accept the following comments on behalf of the WV Chapter of Sierra Club, and our approximately 2600 members.

45-CSR-1. Alternative emissions limitations during Startup and shutdown operations.

In general, we support the proposed changes as important steps to limit pollution emissions. Many facilities emit large amounts of pollution during Startup, Shutdown and Malfunction (SSM) events, often at levels that have disproportionate impacts on air quality and that greatly exceed the annual permit limits for normal operations. Please consider the following additional suggestions:

- 1) Editorial Note. The “Summary of changes in the rule” indicates that “malfunctions” was removed from the title of the rule, but the word removed is “maintenance”.
- 2) The revisions do not appear to address Alternative Emissions Limits (AELs) during “malfunctions”. Although section 2.6 defines malfunction, and section 2.11 defines SSM to include malfunction, it is not clear how emissions during a malfunction are monitored or limited, or how these apply to enforcement, and the current draft of the rule does not address these. Likewise, the language regarding SSM in other rules (e.g., 45-CSR-2-9) addresses malfunctions but is vague as to how emissions limits would be enforced. The failure to include emissions during malfunctions would expose citizens to air pollution that may threaten their health, and leaves these citizens with few options other than “hold your breath”. It also reduces any incentive for owners or operators to minimize such malfunctions. **We recommend that the rule be revised to incorporate monitoring and reporting requirements and enforceable limits for emissions during malfunctions. The rule should explicitly state that excess emissions resulting from malfunctions should be treated as a violation.** We note that regulators and citizens can use discretion as to whether events were preventable, and that a federal court would be unlikely to award penalties if events were truly unavoidable. However, treating such excess emissions as a violation

provides a necessary incentive for owners and operators to exercise due diligence to prevent upsets that are actually preventable.

- 3) Section 3.2.3 requires the Secretary to submit AELs to EPA as a SIP revision. We believe that states may not unilaterally amend provisions in an approved SIP through permit provisions. **We support this provision as a necessary check on industry efforts to allow higher emissions limits through amorphous definitions of such events.**
- 4) Section 4.1 requires an owner or operator to apply for an AEL if they cannot comply with the limits required in other rules. Section 4.2.3 requires the owner or operator to describe the alternative control strategy proposed for SS. However, nothing appears to require an owner or operator to adopt the lowest achievable emissions rate for the pollution controls proposed in applying for the AEL. While section 5.1.5 requires that “all practicable steps are taken to minimize the impact of emissions ...”, **we recommend that the rule specifically base the AEL on the lowest achievable, or best available technology, as appropriate for that area.**

45-CSR-2, 3, 5, 6, 7, 10, and 21.

- 5) These proposed amendments to rules appear to be primarily focused on upgrading the rule to meet the intent of the SSM modifications in 45-CSR-1. We support these proposed changes, subject to the need to improve 45-CSR-1 as outlined above.

45-CSR-8, Ambient Air Quality Standards; 45-CSR-16, Standards of performance for new stationary sources; and 45-CSR-34, Emissions standards for hazardous air pollutants.

- 6) We support updating the rule to incorporate the latest EPA standards.

45-CSR-44. Control of Greenhouse Gas Emissions From Existing Coal-Fired Electric Utility Generating Units

- 7) We do not oppose repeal of this particular rule, because it fell short in several important ways. In particular, the rule, like the EPA Affordable Clean Energy rule (ACE) on which it is based, fails to adequately address climate change, the very reason for the rule’s existence. The emissions reductions that would be achieved were negligible, and fail to protect the health of West Virginians, and the health of our environment.

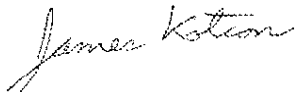
It is becoming increasingly evident that the climate crisis is much more serious than was believed even a few years ago, and requires rapid reductions in greenhouse gas emissions. Emissions of greenhouse gases are cumulative, and delays today mean we must take much more draconian steps in the near future. A simple repeal of 45-CSR-44 also fails to account for indirect health benefits from more stringent emissions reductions. Reductions in total greenhouse gas emissions would likewise reduce the emissions of harmful fine particulates, NO_x, SO₂ and other pollutants.

- 8) Rather than a simple repeal, which would leave WV with no greenhouse gas rule at all, **we recommend replacing the rule with a rule with language modeled on EPA’s proposed**

New Source Performance Standards for Greenhouse Gas Emissions..., released May 3, 2023 (available at: <https://www.federalregister.gov/documents/2023/05/23/2023-10141/new-source-performance-standards-for-greenhouse-gas-emissions-from-new-modified-and-reconstructed>). Such a rule would go a long way to achieving the greenhouse gas emissions reductions needed in this decade. It would be a proactive step that would position West Virginia as a leader in these needed reductions in greenhouse gas emissions.

Thank you for the opportunity to provide these comments.

Sincerely,



James Kotcon
Conservation Chair
WV Chapter of Sierra Club
jkotcon@gmail.com
304-594-3322 (cell)



West Virginia Coal Association

200 Association Dr. Suite 160, Charleston WV 25311 • (304) 342-4153 • Fax 342-7651 •

www.wvcoal.com

July 6, 2023

Ms. Laura Jennings
Assistant Director
Division of Air Quality
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Re: *Proposed Revisions to 45 CSR 5, Control of Air Pollution from the Operation of Coal Preparation Plants, Coal Handling Operations and Coal Refuse Disposal Areas and 45 CSR 1, Alternative Emission Limitations During Startup and Shutdown Operations.*

Submitted via electronic mail: laura.m.jennings@wv.gov

Dear Ms. Jennings:

Pursuant to the public notice published by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments in response to the agency's proposed changes to various administrative rules maintained by the Division of Air Quality (DAQ).

West Virginia is the second largest coal producing state in the nation (85 million tons) and is the largest supplier of the highest quality, cleanest burning bituminous coal in the country. West Virginia is the largest underground mining state, the largest producer of metallurgical coal and the largest coal employment state in the nation. The coal mining industry accounts for almost \$14 billion in economic contributions to West Virginia. Over

57,000 West Virginians depend on the coal industry for their livelihoods, accounting for almost

Comments of the West Virginia Coal Association:

Proposed Revisions to 45 CSR 5, Control of Air Pollution from the Operation of Coal Preparation Plants, Coal Handling Operations and Coal Refuse Disposal Areas and 45 CSR 1, Alternative Emission Limitations During Startup and Shutdown Operations.

July 6, 2023

\$3 billion in average annual wages. The West Virginia coal industry contributes \$611 million to state and local tax collections each year.¹

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. Our general members account for 80 percent of the Mountain State's underground and surface production of both thermal and metallurgical coal. We also represent associate members that supply an array of services to the mining industry in West Virginia. WVCA's members also include various in-state consumers that purchase West Virginia coal to produce electric power, process heat and steam for various industrial processes, iron, and steel, ferro alloys and specialty chemicals.

WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal removal and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA is the largest state coal trade association in the nation.

WVCA's general members operate and maintain various coal processing and handling facilities throughout the state and will be directly impacted by the proposed changes to 45 CSR 5. *Since similar changes regarding startup, shutdown, and malfunction (SSM) have been proposed to 45 CSR 1 and other DAO rules that may impact end users of West Virginia coal,*

¹ "The Economic Impact of Coal and Coal Fired Power Generation in West Virginia." Bureau of Business and Economic Research, West Virginia University, 2021.

https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1326&context=bureau_bef::text=Coal%20mining%20generated%20around%20%24514_Virginia%20and%20its%20local%20governments.

Comments of the West Virginia Coal Association:

Proposed Revisions to 45 CSR 5, Control of Air Pollution from the Operation of Coal Preparation Plants, Coal Handling Operations and Coal Refuse Disposal Areas and 45 CSR 1, Alternative Emission Limitations During Startup and Shutdown Operations.

July 6, 2023

WVCA respectfully request the agency consider these comments as part of the administrative record for those rules as well.

WVCA fully understands and appreciates that the proposed revisions to 45 CSR 5 and 45 CSR 1 are in response to review of the state air program by the federal Environmental Protection Agency (EPA). Specifically, the proposed changes are based on threatened action by the EPA to impose a Federal Implementation Plan (FIP) if DAQ does not resolve its State Implementation Plan (SIP) regarding provisions related to excess emissions during periods of SSM. *However, EPA's position on the SIP may be invalid.* Once these state rules are changed, it may be difficult to "un-ring the bell." At a minimum, it would require another rulemaking action, including legislative review and approval. While we fully support DAQ's efforts to head off a FIP, the interim period should be used to exhaust all remedies other than pursuing final passage of the revised regulations by the West Virginia Legislature. In short, we encourage DAQ to use the time before the Legislative session to ensure that the proposed changes are in the best interest of West Virginia.

WVCA understands the proposed changes are in line with EPA's requested actions. However, the changes may have broader implications than intended. As worded, the revisions may overwrite any provisions related to SSM events in a facility's permit, even if they are not specifically intended. Certain federal regulatory programs contain language related to applicability of requirements during SSM events. For example, 40 CFR §60.8(c) states the following regarding performance tests:

Comments of the West Virginia Coal Association:

Proposed Revisions to 45 CSR 5, Control of Air Pollution from the Operation of Coal Preparation Plants, Coal Handling Operations and Coal Refuse Disposal Areas and 45 CSR 1, Alternative Emission Limitations During Startup and Shutdown Operations.

July 6, 2023

Performance tests shall be conducted under such conditions as the Administrator shall specify to the plant operator based on representative performance of the affected facility.... Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard.

Similar provisions appear in other regulatory programs. It appears that the changes to the West Virginia SIP would override these federal exceptions, especially considering language in the proposed rules indicating that inconsistencies between regulatory provisions are to “be based upon the application of the more stringent provision, term, condition, method or rule.”²

Finally, we are unclear whether a proposed change to add an alternate emissions limitation (AEL) for a specific permittee requires both a SIP revision and a permit modification. The language of 45 CSR § 3.2 appears to indicate that both are required. If EPA can review a draft permit incorporating an AEL, we do not understand the need to revise the SIP, which may necessitate a state rule change proposed by DAQ to the Legislature and Governor (rulemaking review) for approval prior to submittal to EPA. This process may take more than a year to complete, during which a permittee could face violations while awaiting a resolution.

Hypothetically, an intermittent source (such as a coal preparation and handling facility) could suffer tremendous harm, as startup and shutdown events very often have higher emissions than during continuous operations. This would encourage a permittee to operate a source longer than necessary to avoid startup and shutdown periods, overall resulting in higher

² See 45 CSR § 5-16.1, as proposed.

Comments of the West Virginia Coal Association:

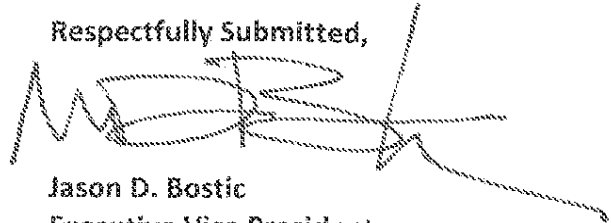
Proposed Revisions to 45 CSR 5, Control of Air Pollution from the Operation of Coal Preparation Plants, Coal Handling Operations and Coal Refuse Disposal Areas and 45 CSR 1, Alternative Emission Limitations During Startup and Shutdown Operations.

July 6, 2023

annual emissions than if the source were allowed limited periods of higher emissions during startup and shutdown.

The WVCA acknowledges that the time to review the proposed state rule changes is limited. Given the complexity of the exchange between WV DEP and EPA regarding the SSM provisions, it is quite possible that we may not fully understand the proposed changes. WVCA appreciates DAQs efforts to maintain to state primacy for these programs and welcomes the opportunity to discuss the proposed rules with DAQ so that we may better evaluate the potential impacts on our members.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'J. Bostic', written over a horizontal line.

Jason D. Bostic
Executive Vice President
West Virginia Coal Association

IN RE: DIVISION OF AIR QUALITY PUBLIC HEARING

RULE 45CSR1

07/06/2023



713 LeeStreet
Charleston, WV 25301

(304) 344-8463
schedulerealtime@gmail.com

Realtimereporters.net

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DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY
PUBLIC HEARING

IN RE:

DIVISION OF AIR QUALITY
PROPOSED 2024 LEGISLATIVE RULES
RULE 45CSR1

* * *

Thursday, July 6, 2023
Held remotely via Google Meets
6:04 p.m.

* * *

Appearing on behalf of the WV DEP

Nicole Ernest
Laura Jennings
Sandra Adkins

Tammie Trigg, Court Reporter

1 * * *

2 P R O C E E D I N G S

3 * * *

4 MS. ERNEST. Okay.

5 We'll go ahead and get started. Good evening
6 and thank you for participating in the public hearing
7 tonight. My name is Nicole Ernest with the West
8 Virginia Department of Environmental Protection's
9 Division of Air Quality.

10 Welcome to the public hearings for the
11 Division of Air Quality's 12 proposed rules for the
12 upcoming 2024 West Virginia legislative session. There
13 will be a separate public hearing for each of the 12 DAQ
14 proposed rules. The hearings will be held sequentially
15 and will commence immediately following the conclusion
16 of the hearing for the previous proposed rule.

17 With me this evening also from the Division of
18 Air Quality are Sandra Adkins and Laura Jennings. A
19 court reporter is also in attendance this evening.

20 The purpose of each public hearing is to
21 receive public comments on the record regarding each of
22 the proposed DAQ rules. DAQ is limiting public comments
23 to the proposed revisions to the rules and is not
24 soliciting comments not related to the proposed
25 revisions.

1 Each public hearing is being recorded and a
2 court reporter is in attendance to meet Clean Air Act
3 requirements and to consider comments during the
4 rulemaking process. Because the purpose of the public
5 hearing is to listen to your comments, it is not a forum
6 to engage the DAQ in open discussion or debate about
7 proposed rules. Unlike a public meeting, the DAQ will
8 not be responding to questions during the hearing. All
9 comments received will be addressed in a response to
10 comment document that will be part of the official
11 rulemaking record made available on the Secretary of
12 State's website.

13 All participants have been muted upon entry
14 into the meeting to ensure we are not interrupting
15 others or talking over one another.

16 Participants were asked to preregister to
17 speak and will be called upon when it's your turn to
18 speak. When called upon, you will unmute and you will
19 be told to go ahead with your comment. Please clearly
20 state your name and indicate if you are representing any
21 group or organization. Please limit your comments to
22 five minutes. Please specify when your comment is
23 finished so we can remute you. If you did not
24 preregister as a speaker, but would like to speak,
25 please use the "raise hand" feature in Google Meets. As

1 a reminder, video demonstrations and screen sharing by
2 witnesses is not permitted. The chat feature in Google
3 Meets will be monitored during the public hearing to
4 assist with any technical issues.

5 We ask that everyone be respectful and
6 considerate of each other by refraining from using foul
7 language, refraining from name-calling, refraining from
8 interrupting others while they are speaking and keeping
9 comments on topic of the proposed DAQ rule.

10 I am now turning this over to Laura Jennings
11 with the Division of Air Quality. Laura.

12 MS. JENNINGS: Thanks, Nicole. Can you
13 hear me okay?

14 MS. ERNEST: Yes, we can.

15 MS. JENNINGS: And is the court reporter
16 ready?

17 THE REPORTER: Yes, I am.

18 MS. JENNINGS: Okay. Thank you.

19 The virtual public hearing for the proposed
20 legislative rule 45CSR1, Alternative Emission
21 Limitations During Startup and Shutdown Operations, will
22 now come to order on this 6th day of July 2023.

23 Oral comments and testimony will be accepted
24 until the close of this hearing and will be made part of
25 the rulemaking record. Any questions regarding

1 revisions to the rules should be included with your
2 comments and any such questions will be addressed as
3 part of the response to comments in the rulemaking
4 record.

5 The purpose of this public hearing is to
6 accept comments on proposed revisions to Rule 1.
7 Promulgated last in the 2020 -- or excuse me,
8 promulgated last in the 2017 session, this rule sets
9 forth the criteria and permit application requirements
10 for establishing an alternative emission limitation
11 during periods of startup or shutdown.

12 Substantive changes to the rule include
13 removing malfunction from the rule title, clarifying the
14 scope, removing maintenance activities from rule
15 applicability, removing 45CSR40 from applicability
16 because the affirmative defense provisions identified in
17 the SSM SIP Call were previously addressed, aligning
18 several definitions with the definitions in the SSM SIP
19 Call, removing maintenance definitions and requirements,
20 making the requirements mandatory if a source cannot
21 comply with the applicable emission limits contained in
22 the underlying rules during startup or shutdown,
23 requiring the Secretary to submit any new AEL,
24 alternative emission limitations to the Administrator
25 for inclusion into the SIP, allowing the Secretary to

1 develop an AEL for a narrowly defined source category
2 and miscellaneous other clarifications. Rule numbering
3 and text formats were revised to comport with 153CSR1.

4 The floor is now open for comments. As a
5 reminder, please keep comments on topic and limit them
6 to five minutes. Nicole, has anyone preregistered to
7 provide comments on Proposed Rule 45CSR1? If so, please
8 unmute their line and call upon them now.

9 MS. ERNEST: Thanks, Laura.

10 For those who have preregistered to speak, I
11 will call your name and you will unmute your line. If
12 you are joining us by telephone, please unmute your line
13 by pressing star 6 when your name is called and press
14 star 6 again at the conclusion of your comment to remute
15 your line. If we do not hear from you when called upon,
16 we'll proceed to the next commenter and call on you
17 again at the end. I apologize in advance if I pronounce
18 anyone's name incorrectly.

19 James Kotcon, you're the first. Please unmute
20 your line, clearly state your name and indicate if
21 you're representing a group or organization.

22 MR. KOTCON: My name is Jim Kotcon. I am
23 currently chair of the West Virginia Chapter of Sierra
24 Club. In particular, with regard to this rule, I very
25 much appreciate the efforts that DEP has made to

1 implement those. We have long had concerns about the
2 SSM exemptions from many of the emissions monitoring and
3 reporting requirements. This rule is definitely a major
4 step forward in the right direction.

5 I have three specific comments that I want to
6 emphasize. The first is that the revise -- revisions in
7 the rule do not clearly address how emissions during
8 malfunctions would be handled. The implication is that
9 any excess emissions during malfunctions would be
10 included as part of the overall emissions, but we think
11 that that should be stated very explicitly because that
12 is a change from previous DEP practices.

13 The second suggestion is regarding Section
14 3.2.3 that requires the Secretary to submit these
15 alternative emissions limits as a SIP revision. That is
16 a provision that the Sierra Club has supported, and we
17 commend DEP for including that in this rule. We think
18 that is an important addition.

19 Finally, the rule, especially in Section 4.1,
20 requires an owner or operator to apply for an
21 alternative emission limit if they cannot comply with
22 the limits required under the rules. There is, however,
23 nothing in that rule that requires an owner or operator
24 to adopt the lowest achievable or best available
25 emissions controls, only that they apply for a limit and

1 describe the control strategies that they have reviewed
2 and proposed.

3 We'd recommend that that section or Section
4 5.15 be amended to specifically base an alternative
5 emissions limit on the lowest achievable or best
6 available technology as appropriate for that particular
7 area. We think it is critical that these permits be
8 designed to allow the lowest practically achievable
9 emissions limits that any pollution that is avoidable
10 should be avoided and that, as such, these alternative
11 emissions limits should require the best technology and
12 the best possible emissions weights. Thank you.

13 MS. ERNEST: Thank you, James.

14 We are at the end of the registered
15 commenter's list. If you did not preregister to speak,
16 but would like to do so now, please use the "raise hand"
17 option.

18 Duane Nichols, please unmute yourself and
19 begin your comment.

20 MR. NICHOLS: Thank you very much.

21 I want to precomment upon this by saying that
22 this hearing is very useful and appreciated, this
23 opportunity to speak. We have an opportunity to learn
24 so much from public hearings that they play a vital role
25 in the regulatory process. However, because of that

1 learning, we need the opportunity to submit comments to
2 revise our comments or extend them immediately after a
3 public hearing. So in that regard, it was essential
4 that this and other public hearings be made available,
5 the period for written comments open for two to three
6 days after the scheduled public hearing. Thank you for
7 receiving that comment.

8 With regards to this particular alternative
9 emission limitations category, startup and shutdown are,
10 indeed, important times in the industrial operations in
11 the power plants and other facilities that involve
12 emissions. We believe that tight control on startup,
13 particularly, it is important because most processes are
14 not actually developed in the laboratory, in the pilot
15 plant or in the demonstration phase to adequately
16 provide environmentally safe performance.

17 So attention to the limits -- when we say that
18 we're going to change the startup and shutdown limits,
19 it needs to mean that we're going to tighten them, that
20 we're going to be more well-defined in our expectations
21 so that the engineers, the owners, the operators of
22 facilities know what is expected of them.

23 With regards to malfunctions, this calls to
24 mind operations that are deviating from some prescribed
25 or expected operation. And thereto, the control system

1 design, the training and preparation of the operators,
2 the skill set, the number of procedures that the company
3 have already defined to respond to or recover from
4 nonstandard operation depends upon this agency providing
5 well-defined strict regulations.

6 These are my comments on this category and
7 thank you for that.

8 MS. ERNEST: Thank you, Duane.

9 Betsy, I see that your hand is raised. Unmute
10 yourself, please state if you're with any organization
11 and go ahead with your comment.

12 MS. LAWSON: My name is Betsy Lawson. I
13 live about a mile away from a new fracking well site and
14 emission limitations are meaningless if there aren't
15 inspectors around to inspect when they startup and when
16 they shutdown. And I just wondered if the DEP have
17 enough inspectors to go around to all these different
18 sites and make sure that the limitations are being
19 respected. So that's my comment.

20 MS. ERNEST: Thank you, Betsy.

21 Is there anyone else who would like to make a
22 comment? Please use the "raise hand" feature.

23 (Short Pause)

24 MS. ERNEST: There being no further
25 comments, this public hearing for proposed rule 45CSR1

1 is concluded. The public hearing for proposed Rule
2 45CSR2 will begin momentarily.

3 MS. JENNINGS: Thank you, Nicole.

4 * * *

5 (Whereupon, this hearing was concluded at 6:18 p.m.)

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1 THE STATE OF :
WEST VIRGINIA : SS: C E R T I F I C A T E
2 COUNTY OF OHIO :

3 I, TAMMIE TRIGG, Registered Professional
Reporter and Notary Public within and for the State of
4 West Virginia, duly commissioned and qualified, do
hereby certify that the proceedings within were by me
5 reduced to stenotype; afterwards reduced to Computer
Aided Transcription under my direction and control; that
6 the foregoing is a true and correct transcription of the
proceedings.
7

8 I do further certify that these proceedings
were taken at the time and place in the foregoing
9 caption specified, and was completed without
adjournment.
10

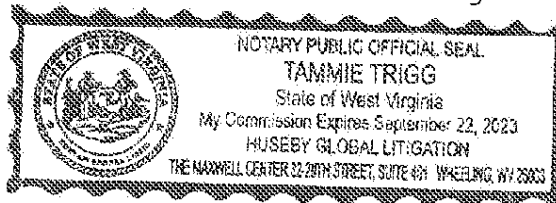
11 I do further certify that I am not a
relative, counsel or attorney of either party, or
12 otherwise interested in the event of this action.

13
14 IN WITNESS THEREOF, I have hereunto set my
hand and affixed my seal of office at Wheeling, West
Virginia, on the _____ day of _____, 2023.

Tammie Trigg

17 TAMMIE TRIGG, Registered
Professional Reporter and
18 Notary Public within and
for the State of West Virginia

20 My commission expires:
21 September 22, 2023



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23
24
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