



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: Air Quality TITLE-SERIES: 45-06
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No
RULE NAME: CONTROL OF AIR POLLUTION FROM
COMBUSTION OF REFUSE
CITE STATUTORY AUTHORITY: W. Va. Code § 22-5-4

The above rule has been authorized by the West Virginia Legislature.

Authorization is cited in (house or senate bill number) SB2

Section 64-3-1 (e) Passed On 3/8/2024 12:00:00 AM

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

June 1, 2024

This rule shall terminate and have no further force or effect from the following date:

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

Yes

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

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

SERIES 6
CONTROL OF AIR POLLUTION FROM COMBUSTION OF REFUSE

§45-6-1. General.

1.1. Scope.

1.1.1. This rule establishes emission standards for particulate matter and requirements for activities involving incineration of refuse which are not subject to, or are exempted from regulation under a federal counterpart for specific combustion sources. This rule also prohibits (with limited exception) open burning and sets forth the registration, permitting, reporting, testing, emergency, natural disaster and exemption provisions for activities involving the combustion of refuse and land clearing debris.

1.1.2. Neither compliance with the provisions of this rule nor the absence of specific language to cover particular situations constitutes approval or implies consent or condonement of any emission which is released in any locality in such manner or amount as to cause or contribute to statutory air pollution. Neither does it exempt nor excuse anyone from complying with other applicable laws, ordinances, regulations or orders of governmental entities having jurisdiction over combustion of refuse or open burning.

1.1.3. All persons engaged in any form of combustion of refuse shall give careful consideration to the effects of the resultant emissions on the air quality of the area(s) affected by such burning. Important considerations include, but are not limited to, the location and time of burning, the type of material being burned and the potential emissions and the prevailing meteorological conditions. Persons failing to give due consideration to these factors will be in violation of this rule.

1.1.4. It is the intent of the Secretary that all incorporated areas and other local governmental entities prohibit open burning and develop alternative methods for disposal of refuse. If such action is not taken in any air basin, air quality control region or other such areas as the Secretary may designate, then such action may be taken by the Secretary to ensure compliance with air quality standards.

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

1.3. Filing Date. -- May 2, 2024.

1.4. Effective Date. -- June 1, 2024.

1.5. Sunset provision. -- Does not apply.

§45-6-2. Definitions.

2.1. "Agency Administrator" means a National Park Service Park Superintendent, Bureau of Indian Affairs Agency Superintendent, U.S. Forest Service Forest Supervisor, Bureau of Land Management District Manager, Fish and Wildlife Service Refuge Manager, State Forest Officer, Fire Chief, or an authorized designee thereof.

45CSR6

2.2. “Air Curtain Incinerator” means an incinerator that operates by forcefully projecting a curtain of air across an open chamber or pit in which combustion occurs. Incinerators of this type can be constructed above or below ground and with or without refractory walls and floor. (Air curtain incinerators are not to be confused with conventional combustion devices with enclosed fireboxes and controlled air technology such as mass burn, modular, and fluidized bed combustors.)

2.3. “Air Pollution” or “statutory air pollution” shall have the meaning ascribed to it in W.Va. Code §22-5-2.

2.4. “Air Pollution Control Equipment” means any equipment used for collecting or converting gasborne particulate or gaseous materials for the purpose of preventing or reducing emission of these materials into the open air.

2.5. “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).

2.6. “CFR” means the Code of Federal Regulations published by the Office of the Federal Register, National Archives and Records Service, General Services Administration.

2.7. “Flare” or ‘flare stack’ means and includes a combustion source normally comprised of, but not limited to, a length of stack or pipe which has an attached burner mechanism designed to destroy liquid or gaseous material with an open or semi-enclosed flame.

2.8. “Incineration” means the destruction of combustible refuse by burning in a furnace designed for that purpose. For the purposes of this rule, the destruction of any combustible liquid or gaseous material by burning in a flare or flare stack, thermal oxidizer or thermal catalytic oxidizer stack shall be considered incineration.

2.9. “Incinerator” means any device used to accomplish incineration.

2.10. “Incinerator Capacity” shall be the manufacturer's or designer's guaranteed maximum charging rate or such other rate as may be determined by the Secretary in accordance with good engineering practices. In case of conflict the determination by the Secretary shall govern. For the purpose of this rule, the total of the capacities of all furnaces within one system shall be considered as the “Incinerator Capacity”.

2.11. “Industrial Waste Incinerator” means an incinerator which is used to incinerate gaseous, liquid, semi-liquid and/or solid by-product waste from industrial sources.

2.12. “Land Clearing Debris” means that vegetative material generated by clearing of land for purposes of preparation for development, construction, mining or other such activity. Non-vegetative refuse is not included in this meaning.

2.13. “Malfunction” means a sudden and unavoidable breakdown of process or control equipment.

2.14. “Opacity” means the degree to which smoke or particulate matter emissions reduce the transmission of light and obscure the view of an object in the background.

45CSR6

2.15. "Open Burning" means the combustion of refuse whereby the gaseous products of combustion are not conveyed through man-made means from one point to another and are discharged directly to the open air. This term includes 'burn barrels', but does not include air curtain incinerators.

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

2.17. "Pathological Waste " means waste material consisting of only human or animal remains, anatomical parts or tissue, the bags or containers used to collect and transport the waste material, and animal bedding (if applicable).

2.18. "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.

2.19. "Prescribed burning" means the controlled application of fire to vegetation under specified environmental conditions and precautionary measures, which allows the fire to be confined to a predetermined area for the purpose of accomplishing specifically planned wildlife and forest management objectives.

2.20. "Refuse" means the useless, unwanted or discarded solid, liquid or gaseous waste materials resulting from community, commercial, industrial or citizen activities.

2.21. "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.

2.22. "Shutdown" means the cessation of operation of a source subject to this rule for any reason, unless otherwise defined in a permit issued to create an alternative emission limitation.

2.23. "Sewage Sludge Incinerator" means an incinerator which is used to incinerate the sludge produced by municipal or industrial sewage treatment plants.

2.24. "Smoke" means small gasborne and airborne particles emitted as the result of the combustion of refuse in sufficient numbers to be visible.

2.25. "Startup" means the setting in operation of a source subject to this rule for any reason, unless otherwise defined in a permit issued to create an alternative emission limitation.

2.26. 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.

§45-6-3. Open Burning Prohibited.

3.1. General Provisions. -- The open burning of refuse by any person is prohibited except for the following exceptions:

3.1.1. Vegetation grown on the premises of a home or farm, provided that there is compliance with the provisions of subdivision 1.1.2, and the health, safety, comfort and property of persons are protected from the effects of such burning.

45CSR6

3.1.2. Fires set for the purpose of bona fide instruction and training of public and industrial employees and members of volunteer fire departments in the methods of fighting fires, provided that approval to conduct such burning is received from the Secretary. Burning of structures for fire training is subject to specific requirements of 45CSR34 and 40 CFR Part 61 Subpart M.

3.1.3. Open burning of land clearing debris provided that all the following conditions are met:

3.1.3.a. There is no practical alternate method for the disposal of the material to be burned;

3.1.3.b. The health, safety, comfort and property of persons are protected from the effects of such burning; and

3.1.3.c. Approval to conduct such burning is received from the Secretary.

3.1.4. Open burning of propellant and explosive wastes, provided that the open burning is conducted in accordance with 45CSR25.

3.1.5. Prescribed burning, in accordance with a written prescribed fire plan approved by the West Virginia Division of Forestry, or in the case of federal lands, approved by the appropriate Agency Administrator and endorsed by the West Virginia Division of Forestry, prior to ignition for the following wildlife, forest and associated land management purposes:

3.1.5.a. To improve forest health;

3.1.5.b. To maintain and restore wildlife habitat;

3.1.5.c. To reduce forest fuels and minimize the effect of wildfires;

3.1.5.d. To prepare land for planting or seeding (site preparation);

3.1.5.e. To restore fire-dependent forest ecosystems; and

3.1.5.f. To integrate with other control methods for use in eradication of non-native invasive plants.

3.2. The exemptions listed in subsection 3.1 are subject to the following stipulation:

3.2.1. Upon notification by the Secretary, no person shall cause or allow any form of open burning during existing or predicted periods of atmospheric stagnation. Notification shall be made by such means as the Secretary may deem necessary and feasible.

§45-6-4. Emission Standards for Incinerators and Incineration.

4.1. No person shall cause or allow particulate matter to be discharged from any incinerator into the open air in excess of the quantity determined by use of the following formula:

Emissions (lb/hr) = F x Incinerator Capacity (tons/hr)

Where, the factor, F, is as indicated in Table 45-6 below:

Table 45-6: Factor, F, for Determining Maximum Allowable Particulate Emissions.

Incinerator Capacity	Factor F
Less than 15,000 lbs/hr	5.43
15,000 lbs/hr or greater	2.72

4.2. In the Counties of Brooke, Hancock, Ohio, Marshall and Kanawha; and the Magisterial Districts of Valley (Fayette County), Scott and Pocatalico (Putnam County), Tygart (Wood County), the City of Fairmont and those portions of Union and Winfield Magisterial Districts west of I-79 (Marion County), no person shall cause or allow the operation of any incinerator during the period starting 1 hour before sunset and extending until 2 hours after sunrise. This subsection shall not apply to the operation of flares, pathological waste, industrial, or sewage sludge incinerators.

4.3. Emission of Visible Particulate Matter. -- No person shall cause or allow emission of smoke into the atmosphere from any incinerator which is 20% opacity or greater.

4.4. The provisions of subsection 4.3 shall not apply to smoke which is less than 40% opacity, for a period or periods aggregating no more than 8 minutes per start-up, or 6 minutes in any 60-minute period for stoking operations.

4.5. No person shall cause or allow the emission of particles of unburned or partially burned refuse or ash from any incinerator which are large enough to be individually distinguished in the open air.

4.6. Incinerators, including all associated equipment and grounds, shall be designed, operated and maintained so as to prevent the emission of objectionable odors.

4.7. Incineration of Pathological Waste. -- Persons responsible for the incineration of pathological waste shall give the utmost care and consideration to the effects of the emissions resulting from such activities. Evaluation of these facilities as to adequacy, efficiency and emission potential will be made on an individual basis by the Secretary, working in conjunction with other appropriate governmental agencies.

4.8. Temporary Air Curtain Incinerators. -- Air curtain incinerators that are temporarily sited and operated only for the disposal of on-site land clearing debris shall not be subject to the emission standards of this rule or to the preconstruction permitting requirements of 45CSR13, provided that the following conditions are met:

4.8.1. There is no practical alternative method for the disposal of the material to be incinerated;

4.8.2. The health, safety, comfort and property of persons are protected from the effects of such incineration;

4.8.3. Approval to conduct such incineration is received from the Secretary; and

4.8.4. The temporary air curtain incinerator is not subject to the requirements of section 9 of this rule, 45CSR14, 45CSR18, 45CSR19, or 45CSR30.

4.9. Except for flares and temporary air curtain incinerators under subsection 4.8, the owner or operator of an incinerator shall post operating instructions for the incinerator clearly visible by the operator from the incinerator charging area. Such posting shall provide instruction for proper operation in order to prevent a violation of this rule.

45CSR6

4.10. The owner and operator of an incinerator shall design, construct and operate the facility in accordance with all applicable rules promulgated by the Secretary including, but not limited to, this rule, 45CSR13, 45CSR14, 45CSR18, 45CSR19, 45CSR25, 45CSR30 and 45CSR34, as applicable.

§45-6-5. Reserved.

§45-6-6. Permits.

6.1. Except for temporary air curtain incinerators under subsection 4.8, no person shall construct, modify or relocate any incinerator without first obtaining a permit in accordance with the provisions of W.Va. Code §22-5-1 et seq., 45CSR13, 45CSR14, 45CSR19, and 45CSR30, as applicable, provided that, and notwithstanding the provisions of 45CSR13, flares and flare stacks meeting the following requirements shall not be required to obtain a preconstruction permit under 45CSR13:

6.1.1. Temporary flares used in conjunction with maintenance and repair of natural gas pipelines, combusting only the gas contained therein, which meet the following conditions:

6.1.1.a. The flare or flare stack exists on-site for a cumulative period of less than 30 days in any 12 consecutive month period;

6.1.1.b. The maximum emissions from the flare or flare stack, based on the potential to emit for the period of time that the flare or flare stack is in use, do not exceed the threshold amounts specified in the definitions of “stationary source” and “modification” in 45CSR13;

6.1.1.c. The flare or flare stack is not subject to the requirements of 45CSR14, 45CSR16, 45CSR19, 45CSR25, 45CSR30 or 45CSR34; and

6.1.1.d. The source maintains records of emissions, monitoring results or other records sufficient to determine compliance with the requirements of paragraphs 6.1.1.a through 6.1.1.c for a minimum period of 3 years and makes such records available upon the Secretary’s request.

6.1.2. Temporary flares, other than those identified in subdivision 6.1.1, which meet the following conditions:

6.1.2.a. The flare or flare stack exists on-site for a cumulative period of less than 10 days in any 12 consecutive month period;

6.1.2.b. The maximum emissions from the flare or flare stack, based on the potential to emit for the period of time that the flare or flare stack is in use, do not exceed the threshold amounts specified in the definitions of “stationary source” and “modification” in 45CSR13;

6.1.2.c. The flare or flare stack is not subject to the requirements of 45CSR14, 45CSR16, 45CSR19, 45CSR25, 45CSR30 or 45CSR34;

6.1.2.d. The flare or flare stack meets all of the general control device requirements of 40 CFR §60.18 and 45CSR16 including, but not limited to, the requirement to monitor the flare to ensure it is operated and maintained in conformance with its design and the opacity standard in 40 CFR §60.18(c)(1);

6.1.2.e. The flare or flare stack is designed and operated in a manner to prevent violations of any national ambient air quality standard;

45CSR6

6.1.2.f. The source notifies the Secretary within 10 working days of locating any flare or flare stack on-site, which notification shall include the location and anticipated duration that such flare will remain on-site; and

6.1.2.g. The source maintains records of emissions, monitoring results or other records sufficient to determine compliance with the requirements of paragraphs 6.1.2.a through 6.1.2.f for a minimum period of 3 years and makes such records available upon the Secretary's request.

6.2. Nothing contained in this rule shall be construed or inferred to mean that permit requirements in accordance with applicable rules shall be in any way limited or inapplicable, including but not limited to the permitting requirements under 45CSR13, 45CSR14, 45CSR19, 45CSR25 and 45CSR30.

§45-6-7. Reports and Testing.

7.1. At such reasonable times as the Secretary may designate, the operator of any incinerator shall be required to conduct or have conducted stack tests to determine the particulate matter loading, by using 40 CFR Part 60, Appendix A, Method 5 and 45CSR16 or other equivalent U.S. EPA approved method approved by the Secretary, in exhaust gases. Such tests shall be conducted in such manner as the Secretary may specify and be filed on forms and in a manner acceptable to the Secretary. The Secretary may, at the Secretary's option, witness or conduct such stack tests. Should the Secretary exercise his or her 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 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.

7.2. The Secretary may conduct such other tests as the Secretary may deem necessary to evaluate air pollution emissions other than those noted above.

§45-6-8. Variances.

8.1. If it can be demonstrated to the Secretary that the disposal of certain materials by any method other than burning leads to ground water contamination, then the person responsible for the disposal of such materials shall submit to the Secretary within 60 days of such demonstration a program and preconstruction permit application under 45CSR13 leading to the construction of a suitable incinerator. If such program and permit is approved by the Secretary, the person shall not be in violation as long as such incineration is in accordance with the approved program and permit issued by the Secretary.

8.2. Reserved.

§45-6-9. Alternative Emission Limitations

9.1. Any owner or operator that cannot meet the emission limitations established in section 4 during periods of startup or shutdown shall request an alternative emission limitation pursuant to 45CSR1.

§45-6-10. Emergencies and Natural Disasters.

10.1. In situations involving flood, tornado, ice storm, high winds or other natural disaster the Secretary may, based on demonstrated need, approve temporary open burning of vegetation, non-hazardous building debris and other non-hazardous debris from such natural disaster which would otherwise be subject to the requirements of sections 3 or 6, provided that:

45CSR6

- 10.1.1. There is no practical alternative method for disposal of the material to be burned;
- 10.1.2. The health, safety, comfort and property of persons are protected from such burning; and
- 10.1.3. Approval to conduct such burning is received from the Secretary.

10.2. During a declared state of emergency under Annex W of the West Virginia Emergency Operations Plan involving a highly contagious animal or poultry disease, the Secretary may approve temporary incineration or open burning of animal or poultry remains and related pathological waste which would otherwise be subject to the requirements of sections 3, 4 or 6 or 45CSR18, provided that:

- 10.2.1. There is no practical alternative method for carcass and pathological waste disposal;
- 10.2.2. The health, safety, comfort and property of persons are protected from such incineration or burning; and
- 10.2.3. Approval to conduct such incineration or burning is received from the Secretary.

§45-6-11. Exemptions.

11.1. The following combustion units are subject to the requirements of 45CSR18 and shall be exempt from the requirements of this rule:

11.1.1. Large municipal waste combustors, small municipal waste combustion units, hospital/ medical/ infectious waste incinerators, commercial and industrial solid waste incineration units, and other solid waste incineration units;

11.1.2. Air curtain incinerators which are a distinct operating unit of any commercial or industrial facility;

11.1.3. Any air curtain incinerator that burns less than 35 tons per day of municipal solid waste, or is located at an institutional facility burning any amount of institutional waste generated at that facility; and

11.1.4. Incinerators or air curtain incinerators used on a temporary basis to combust vegetation or debris from disaster recovery or a state of emergency.

11.2. Any pathological waste incinerator subject to 45CSR18 or 45CSR25 shall be exempt from the requirements of this rule.

11.3. Any facility which incinerates low-level radioactive waste or chemotherapeutic waste shall be exempt from the requirements of this rule.

11.4. Any hazardous waste combustor subject to 40 CFR Part 63, Subpart EEE and 45CSR34 shall be exempt from the requirements of this rule.

11.5. Any hazardous waste incinerator subject to 40 CFR Parts 264 or 265 and 45CSR25 shall be exempt from the requirements of this rule.

§45-6-12. Effect of the Rule.

- 12.1. Nothing in this rule shall be construed to allow or permit the installation, establishment or

construction of a new municipal or commercial solid waste facility utilizing incineration technology for the purpose of solid waste incineration in violation of W.Va. Code §22-15-19.

§45-6-13. Inconsistency Between Rules.

13.1. In the event of any inconsistency between this rule and any other rule of the Division of Air Quality, the inconsistency shall be resolved by the determination of the Secretary and the determination shall be based upon the application of the more stringent provision, term, condition, method, or rule.

§45-6-14. Disposition of Rule; Severability.

14.1. 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.

14.2. 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.

14.3. 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.

14.4. 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 § 45-6-9.1 and revert to the June 1, 2008 requirements found at § 45-6-8.2.