



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

7/28/2023 10:56:13 AM

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: 45-03  
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No  
RULE NAME: Control of Air Pollution from the Operation of Hot Mix Asphalt Plants

**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.

This rule establishes emission limitations for hot mix asphalt plants and the plant property and sets forth the permitting, recordkeeping, reporting, and exemption requirements.

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: 5/31/2023

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/6/2023

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 6/2/23 in the Charleston Newspapers  
Public notice published 6/2/23 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 6/2/23

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 emission limitations for hot mix asphalt plants and the plant property and sets forth the permitting, recordkeeping, reporting, and exemption requirements.

The purpose of the rule is to control particulate matter and continue to be in attainment with the NAAQS.

Rule revisions were developed in accordance with 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 [80 Fed. Reg. 33840, June 12, 2015] and the 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 [88 Fed. Reg. 23353, April 17, 2023]. The SSM SIP Call and the Finding of Failure to Submit identified provisions in 45CSR2, 45CSR3, 45CSR5, 45CSR6, 45CSR7, 45CSR10 and 45CSR21 which potentially allowed excess emissions during startup, shutdown or malfunction (SSM) events.

Revisions to the rule include removing the SSM SIP Call provisions in subsections 3.2 and 7.1. Additional revisions include updating the title and series name, clarifying the scope and authority, adding the sunset provision, adding or revising the definition section consistent with the SSM SIP Call or with other DAQ rules, replacing "Director" with "Secretary", adding references to state rules associated with federal regulations, and adding a provision in subsection 3.3 requiring any owner or operator that cannot comply with the emission limits of this rule during periods of startup and shutdown to request an alternative emission limitation pursuant to 45CSR1. The rule numbering and text formats were revised to comport with 153CSR1. Revisions made in response to comments include adding section 10 to address disposition of the rule and severability.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

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

The rule is being amended in response to the U.S. EPA finding of failure to submit action [88 Fed. Reg. 23353, April 17, 2023] to address deficiencies identified in the U.S. EPA 2015 findings of substantial inadequacy and SIP Call for provisions related to excess emissions during periods of startup, shutdown, and malfunction (SSM) (SSM SIP Call). The provisions identified in 45CSR3 were §45-3-3.2 on the basis that the alternative limit was not sufficiently justified and the discretionary exemption at §45-3-7.1. The finding of failure to submit action triggers certain Clean Air Act deadlines for U.S. EPA to impose sanctions if a state does not submit a complete SIP revision addressing the outstanding requirements.

Upon authorization and promulgation, 45CSR3 will be submitted to the U.S. EPA to fully respond to the 2015 SSM SIP Call and the finding of failure to submit actions and request approval that West Virginia has met its obligations identified in these actions. Furthermore, 45CSR3 will be submitted to the U.S. EPA with a request

for approval to add 45CSR3 into the SIP.

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 revisions 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 the cost of state government beyond that resulting from currently applicable federal requirements, nor should it have an economic impact on the state or its residents.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2023 Increase/Decrease (use "-")	2024 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0

<b>Personal Services</b>	0	0	0
<b>Current Expenses</b>	0	0	0
<b>Repairs and Alterations</b>	0	0	0
<b>Assets</b>	0	0	0
<b>Other</b>	0	0	0
<b>2. Estimated Total Revenues</b>	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 it is not anticipated that implementation of the rule will require any additional staffing.

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.**

45CSR3

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

SERIES 3  
~~TO PREVENT AND CONTROL OF~~ AIR POLLUTION  
FROM THE OPERATION OF HOT MIX ASPHALT PLANTS

§45-3-1. General.

1.1. Scope. -- ~~The purpose of this~~ This rule is to establishes emission limitations for hot mix asphalt plants and the plant property and sets forth the permitting, recordkeeping, reporting, and exemption requirements.

1.2. Authority. -- W. Va. Code ~~§22-5-1 et seq~~ §22-5-4.

1.3. Filing Date. -- ~~June 2, 2000.~~

1.4. Effective Date. -- ~~August 31, 2000.~~

1.5. ~~Former Rules~~ — ~~This legislative rule amends 45CSR3 “To Prevent and Control Air Pollution from the Operation of Hot Mix Asphalt Plants” which was filed on March 30, 1979 and became effective October 27, 1979.~~ Sunset provision. -- Does not apply.

§45-3-2. Definitions.

2.1. "Air Pollution", "statutory air pollution"; shall have the meaning ascribed to it in W. Va. Code §22-5-2.

2.2. "Air Pollution Control Equipment" is defined as:

~~2.2.a~~ 2.2.1. "Primary Collection" -- is that equipment including, but not limited to, cyclones or multicyclones incorporated for the collection of fine particulate matter generated and emitted principally from the drying operation and from which all collected material may or may not be reinjected into the main aggregate flow.

~~2.2.b~~ 2.2.2. "Secondary Collection" -- is that equipment including, but not limited to, multicyclones, scrubbers, bag filters and electrostatic precipitators, incorporated for the collection of that particulate matter not collected by the primary collection equipment and from which such collected material may or may not be reinjected into the main aggregate flow.

2.3. "Director" means ~~the director of the division of environmental protection or such other person to whom the director has delegated authority or duties pursuant to W. Va. Code §§22-1-6 or 22-1-8.~~

“Alternative Emission Limitation” means an emission limitation that applies to a source during some but not all periods of normal operation (e.g., applies only during a specifically defined mode of operation such as startup or shutdown). An alternative emission limitation is a component of a continuously applicable emission limitation, and it may take the form of a control measure such as a design, equipment, work practice or operational standard (whether or not numerical).

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2.4. "Fuel" means any gaseous, liquid or solid substance or any combination thereof burned in fuel burning equipment.

2.5. "Fuel Burning Equipment" means and includes any chamber, apparatus, device, mechanism, stack or structure used in the process of burning fuel or other combustible material for the primary purpose of producing heat for direct heat transfer as applied to a hot mix asphalt plant excluding internal combustion engines.

2.6. "Fugitive Particulate Matter" means any ~~and all~~ particulate matter generated by the operation of a hot mix asphalt plant which, if not confined, would be emitted directly to the atmosphere from points other than a stack outlet.

2.7. "General Permit" means a general permit issued pursuant to 45CSR13.

2.8. "Malfunction" means ~~any a sudden and unavoidable failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner. Failures that are caused entirely or in part by poor maintenance, careless operation, or any other preventable upset condition or equipment breakdown shall not be considered malfunctions~~ breakdown of process or control equipment.

2.9. "Opacity" means the degree to which smoke and/or particulate matter emissions reduce the transmission of light and obscure the view of an object in the background.

2.10. "Operating Permit" means a general permit issued pursuant to 45CSR13 or a permit issued pursuant to 45CSR30, or section 5 of this rule.

2.11. "Particulate Matter" means any material, except uncombined water, that exists in a finely divided form as a liquid or solid.

2.12. "Particulate Matter Capture System" means any equipment or method used to confine, collect and transport particulate matter from elevators, screens, mixers, weighing equipment, bins and other plant components to air pollution control equipment. Particulate matter capture systems shall include, but not be limited to, hoods, bins, ductwork, enclosures and fans.

2.13. "Person" means any and all persons, natural or artificial, including the state of West Virginia or any other state, the United States of America, any municipal, statutory, public or private corporation organized or existing under the laws of this or any other state or country, and any firm, partnership or association of whatever nature.

2.14. "Plant" or "Hot Mix Asphalt Plant" means a hot mix asphalt plant which shall mean and include all the equipment utilized in the manufacture of asphaltic hot mix concrete, including, but not limited to, burner(s), drier(s), elevators, screens, mixer(s), weighing equipment, bins, and air pollution control equipment.

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

~~2.15~~ 2.16. "Shutdown" means the cessation of operation of a plant subject to this rule for any purpose, unless defined otherwise in a permit issued to create an alternative emission limitation.

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~~2.16~~ 2.17. "Smoke" means small gasborne and airborne particles arising from a process of combustion in sufficient numbers to be visible.

~~2.17~~ 2.18. "Standard Conditions" for the purpose of this rule means a temperature of 68° F, 20° C and a pressure of 29.92 inches of mercury (760 mm of Hg).

~~2.18~~ 2.19. "Start-up" means the setting in operation of a plant subject to this rule for any purpose, unless defined otherwise in a permit issued to create an alternative emission limitation.

~~2.19~~ 2.20. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in W. Va. Code §22-5-1 et seq.

**§45-3-3. Emission of Smoke and/or Particulate Matter Prohibited and Standards of Measurement - Visible.**

3.1. No person shall cause, suffer, allow or permit emission of smoke and/or particulate matter into the open air from any fuel burning equipment which is twenty percent (20%) opacity or greater based on six minute averages using 40 CFR Part 60, Appendix A, Method 9, and 45CSR16 or other equivalent EPA approved method as approved by the ~~Director~~ Secretary.

3.2. ~~The provisions of subsection 3.1 shall not apply to smoke and/or particulate matter emitted during the start-up or shutdown of an operation which is less than forty percent (40%) opacity for a period of six (6) minutes per start-up or shutdown based on six minute averages using 40 CFR Part 60, Appendix A, Method 9, or other equivalent EPA approved method as approved by the Director~~ Reserved.

3.3. Any owner or operator that cannot comply with the emission limitation required by section 3.1 during periods of startup or shutdown shall request an alternative emission limitation pursuant to 45CSR1.

3.4. Where the ~~Director~~ Secretary believes that start-ups and shutdowns are excessive in duration and/or frequency, the ~~Director~~ Secretary may require an owner or operator to provide a written report demonstrating that such frequent start-ups and shutdowns are necessary.

**§45-3-4. Emission of Smoke and/or Particulate Matter Prohibited and Standards of Measurement - Weight Emissions.**

4.1. For those plants placed in operation after June 11, 1973 or that have since been modified to cause such plant to be regulated pursuant to 40 CFR Part 60, Subpart I and 45CSR16, no person shall cause, suffer, allow or permit total particulate matter emissions to be discharged into the open air from such plant in excess of 0.04 grains per dry standard cubic foot.

4.2. For those plants not subject to 40 CFR Part 60, Subpart I and 45CSR16, no person shall cause, suffer, allow or permit particulate matter emissions from a plant into the open air in excess of the quantity as listed in ~~the following~~ Table 45-3:

**TABLE 45-3**

<u>Aggregate Process Rate</u> <u>(Pounds Per Hour)</u>	<u>Stack Emission Rate</u> <u>(Pounds Per Hour)</u>
10,000	10
20,000	16
30,000	22
40,000	28

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100,000	33
200,000	37
300,000	40
400,000	43
500,000	47
600,000	50

~~4.2.a~~ 4.2.1. For a process weight between any two consecutive process weights stated in ~~this~~ Table 45-3, the emission limitation shall be determined by interpolation.

4.3. No person shall cause, suffer, allow or permit total particulate matter emissions to be discharged into the open air from any stack of a plant located in the following counties and magisterial districts in excess of 0.04 grains per dry standard cubic feet.

~~4.3.a~~ 4.3.1. Counties -- Brooke, Hancock, Ohio, Marshall and Kanawha.

~~4.3.b~~ 4.3.2. Magisterial Districts -- Valley (Fayette County), Scott and Pocatalico (Putnam County), Tygart (Wood County), Union and Winfield (Marion County, west of Interstate I-79).

4.4. In the case of more than one stack to a hot mix asphalt plant, the emission limitation of subsection 4.2 of this section will be based on the total emission from all stacks.

4.5. No person shall cause, suffer, allow or permit a plant to operate that is not equipped with a particulate matter capture system. This system shall be designed, operated and maintained in such a manner as to prevent the emission of particulate matter from any point other than a stack outlet.

4.6. The owner or operator of the plant shall maintain control of fugitive particulate matter on the plant premises and plant owned, leased or controlled access roads by paving, chemical treatment or other suitable measures. Good operating practices shall be observed in relation to the stockpiling, screen changing and general maintenance to prevent fugitive particulate matter generation and atmospheric entrainment. Good operating practices, including water spraying or other suitable measures, shall be employed to minimize fugitive particulate matter generation and atmospheric entrainment when hot bins are pulled.

**§45-3-5. Permits.**

5.1. No person shall construct, modify or relocate a hot mix asphalt plant without first obtaining any permit(s) required by 45CSR13, 45CSR14 or 45CSR19.

5.2. No person shall operate a hot mix asphalt plant without first obtaining an operating permit. The possession of an operating permit issued pursuant to 45CSR30 or a general permit issued pursuant to 45CSR13 will satisfy the requirements of this subsection.

5.3. Applications for permits shall be made upon forms available from the ~~Director~~ Secretary and shall include such information as in the judgement of the ~~Director~~ Secretary will enable him or her to determine whether such source(s) will be so designed as to operate in conformance with the provisions of this rule and other applicable rules, the W. Va. Code §22-1-1 et seq., and will not cause or contribute to the violation of applicable ambient air quality standards.

5.4. An operating permit, issued pursuant to this rule, will be granted for plants provided they meet and maintain the requirements as set forth in this rule. These permits will be valid for one (1) calendar

year and must be renewed annually. Any person failing to maintain the requirements of this rule shall, at the discretion of the ~~Director~~ Secretary, have their operating permit revoked.

5.5. When operating permits are revoked, the ~~Director~~ Secretary will consider reissuing permits when such changes as necessary to meet the requirements of this rule are made by the owner or operator of the plants.

5.6. Plants operating without all applicable permits will be in violation of this rule.

#### §45-3-6. Reports and Testing.

6.1. At such reasonable times as the ~~Director~~ Secretary may designate, the owner or operator of any hot mix asphalt plant may be required to conduct or have conducted stack tests to determine the particulate matter concentration in exhaust gases. Such tests shall be conducted in accordance with 40 CFR Part 60, Appendix A, Method 5 and 45CSR16 or other equivalent EPA approved method approved by the ~~Director~~ Secretary.

~~6.1.a~~ 6.1.1. All such tests shall be conducted under such reasonable operating conditions as the ~~Director~~ Secretary may specify. The ~~Director~~ Secretary, or his duly authorized representative, may at his option witness or conduct such stack tests. Should the ~~Director~~ Secretary exercise his option to conduct such tests, the operator will provide all the necessary sampling connections and sampling ports to be located in such manner as the ~~Director~~ Secretary may require, power for test equipment and the required safety equipment such as scaffolding, railings and ladders to comply with generally accepted good safety practices.

6.2. At such time as the ~~Director~~ Secretary may request, the operator of the plant will submit data, including, but not limited to, on type, sizing and quantity of the aggregate used and the hours of operation.

6.3. Any stack serving a hot mix asphalt plant shall contain flow straightening devices or a vertical run of sufficient length to establish flow patterns consistent with acceptable stack sampling procedures.

#### §45-3-7. Variance Reserved.

~~7.1. Due to unavoidable malfunctions of equipment, emissions exceeding those provided for in this rule may be permitted by the Director for periods not to exceed two (2) days upon specific application to the Director. Such application shall be made within twenty four (24) hours of the malfunction or within such other time period as the Director may specify. When parts are not available for repair the Director may grant an extension of time for a period longer than two (2) days, but not to exceed ten (10) days.~~

#### §45-3-8. Circumvention.

8.1. No owner or operator subject to the provisions of this rule shall build, erect, install or use any article, machine, equipment or process, the use of which purposely conceals an emission which would otherwise constitute a violation of an applicable standard. Such concealment includes, but is not limited to, the use of gaseous diluents to achieve compliance with an opacity standard or with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere.

#### §45-3-9. Inconsistency Between Rules.

9.1. In the event of any inconsistency between this rule and any other rule of the West Virginia ~~Division of Environmental Protection~~ Division of Air Quality, such inconsistency shall be resolved by the

determination of the ~~Director~~ Secretary and such determination shall be based upon the application of the more stringent provision, term, condition, method or rule.

**§45-3-10. Disposition of Rule; Severability.**

10.1. 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.

10.2. 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.

10.3. 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.

10.4. 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 § 45-3-3.3 and revert to the August 31, 2000 requirements found at §§ 45-3-3.2 and -7.1.