

**45CSR16**  
**STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES**  
**RESPONSE TO COMMENTS**

The WV Department of Environmental Protection (DEP), Division of Air Quality (DAQ) commenced the public comment period for proposed legislative rule 45CSR16 on July 5, 2024. The public comment period concluded August 6, 2024, after satisfying the 30-day period. A public hearing was held virtually on August 6, 2024. The purpose of the public comment period and hearing was to accept oral and written comments on the proposed revisions to 45CSR16.

There were three written comments received during the public comment period from: Ellen Schmitt representing the U.S. EPA, Region 3, Mr. James Kotcon, and joint comments from the Ohio Valley Environmental Advocates and Jefferson County Foundation, Inc. There were not any oral comments provided during the public hearing. The original comments received, and the public hearing transcript are provided as part of the formal rulemaking record. A summary of the consolidated comments and responses are provided below.

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

- §45-16-8.2 was reworded for clarity.
- §45-16-8.3 was reworded for clarity.
- §45-16-8.4 was added.

Commenter 1: U.S. EPA, Region 3

COMMENT 1: For 45-16-8.3 (regarding severability and permits) I believe that there is a cross-referencing error. They incorrectly reference subsection 4.1, as the subsections that led to severance. For instance, in 41-16-8.3 it begins “In the event any provisions are severed pursuant to subsection 4.1...” Section 4.1 is the section adopting the standards of 40 CFR Part 60 and 65. My thought is that it should instead reference subsection 8.2, as that is the subsection that delineates when a provision would be severed.

RESPONSE 1: The DAQ concurs and reworded §§45-16-8.3 as follows:

8.3. In the event any provisions are severed pursuant to subsection ~~4.1~~ 8.2, the Secretary may terminate any permit or section of an existing permit issued pursuant to 45CSR13, 45CSR14, 45CSR19, and 45CSR30.

COMMENT 2: With respect to the severability clauses regarding termination of permits (45-16-8.3), it does not specify that termination of permits/sections of permits is limited to those permits/sections that are affected by the severed provision. For instance, I think it could be read as if there is a severed provision, any permit issued pursuant to the mentioned regulations could be terminated. I don't think that's what is meant and perhaps felt it did not need to be specified.

RESPONSE 2: The DAQ concurs and in addition to the rewording in RESPONSE 1, further reworded §45-16-8.3 for clarification as follows:

8.3. In the event any provisions are severed pursuant to subsection 4.1 ~~8.2~~, the Secretary may terminate any permit or section of an existing permit issued pursuant to 45CSR13, 45CSR14, 45CSR19, and 45CSR30 to address, and limited to, the affected severed provisions.

COMMENT 3: Each section that delineates what would lead to severance (§§45-16-8.2) seems to be worded oddly. The last phrase of these sections “are severed from...” should instead be something like “such provision is severed...”

RESPONSE 3: The DAQ concurs and reworded §§45-16-8.2 as follows:

8.2. In the event any provisions of 40 C.F.R. parts 60 and 65, to the extent referenced in 40 C.F.R. part 60, including any reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 C.F.R. parts 60 and 65 and adopted and incorporated by reference under subsection 4.1 is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the United States Congress, ~~are~~ such provision is severed from 45CSR16 and no longer adopted and incorporated by reference under subsection 4.1.

Commenter 2: James Kotcon

COMMENT 4: The rule adds language related to "severability". Can you explain DAQ's intent in adding the language and what its effect would be? It seems reasonable, but I don't know why it is needed.

RESPONSE 4: The DAQ incorporates by reference numerous federal regulations during each legislative session, including those adopted under 45CSR16. Given the number of lawsuits involving federal regulations, the DAQ thought it prudent to add severability language to each of the state air quality rules which incorporate by reference federal counterpart regulations to not only remain current with the status of the federal counterpart regulations, but also be transparent to the regulated community and the public.

The effect of adding the language is to ensure the State rule reflects the federal regulation and to ensure air quality permits or sections of permits related to any severed requirements may be terminated resulting from the severed provisions. The language was clarified in response to COMMENT 3 above.

COMMENT 5: 45CSR16 adds an exclusion for 40CFR60, subpart Ba (Adoption and Submittal of State Plans for Designated Facilities). I am unclear on why this is being excluded, and what effect that might have on how the state adopts State Implementation Plans. Can you explain or provide examples of who might be affected, and what the intent of this exclusion is? Is there an alternative procedure to develop a SIP for Designated Facilities?

RESPONSE 5: The scope of 45CSR16 establishes and adopts standards of performance for new stationary sources promulgated by the United States Environmental Protection Agency pursuant to section 111(b) of the federal Clean Air Act, as amended. The reason 40CFR60, subpart Ba is excluded is because it is the regulation which specifies how the U.S. EPA and States must respond when emission guidelines for existing sources are published under section 111(d) of the federal Clean Air Act, as amended. Subpart Ba is a more recent version of subpart B of 40CFR60 which is also excluded from the adoption of standards. The U.S. EPA and States (not regulated sources)

are directly subject to 40CFR60 subpart B and Ba; therefore, it is not appropriate to adopt and incorporate by reference these implementing guidelines.

The State is required to develop and submit State Plans in accordance with 40CFR60, subpart Ba and excluding this subpart from the adoption of standards has no bearing on the State's responsibility to comply with these requirements.

COMMENT 6: The WV Secretary of State's website on 45-CSR-16 includes 40-CFR Part 60 Subpart OOOOb (Standards of Performance for Crude Oil and Natural Gas Facilities...) as "Adopted by Reference", but I do not see that adopted in any of these rules. Is that an error? If not, how is it relevant to 45-CSR-16?

RESPONSE 6: Toward the bottom of the first page in the .pdf version of the 45CSR16 "Notice" document from the Secretary of State website, the notice indicates that the filing includes incorporation by reference. The federal regulations which are incorporated by reference are provided in the "Adopted by Reference" link for the rule which you mentioned. This is the process by which the Secretary of State website handles identifying incorporation by reference documents.

40CFR60 subpart OOOOb published March 8, 2024, is not identified as an exclusion under §45CSR16-4.1, and therefore is included in the incorporated by reference federal counterpart regulations identified under §45CSR16-1.6 and adopted under §45CSR16-4.1 which state:

1.6. Incorporation by reference. -- federal counterpart regulation. The Secretary has determined that a federal counterpart rule exists, and in accordance with the Secretary's recommendation, with limited exception, this rule incorporates by reference 40 C.F.R. parts 60 and 65, to the extent referenced in 40 C.F.R. part 60, effective June 1, 2024.

4.1. Standards. -- The Secretary hereby adopts and incorporates by reference the provisions of 40 C.F.R. parts 60 and 65, to the extent referenced in 40 C.F.R. part 60, including any reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 C.F.R. parts 60 and 65, effective June 1, 2024, for the purposes of implementing a program for standards of performance for new stationary sources, except as follows: . . .

Commenter 3: Ohio Valley Environmental Advocates and Jefferson County Foundation, Inc.

COMMENT 7: Commenters seek to ensure that air quality in West Virginia is fully protected under state law at levels that are equivalent to the most current and stringent federal standards, methods, and rules.

RESPONSE 7: Thank you for your comment, a response is not necessary.

COMMENT 8: Commenters want to ensure that the many different stationary sources of air pollution in the state are required to meet — and hold air permits including — the most current federal standards. The adoption and application of the most current federal standards, methods, and rules are most likely to result in improved air quality throughout West Virginia and best protect the health of its residents and environment.

RESPONSE 8: Thank you for your comment, a response is not necessary.

COMMENT 9: DAQ has failed to provide the public with the information necessary to fully understand and assess the proposed changes. West Virginia law provides that when amending a rule, the proposed rule “shall be accompanied by note of explanation as to the effect of the amendment and its relation to the existing rules.” DAQ provided public notice of these proposed revisions to the state rules on July 5, 2024. The public notice for the Proposed Rules, along with the specific proposed revisions, make clear that these are amendments to existing rules and thus subject to the provisions of the WV APA governing amendments. As a result, DAQ was required to provide a note of explanation for these changes. That note of explanation is critical to public engagement and agency transparency.

RESPONSE 9: DAQ did not fail to provide the public with necessary information to fully understand and assess the proposed changes. In the “Notice of Public Comment Period” filed with the Office of West Virginia Secretary of State on July 3, 2024<sup>1</sup>, DAQ provided the following explanation of the changes as in accordance with West Virginia State Code and in addition to the strike-through, underline version of the proposed changes.

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

The rule incorporates by reference the federal standards of performance for new stationary sources promulgated by the United States Environmental Protection Agency (EPA) pursuant to §111(b) of the federal Clean Air Act, as amended (CAA). This rule codifies general procedures and criteria to implement standards of performance for new stationary sources set forth in 40 CFR part 60. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to such standards.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

Summary of changes in the rule:

Revisions to the rule include updating the annual incorporation by reference (IBR) of the New Source Performance Standards (NSPS) promulgated by the EPA under Clean Air Act § 111(b) and 40 CFR part 60 as of June 1, 2024, by updating the IBR dates in subsections 1.6 and 4.1. Paragraph 4.1.2 was updated to add 40 CFR part 60, subpart Ba to the subparts excluded from the adoption of standards section. Severability clauses were added under section 8. The NSPS IBR updates include: (1) Standards of Performance for New, Reconstructed, and Modified Sources: Oil and Natural Gas Sector including subparts KKK, OOOO, OOOOa, OOOOb and Appendix K to part 60 (Determination of Volatile Organic Compound and Greenhouse Gas Leaks Using Optical Gas Imaging); (2) New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units including subparts TTTT and TTTTa; (3) Appendix B to part 60, Performance Specification 19 - Performance Specifications and Test Procedures for Ethylene Oxide (ETO) Continuous Emission Monitoring Systems; (4) Appendix F to part 60 - Quality Assurance Procedures, Procedure 7. Quality Assurance Requirements for Gaseous Ethylene

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<sup>1</sup> <https://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=18111&Keyword=>

Exide (ETO) Continuous Emission Monitoring Systems Used for Compliance Determination; (5) New Source Performance Standards for the Synthetic Organic Chemical Manufacturing Industry including subparts III, NNN, RRR, VVa, VVb, lila, NNNa, and RRRa; (6) New Source Performance Standards for Bulk Gasoline Terminals including subparts XX and XXa; (7) New Source Performance Standards Review for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels and Correction including subparts AA, AAa, and AAb; (8) New Source Performance Standards Review for Secondary Lead Smelters including subparts L and La; (9) Testing Provisions for Air Emission Sources; Correction; and (10) Subpart A.

Statement of circumstances requiring the rule:

Promulgation of this rule will enable West Virginia to continue to be the primary enforcement authority for the NSPS promulgated by the EPA. Revisions to this rule are necessary to maintain consistency with current federal regulations, and to fulfill West Virginia's responsibilities under the CAA. Revisions to the rule include annual incorporation by reference updates. This rule is exempt from the Regulatory Moratorium of Executive Order 2-18 under condition 3(g), updating state rules to comply with federal law requirements.

Determination of Stringency:

Federal counterparts to the proposed rule are incorporated by reference; therefore, no determination of stringency is required.

Consultation with the Environmental Protection Advisory Council:

The Environmental Protection Advisory Council received a copy of this proposed rule in advance of its June 4, 2024, meeting.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED 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 RULE ON THE STATE OR ITS RESIDENTS:

The proposed revisions to this rule should not impact costs 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:

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2024 Increase/Decrease (use "-" )	2025 Increase/Decrease (use "-" )	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

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

Costs anticipated to be incurred for the implementation of federal rules promulgated under 40 CFR part 60 are included in prior cost estimates prepared for state implementation of Title V of the Clean Air Act, as amended, under 45CSR30. 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.

COMMENT 10: In order to provide the public with the required opportunity to review these proposed changes, the appropriate remedy is to re-issue public notice for each of these Proposed Rules with a note of explanation and any other information necessary for compliance with all other applicable state and federal laws, and to allow the public an additional 30 days to comment on the Proposed Rules.

RESPONSE 10: DAQ met its obligation to provide an explanation regarding the effect of the amendment and its relation to the existing rule. See RESPONSE 9. The request for an additional public comment period is denied.

COMMENT 11: A note of explanation is required to explain the anticipated effect of the amendment and how the amendment relates to existing rules, information that is essential to meaningful public review of the Proposed Rules and necessary for meaningful public participation

as required by EPA rules regarding changes to 45CSR16 for state delegation and authorization of these emission standard programs.

RESPONSE 11: See RESPONSE 9.

COMMENT 12: Commenters are unable to determine the exact nature and purpose of the “IBRs Combined” files as they relate to the Proposed Rules. We assume the acronym IBR as used in these file names stands for “incorporation by reference,” which is the “method of making one document of any kind become a part of another separate document by referring to [the] former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as if it fully set out therein.” Accordingly, Commenters assume the “IBRs Combined” files would contain documents that are thus incorporated into the relevant West Virginia rules. However, it is simply not clear exactly what is being incorporated into the Proposed Rules (if anything). While simple incorporation by reference may be possible for the portions of the IBRs Combined files that contain copies of federal rules from the Code of Federal Register, it is not clear whether or how DAQ intends to incorporate the Federal Register notices into the Proposed Rules. Moreover, it is not clear if these IBRs Combined files are meant to contain the complete scope of materials that DAQ intends to incorporate into the respective Proposed Rules, provide an example of such materials, or serve some other completely unknown purpose.

For example, 45CSR8 “establishes and adopts ambient air quality standards in West Virginia [for 6 different pollutants] equivalent to the national primary and secondary ambient air quality standards established under Section 109 of the Clean Air Act and promulgated by the United States Environmental Protection Agency under 40 C.F.R. Part 50.” The “45CSR8 IBRs Combined 2025” file includes four Federal Register notices – an EPA final rule reconsidering the particulate matter (“PM”) ambient air standards and three EPA notices/final rules regarding new method of measuring ambient air concentrations of PM10, lead and PM10, and ozone, respectively. These Federal Register notices contain information that has been adopted into the Code of Federal Register, but they also include pages of explanations about EPA’s action and reasoning (more than 175 PDF pages in the case of the PM standards reconsideration notice). It is not clear which, if any, portions of these documents DEP is intending to incorporate into 45CSR8. In addition, the four Federal Register notices that comprise the “45CSR8 IBRs Combined 2025” file are only a small portion of the national ambient air quality standards (addressing only one of six pollutants) and related monitoring methods (addressing only a few methods for three of six pollutants) that EPA has adopted. Providing this file as part of this action without any explanation could be interpreted to mean only these air quality standards and monitoring methods are relevant in West Virginia, thereby excluding adoption and implementation of many other relevant federal pollution standards and methods.

RESPONSE 12: In the adoption of standards section of the proposed rule 45CSR16 (§45-16-4.1), the Secretary adopts and incorporates by reference the provisions of 40 C.F.R. parts 60 and 65, to the extent referenced in 40 C.F.R. part 60, including any reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 C.F.R. parts 60 and 65, effective June 1, 2024, for the purposes of implementing a program for standards of performance for new stationary sources, with exceptions clearly identified. 45CSR16 has been updated almost every year since its inception to ensure that it remains current with its federal counterparts. The IBR document provided on the DEP website and the Adoption by Reference document on the Secretary of State website made available to the public reflect the federal counterpart updates published from the time the state rule was last amended with the

purpose of communicating the most recent federal counterpart regulations adopted by reference. The IBR document is different each year; however, the scope of the rule and what is adopted by reference is comprehensive and is not amended, other than the effective date.

COMMENT 13: Because the public cannot determine the exact scope and intent of DAQ's changes to the Proposed Rules or how the IBRs combined files address those changes, the current public notice is insufficient to support finalization of the Proposed Rules. DAQ must provide this clarity and re-notice the Proposed Rules so that the public can fully evaluate the proposed changes and comment on their appropriateness and compliance with West Virginia law.

RESPONSE 13: See RESPONSE 10.

COMMENT 14: Commenters are generally supportive of the proposal to update the Proposed Rules to adopt and incorporate federal standards, methods, or rules effective as of June 1, 2024, so long as such adoption and incorporation includes all relevant federal standards, methods, and rules and not just those included in the "IBRs Combined" files, as discussed above.

RESPONSE 14: See RESPONSE 12.

COMMENT 15: Commenters have not identified any major issues with the other small formatting, typographical, and dating changes included in the rule.

RESPONSE 15: Thank you for your comment, a response is not necessary.

COMMENT 16: Commenters have identified significant deficiencies in the new Severability sections added to the Proposed Rules. First, the relevant provisions appear to be missing important text and are ambiguous as currently written. Specifically, it is not clear what "..., are severed from [the state rule] and no longer adopted and incorporated by reference under [it]." This key phrase in the additions to the Proposed Rules discussing the severance and lack of adoption and incorporation in West Virginia law does not contain a subject. The first part of those provisions sets out the specific conditions for severance – "In the event any [federal standard, method, or rule] adopted and incorporated by reference under [West Virginia law] is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the United States Congress" – but the next part of the provisions does not state what will be severed. We believe DAQ intends for a federal standard, method, or rule – or portion of it – that is withdrawn or invalidated to be severed and no longer adopted and incorporated, but that is not stated in the current text. If DAQ plans to finalize the addition of these provisions in the Proposed Rules, they must revise this text to be clear exactly what will be "severed...and no longer adopted and incorporated" under state air rules.

RESPONSE 16: See RESPONSE 3.

COMMENT 17: To the extent DAQ intends that West Virginia air rules will no longer adopt and incorporate a federal standard, method, or rule (or portion thereof) in certain circumstances, DAQ must revise the Proposed Rules to provide much more specificity regarding those circumstances to ensure that such severing and lack of adoption and incorporation only occurs as the result of a truly final and effective change.

RESPONSE 17: DAQ further revised provisions 45CSR16-8.2 in addition to revisions identified in RESPONSE 1 to provide additional clarity as follows.

8.2. In the event any provisions of 40 C.F.R. parts 60 and 65, to the extent referenced in 40 C.F.R. part 60, including any reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 C.F.R. parts 60 and 65 and adopted and incorporated by reference under subsection 4.1 is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction in a final action after the last appeal deadline, and/or is invalidated by an act of the United States Congress, ~~are~~ such provision is severed from 45CSR16 after the effective date of the withdrawal or invalidation and is no longer adopted and incorporated by reference under subsection 4.1.

COMMENT 18: As the Proposed Rules only adopt and incorporate a federal standard, method, or rule promulgated by EPA, DAQ must clarify the exact part of any EPA withdrawal action that will trigger the rule. For example, will the severability provisions be invoked when the EPA action is published in the Federal Register or on the effective date of such action?

RESPONSE 18: Severability provisions will be invoked upon the effective date of such action. See RESPONSE 17.

COMMENT 19: It is not clear what standard, method, or rule might apply when such severing occurs, especially if the EPA withdrawal action is also accompanied by adoption of a different standard, method, or rule. For example, the EPA final rule reconsidering various PM ambient air standards contained in the “45CSR8 IBRs Combined 2025” file reconsidered an earlier EPA action that retained the primary PM<sub>2.5</sub> ambient air standard of 12.0 µg/m<sup>3</sup> and instead finalized a new more stringent standard of 9.0 µg/m<sup>3</sup>. If the proposed changes to 45CFR8 were finalized as adopted, it appears that the 12.0 µg/m<sup>3</sup> PM<sub>2.5</sub> standard would be immediately severed and no longer incorporated and adopted into 45CSR8 without also adopting and incorporating the 12.0 µg/m<sup>3</sup> standard. This would mean there would be no primary PM<sub>2.5</sub> ambient air standard applicable in West Virginia, which would conflict with the requirements of the Clean Air Act.

RESPONSE 19: Future EPA actions would be incorporated by reference in future years, as part of the rulemaking process. In the example provided and, in the event, the PM<sub>2.5</sub> ambient air quality standard of 9.0 µg/m<sup>3</sup> were severed, the previous standard of 12.0 µg/m<sup>3</sup> would have previously been incorporated by reference under 45CSR8 and would then be in effect. West Virginia would remain in compliance with the Clean Air Act. See also RESPONSE 12.

COMMENT 20: Many EPA actions are challenged in Federal Court, and such litigation could lead to a vacatur of EPA’s withdrawal. As DAQ is likely aware, challenges to federal standards, methods, or rules promulgated by EPA are often challenged in multiple federal courts and may proceed through appeal to higher federal courts. It would be inefficient (and potentially illegal) to sever provisions from state law at the time of EPA’s withdrawal action if a court later finds such withdrawal was unlawful.

RESPONSE 20: See RESPONSE 17.

COMMENT 21: It is not clear what DAQ means by a court of competent jurisdiction. The jurisdiction of a court to address EPA’s Clean Air Act rules depends on multiple factors, and the decision of a court of competent jurisdiction can still conflict with the decision of another or be

appealed to a higher court. Thus, a decision by one court – even one of “competent jurisdiction” – may not be the final word on the legality of a federal standard, method, or rule. It would be inefficient (and potentially illegal) to sever provisions from state law based on the decision on one court if a later court, such as DC Circuit Court of Appeals or the U.S. Supreme Court, could ultimately overturn that decision.

RESPONSE 21: See RESPONSE 17.

COMMENT 22: Acts of Congress do not always provide clear direction, or they may require additional actions of regulatory agencies before taking effect. In addition, it is not clear what would be considered “invalidated.” For example, would Congress have to explicitly state in an Act that a specific federal standard, method, or rule is invalidated, or could they simply pass an EPA appropriation bill with riders restricting EPA from implementing that standard, method, or rule? And how do the severability provisions address acts of Congress that are later vetoed by the President?

RESPONSE 22: Comment 22 poses a number of hypothetical situations that do not currently exist. If and when Congress takes a specific action, DAQ will analyze the legislative action and determine its next steps.

COMMENT 23: The proposed Severability additions to the Proposed Rules lack the clarity necessary to determine when they will be triggered. DAQ must make additional revisions to the Proposed Rules to address these deficiencies. In so doing, DAQ should also further revise the Proposed Rules to address what will happen if the withdraw or invalidation impacts only portions of the federal standard, method, or rule that has been adopted and incorporated in state rules. Federal standard, method, and rules can contain many separate but interconnected provisions, and determining the path forward when only one provision is invalidated or otherwise removed can be difficult. In such instances, the Proposed Rules must ensure that all remaining and still valid portions of a federal standard, method, and rules continue to be adopted and incorporated into the West Virginia rules.

RESPONSE 23: See RESPONSES 12 and 17.

COMMENT 24: DAQ should include additional provisions in the Proposed Rules that require DAQ to announce the timing and scope of any such severing and corresponding lack of adoption and incorporation. Such provisions would provide DAQ with a mechanism to address any remaining case-specific ambiguity in application of the Proposed Rules, while also providing the regulated community and the public at large with clear information that a federal standard, method, or rule is “severed...and no longer adopted and incorporated” under state air rules. Requiring affirmative action on DAQ’s part to invoke the severability portions will be especially useful and important if a major standard, method, or rule is severed, because DAQ could clarify what – if anything – will be required to protect air quality and control pollution in the state going forward.

RESPONSE 24: DAQ concurs that public notice should be provided to inform the public and regulated community regarding the timing and scope of any such severing. Provision §45-16-8.4 identified below was added.

8.4. In the event any provision is severed in accordance with subsection 8.2, the Secretary shall publicly identify the severed provisions which are no longer adopted and incorporated by reference.

COMMENT 25: DAQ should also revise the Proposed Rules to provide additional clarity on when and how the Secretary's discretion to "terminate any permit or section of an existing permit issued pursuant to 45CSR13, 45CSR14, 45CSR19, and 45CSR30" can be invoked and process the Secretary would use to make such changes. For example, will the Secretary address potential permit changes on a source-by-source or sector-wide basis; in a distinct permitting action or at the next renewal of the operating permit; simply remove the provision or replace it with another provision to ensure adequate pollution control? Without more specificity, the full impact of a severability decision on permitting will remain unknown, resulting in a lack of certainty for the regulated community and the public at large and potential confusion in on-going or future permitting actions.

RESPONSE 25: See RESPONSE 2 and RESPONSE 24.

COMMENT 26: DAQ must revise the Proposed Rules and accompanying materials as appropriate and re-notice them for public comment so that the public can fully evaluate the proposed changes and comment on their appropriateness and compliance with West Virginia law.

RESPONSE 26: DAQ clarified subsections 8.2 and 8.3 and added subsection 8.4 in response to comments received during the public comment period. DAQ is not required to provide additional public notice when making revisions in response to comments. The response to comments document is a part of the formal rulemaking record and is filed with the West Virginia Secretary of State.



Jennings, Laura M &lt;laura.m.jennings@wv.gov&gt;

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## West Virginia DAQ Proposed Rules for the 2025 Legislative Session

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**Schmitt, Ellen (she/her/hers)** <Schmitt.Ellen@epa.gov>  
 To: "Laura M. Jennings@wv.gov" <laura.m.jennings@wv.gov>  
 Cc: "Talley, David" <Talley.David@epa.gov>

Fri, Aug 2, 2024 at 2:31 PM

Hi Laura,

Our attorneys took a look at the severability language in the 2025 legislative session rules and while they didn't see anything major, they did provide a few comments that I wanted to pass along to you.

For **45-16-8.3** and **45-25-9.3** (both regarding severability and permits) I believe that there is a cross referencing error. They incorrectly reference subsection 4.1 and 3.2, respectively, as the subsections that lead to severance. For instance, in 41-16-8.3 it begins "In the event any provisions are severed pursuant to subsection 4.1..." 4.1 is the section adopting the standards of 40 CFR Part 60 and 65. My thought is that it should instead reference subsection 8.2, as that is the subsection that delineates when a provision would be severed. Same case for 45-25-9.3, I believe it should reference subsection 9.2 instead of 3.2. Looking at the similar provision in 45-34-8.3, it correctly references subsection 8.2 as opposed to the subsection on adoption of standards. Perhaps I'm missing something as to why they referenced 4.1 and 3.2, but it is inconsistent with the same cross reference in 45-34-8.3 – so one appears to be wrong.

With respect to all of the severability clauses regarding termination of permits (**45-16-8.3**, **45-25-9.3**, **45-34-8.3**), they do not specify that termination of permits/sections of permits is limited to those permits/sections that are affected by the severed provision. For instance, I think it could be read as if there is a severed provision any permit issued pursuant to the mentioned regulations could be terminated. I don't think that's what they mean and perhaps they felt that they did not need to specify, but it is just a thought.

Lastly (and least importantly), each section that delineates what would lead to severance (**45-8-5.3**, **5.4**, **45-16-8.2**, **45-25-9.2**, **45-34-8.2**) seems to me to worded oddly. I think the last phrase of these sections "are severed from..." should instead be something like "such provision is severed..."

Let me know if you have any questions or if you would like any clarification and we can set up a call.

Best,

Ellen

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**From:** Goold, Megan (she/her/hers) <Goold.Megan@epa.gov>  
**Sent:** Wednesday, July 3, 2024 10:23 AM  
**To:** Schmitt, Ellen (she/her/hers) <Schmitt.Ellen@epa.gov>  
**Subject:** FW: West Virginia DAQ Proposed Rules for the 2025 Legislative Session

FYI

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**From:** Jennings, Laura M <laura.m.jennings@wv.gov>  
**Sent:** Wednesday, July 03, 2024 10:15 AM  
**To:** Fernandez, Cristina (she/her/hers) <Fernandez.Cristina@epa.gov>  
**Cc:** Laura M Crowder <laura.m.crowder@wv.gov>, Goold, Megan (she/her/hers) <Goold.Megan@epa.gov>  
**Subject:** West Virginia DAQ Proposed Rules for the 2025 Legislative Session



**Caution:** This email originated from outside EPA, please exercise additional caution when deciding whether to open attachments or click on provided links.

Director Fernandez,

[Quoted text hidden]



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

## WV-DAQ Rules-Please forward

2 messages

James Kotcon <jkotcon@gmail.com>

Mon, Jul 22, 2024 at 4:21 PM

To: "Jennings, Laura M" <Laura.M.Jennings@wv.gov>

I am unclear on several of the changes proposed in 45-CSR-8, 16, 25, and 34, and would appreciate it if you could forward this query to someone who can answer these questions.

1) Each of the rules adds language related to "severability". Can you explain DAQ's intent in adding the language and what its effect would be? It seems reasonable, but i don't know why it is needed.

2) 45-CSR-16 adds an exclusion for 40-CFR Part 60 subpart Ba (Adoption and Submittal of State Plans for Designated Facilities). I am unclear on why this is being excluded, and what effect that might have on how the state adopts State Implementation Plans. Can you explain or provide examples of who might be affected, and what the intent of this exclusion is? Is there an alternative procedure to develop a SIP for Designated Facilities?

3) The WV Secretary of State's website on 45-CSR-16 includes 40-CFR Part 60 Subpart OOOOb (Standards of Performance for Crude Oil and Natural Gas Facilities...) as "Adopted by Reference", but I do not see that adopted in any of these rules. Is that an error? If not, how is it relevant to 45-CSR-16?

4) Is there a Fact Sheet or other supporting document to explain the rationale for these rule changes?

Thank you for your assistance. If it is helpful, I would welcome a phone call to discuss your goals on these changes. The answers to these questions will help us provide informed, meaningful and relevant comments.

Jim Kotcon  
304-594-3322 (cell)

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

Fri, Aug 2, 2024 at 12:28 PM

To: James Kotcon <jkotcon@gmail.com>

Mr. Kotcon,

The responses to questions 1 and 2 will be addressed in the formal response to comments document. Unfortunately, I cannot respond to these types of questions during the public comment period.

I can address questions 3 and 4 during the public comment period because they are procedural in nature. I have attached the .pdf version of the "Notice" document from the Secretary of State office for 45CSR16 to answer question 3 and as an example to the response to question 4. Towards the bottom of the first page in the "notice" document, the notice indicates that the filing includes incorporation by reference. The federal regulations which are incorporated by reference are provided in the "Adopted by Reference" link for the rule which you noticed. This is how the Secretary of State website handles incorporation by reference documents. Additionally, on page 2 of the "notice" the list of regulations incorporated by reference are specified and 40CFR60 Subpart OOOOb is identified under (1).

The .pdf versions of the "notice" documents on the Secretary of State website provides additional information such as a brief summary of the content of the rule, a summary of the changes in the rule and a statement of circumstances requiring the rule, and a summary of the overall economic impact of the proposed rule in addition to information regarding the public comment period. This is the equivalent of a fact sheet or other supporting documentation explaining the rationale for the rule changes.

Regards,

**Laura M. Jennings**  
Assistant Director Planning  
WV DEP, Division of Air Quality  
601 57th Street, SE  
Charleston, WV 25304  
Laura.M.Jennings@wv.gov  
(304) 926-0499 x41266  
(304) 414-1266 (Direct Dial)

[Quoted text hidden]

 **45CSR16 - Proposed SOS.pdf**  
362K



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

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## Proposed DAQ 2025 Rule Comments

1 message

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**Jefferson County Foundation** <jeffersoncountyfoundation@gmail.com>

Tue, Aug 6, 2024 at 4:00 PM

To: Laura.M.Jennings@wv.gov

Cc: oveadvocates@gmail.com, Ortiz.Adam@epa.gov, "Fernandez, Cristina" <Fernandez.Cristina@epa.gov>, "Opila, MaryCate"

<Opila.Marycate@epa.gov>, Becoat.Gregory@epa.gov, Harold.D.Ward@wv.gov


Ms. Jennings,

In accordance with the public notice provided by the West Virginia Department of Environmental Protection, Division of Air Quality DAQ, on July 5, 2024, attached please find the public comments of Ohio Valley Environmental Advocates and Jefferson County Foundation, Inc. on the DAQ proposed 2025 legislative rules.

Thank you,

Billie Garde, Treasurer  
Jefferson County Foundation, Inc.

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 **OVEA and JCF Comments on Proposed WVDEP Rule Changes - Aug 6 2024 .pdf**  
312K



## Jefferson County Foundation, Inc.

August 6, 2024

Laura Jennings  
WV Department of Environmental Protection  
Division of Air Quality  
601 57th Street SE  
Charleston, WV 25304  
**Via Email to** [Laura.M.Jennings@wv.gov](mailto:Laura.M.Jennings@wv.gov)

RE: Comments on the Proposed 2025 Legislative Rules

Ms. Jennings,

In accordance with the public notice provided by the West Virginia Department of Environmental Protection (“DEP”), Division of Air Quality (“DAQ”), on July 5, 2024,<sup>1</sup> Ohio Valley Environmental Advocates<sup>2</sup> and Jefferson County Foundation, Inc.<sup>3</sup> (collectively, “Commenters”) provide the following public comments on the DAQ proposed 2025 legislative rules (“Proposed Rules”). Specifically, DAQ is proposing revisions to:

- 45CSR8 (Ambient Air Quality Standards),
- 45CSR16 (Standards of Performance for New Stationary Sources),
- 45CSR25 (Control of Air Pollution From Hazardous Waste Treatment, Storage and Disposal Facilities); and
- 45CSR34 (Emission Standards for Hazardous Air Pollutants)

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<sup>1</sup> Public Notice, Proposed Activity: DAQ 2025 Legislative Rules (July 5, 2024), <https://dcp.wv.gov/pio/Documents/2024%20Proposed%20Rules/DAQ%20Public%20Notice-2025%20Rules.pdf>.

<sup>2</sup> Ohio Valley Environmental Advocates is a community focused non-profit organization that works to empower individuals and communities in the mid-Ohio Valley to create a healthy and sustainable environment with justice and equity for all. For more information, *see* <https://oveadvocates.org>.

<sup>3</sup> Jefferson County Foundation, Inc. is a 501(c)(3) non-profit organization that works strategically to address long-term issues facing the Eastern Panhandle of West Virginia. JCF supports and promotes effective and accountable government, sustainable development, environmental injustice, and the protection of health, heritage, and the environment in the Eastern Panhandle. For more information, *see* <https://www.jeffersoncountyfoundation.org>.

Accompanying the public notice for the Proposed Rules, DAQ also provided the following files for review on their public website:<sup>4</sup>

*2025 DAQ Proposed Legislative Rules*

- *Public Notice for 2025 Proposed Legislative Rules*
- *45CSR8 - Proposed Rule 2025*
- *45CSR8 IBRs Combined 2025*
- *45CSR16 - Proposed Rule 2025*
- *45CSR16 IBRs Combined 2025*
- *45CSR16 Relevant Reg 2025*
- *45CSR25 - Proposed Rule 2025*
- *45CSR25 IBRs Combined 2025*
- *45CSR34 - Proposed Rule 2025*
- *45CSR34 IBRs Combined 2025*

The Proposed Rule files above are red-line versions of the current rules showing the proposed changes.<sup>5</sup> The IBRs Combined files are generally composed of Federal Register notices (either in whole or in part) for various U.S. EPA actions and/or copies of federal rules (either in whole or in part) from the Code of Federal Register.<sup>6</sup> The 45CSR16 Relevant Reg 2025 file is a copy of 40 CFR Part 60, Subpart Ba, which provides the relevant federal rules regarding the adoption and submission of state plans addressing New Source Performance Standards (“NSPS”) requirements for designated facilities.<sup>7</sup>

Commenters seek to ensure that air quality in West Virginia is fully protected under state law at levels that are equivalent to the most current and stringent federal standards, methods, and rules. Commenters also want to ensure that the many different stationary sources of air pollution in the state are required to meet – and hold air permits including – the most current federal standards. The adoption and application of the most current federal standards, methods, and

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<sup>4</sup> DEP, Public Notice and Comment, <https://dep.wv.gov/daq/publicnoticcandcomment/Pages/default.aspx>.

<sup>5</sup> See generally 45CSR8 - Proposed Rule 2025, <https://dep.wv.gov/pio/Documents/2024%20Proposed%20Rules/45CSR8%20-%20Proposed%20Rule%202025.pdf>; 45CSR16 - Proposed Rule 2025, <https://dep.wv.gov/pio/Documents/2024%20Proposed%20Rules/45CSR16%20-%20Proposed%20Rule%202025.pdf>; 45CSR25 - Proposed Rule 2025, <https://dep.wv.gov/pio/Documents/2024%20Proposed%20Rules/45CSR25%20-%20Proposed%20Rule%202025.pdf>; and 45CSR34 - Proposed Rule 2025, <https://dep.wv.gov/pio/Documents/2024%20Proposed%20Rules/45CSR34%20-%20Proposed%20Rule%202025.pdf>.

<sup>6</sup> See generally 45CSR8 IBRs Combined 2025, <https://dep.wv.gov/pio/Documents/2024%20Proposed%20Rules/45CSR8%20IBRs%20Combined%202025.pdf>; 45CSR16 IBRs Combined 2025, <https://dep.wv.gov/pio/Documents/2024%20Proposed%20Rules/45CSR16%20-%20IBRs%20Combined-2025.pdf>; 45CSR25 IBRs Combined 2025, <https://dep.wv.gov/pio/Documents/2024%20Proposed%20Rules/Rule%2025%20IBRs%20combined%202025.pdf>; and 45CSR34 IBRs Combined 2025, <https://dep.wv.gov/pio/Documents/2024%20Proposed%20Rules/Rule%2034%20IBRs%20Combined%202025.pdf>.

<sup>7</sup> See 45CSR16 Relevant Reg 2025, <https://dep.wv.gov/pio/Documents/2024%20Proposed%20Rules/45CSR16%20Relevant%20Reg%202025.pdf>.

rules are most likely to result in improved air quality throughout West Virginia and best protect the health of its residents and environment. After reviewing the Proposed Rules and accompanying materials provided by DAQ, Commenters have serious concerns about the process that DAQ is using to make the Proposed Changes and the specific content of those Changes, which could lead to an unnecessary and unlawful diminishment of air quality and relaxation of air pollution requirements throughout the state.

### **I. DAQ Must Address Serious Deficiencies in the Public Process for the Proposed Rules**

As an initial matter, DAQ has failed to provide the public with the information necessary to fully understand and assess the proposed changes. West Virginia law provides that when amending a rule, the proposed rule “shall be accompanied by note of explanation as to the effect of the amendment and its relation to the existing rules.”<sup>8</sup> DAQ provided public notice of these proposed revisions to the state rules on July 5, 2024. The public notice for the Proposed Rules, along with the specific proposed revisions, make clear that these are amendments to existing rules and thus subject to the provisions of the WV APA governing amendments.<sup>9</sup> As a result, DAQ was required to provide a note of explanation for these changes. That note of explanation is critical to public engagement and agency transparency. Each of these proposed rules, if enacted and utilized, have the potential to make sweeping changes to how the Clean Air Act operates in West Virginia, and citizen must understand those potential impacts and how it might affect their engagement on air issues and processes. However, even if someone has previous regulatory experience, the impact of the Proposed Rules is opaque at best, as our additional comments below make clear. DAQ was required to provide an explanation of what these Proposed Rules will do. DAQ failed to do that. In order to provide the public with the required opportunity to review these proposed changes, the appropriate remedy is to re-issue public notice for each of these Proposed Rules with a note of explanation and any other information necessary for compliance with all other applicable state and federal laws, and to allow the public an additional 30 days to comment on the Proposed Rules. That note of explanation is required to explain the anticipated effect of the amendment and how the amendment relates to existing rules, information that is essential to meaningful public review of the Proposed Rules.<sup>10</sup>

In addition, Commenters are unable to determine the exact nature and purpose of the “IBRs Combined” files as they relate to the Proposed Rules. We assume the acronym IBR as used in these file names stands for “incorporation by reference,” which is the “method of making one document of any kind become a part of another separate document by referring to [the] former in the latter, and declaring that the former shall be taken and considered as a part of the

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<sup>8</sup> W. Va. Code § 29A-3-1a(a).

<sup>9</sup> See West Virginia Register, W. Va. Secretary of State (July 3, 2024), <https://apps.sos.wv.gov/adlaw/registers/rcadpdf.aspx?did=40134at> PDF pages 20-21 (stating “Amendment to Existing Rule: Yes” for each of the Proposed Rules).

<sup>10</sup> Such information is also necessary for meaningful public participation as required by EPA rules regarding changes to 45CSR8 for the state implementation plan (“SIP”) and changes to 45CSR16 and 45CSR34 for state delegation and authorization of these emission standard programs. See 40 CFR §§ 51.102, 60.23(c)-(d), and 63.92(b)(1), respectively.

latter the same as if it fully set out therein.”<sup>11</sup> Accordingly, Commenters assume the “IBRs Combined” files would contain documents that are thus incorporated into the relevant West Virginia rules. However, it is simply not clear exactly *what* is being incorporated into the Proposed Rules (if anything). While simple incorporation by reference may be possible for the portions of the IBRs Combined files that contain copies of federal rules from the Code of Federal Register, it is not clear whether or how DAQ intends to incorporate the Federal Register notices into the Proposed Rules. Moreover, it is not clear if these IBRs Combined files are meant to contain the complete scope of materials that DAQ intends to incorporate into the respective Proposed Rules, provide an example of such materials, or serve some other completely unknown purpose.

For example, 45CSR8 “establishes and adopts ambient air quality standards in West Virginia [for 6 different pollutants] equivalent to the national primary and secondary ambient air quality standards established under Section 109 of the Clean Air Act and promulgated by the United States Environmental Protection Agency under 40 C.F.R. Part 50.”<sup>12</sup> The “45CSR8 IBRs Combined 2025” file includes four Federal Register notices – an EPA final rule reconsidering the particulate matter (“PM”) ambient air standards and three EPA notices/final rules regarding new method of measuring ambient air concentrations of PM<sub>10</sub>, lead and PM<sub>10</sub>, and ozone, respectively.<sup>13</sup> These Federal Register notices contain information that has been adopted into the Code of Federal Register, but they also include pages of explanations about EPA’s action and reasoning (more than 175 PDF pages in the case of the PM standards reconsideration notice). It is not clear which, if any, portions of these documents DEP is intending to incorporate into 45CSR8. In addition, the four Federal Register notices that comprise the “45CSR8 IBRs Combined 2025” file are only a small portion of the national ambient air quality standards (addressing only one of six pollutants) and related monitoring methods (addressing only a few methods for three of six pollutants) that EPA has adopted. Providing this file as part of this action without any explanation could be interpreted to mean only these air quality standards and monitoring methods are relevant in West Virginia, thereby excluding adoption and implementation of many other relevant federal pollution standards and methods.

Because the public cannot determine the exact scope and intent of DAQ’s changes to the Proposed Rules or how the IBRs Combined files address those changes, the current public notice is insufficient to support finalization of the Proposed Rules. DAQ must provide this clarity and re-notice the Proposed Rules so that the public can fully evaluate the proposed changes and comment on their appropriateness and compliance with West Virginia law.

## II. DAQ Must Address Serious Deficiencies in the Proposed Rules

As discussed above, DAQ has not provided the public with the information necessary to fully evaluate the changes to the Code of State Rules contained in the Proposed Rules. However, the comments below address deficiencies in the revisions to the Proposed Rules that were

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<sup>11</sup> *Black's Law Dictionary*, 2nd pocket ed., as provided at <https://thelawdictionary.org/incorporation>.

<sup>12</sup> 45CSR8-1.1.

<sup>13</sup> 45CSR8 IBRs Combined 2025 at PDF pages 1, 206, 207, and 209.

provided. When DAQ re-notices these Proposed Rules with sufficient information to identify the scope and intent of those changes, Commenters may identify additional issues.

In general, it appears that each of the Proposed Rules contains three general types of changes:

- (1) Updating any adoption and incorporation by reference of relevant federal standards, methods, or rules to such federal standards, methods, or rules that were effective as of June 1, 2024;<sup>14</sup>
- (2) Adding a new “Severability” section stating that each federal standard, method, or rule adopted and incorporated by reference into that rule is severable and that if such federal standard, method, or rule “is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the United States Congress, are severed from [that West Virginia rule] and no longer adopted and incorporated by reference under [it];”<sup>15</sup> and
- (3) Making other small formatting, typographical, and dating changes.<sup>16</sup>

The newly added Severability sections of Proposed Rules 45CSR8, 45CSR16, and 45 CSR 34 also contain provisions stating that if such severability occurs, the DEP Secretary “may terminate any permit or section of an existing permit issued pursuant to 45CSR13, 45CSR14, 45CSR19, and 45CSR30.”<sup>17</sup>

Commenters are generally supportive of the proposal to update the Proposed Rules to adopt and incorporate federal standards, methods, or rules effective as of June 1, 2024, so long as such adoption and incorporation includes *all* relevant federal standards, methods, and rules and not just those included in the “IBRs Combined” files, as discussed above. Likewise, Commenters have not identified any major issues with the other small formatting, typographical, and dating changes included in the rule. However, Commenters have identified significant deficiencies in the new Severability sections added to the Proposed Rules.

First, the relevant provisions appear to be missing important text and are ambiguous as currently written. Specifically, it is not clear *what* “... are severed from [the state rule] and no longer adopted and incorporated by reference under [it].”<sup>18</sup> This key phrase in the additions to the Proposed Rules discussing the severance and lack of adoption and incorporation in West Virginia law does not contain a subject. The first part of those provisions sets out the specific conditions for severance – “In the event any [federal standard, method, or rule] adopted and incorporated by reference under [West Virginia law] is withdrawn by the U.S. EPA, is invalidated by a court of competent jurisdiction, and/or is invalidated by an act of the United States Congress” – but the next part of the provisions does not state what will be severed.<sup>19</sup> We believe DAQ intends for a federal standard, method, or rule – or portion of it – that is withdrawn or

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<sup>14</sup> Proposed Rules §§ 45-8-1.6, 3.1, and 3.2; 45-16-1.6 and 4.1; 45-25-1.6.1, 3.1, and 3.2; and 45-34-1.6 and 4.1.

<sup>15</sup> Proposed Rules §§ 45-8-5, 45-16-8, 45-25-9, and 45-34-8.

<sup>16</sup> *See generally* Proposed Rules §§ 45-8, 45-16, 45-25, and 45-34.

<sup>17</sup> Proposed Rules §§ 45-16-8.3, 45-25-9.3, and 45-34-8.3.

<sup>18</sup> Proposed Rules §§ 45-8-5, 45-16-8, 45-25-9, and 45-34-8.

<sup>19</sup> *Id.*

invalidated to be severed and no longer adopted and incorporated, but that is not stated in the current text. If DAQ plans to finalize the addition of these provisions in the Proposed Rules, they must revise this text to be clear exactly what will be “severed...and no longer adopted and incorporated” under state air rules.

Second, to the extent DAQ intends that West Virginia air rules will no longer adopt and incorporate a federal standard, method, or rule (or portion thereof) in certain circumstances, DAQ must revise the Proposed Rules to provide much more specificity regarding those circumstances to ensure that such severing and lack of adoption and incorporation only occurs as the result of a truly final and effective change. Regarding each of the potential actions that could cause a federal standard, method, or rule to be “severed...and no longer adopted and incorporated” in state air rules, Commenters note the following deficiencies in the Proposed Rules:

- “[I]s withdrawn by the U.S. EPA” – As the Proposed Rules only adopt and incorporate a federal standard, method, or rule promulgated by EPA, DAQ must clarify the exact part of any EPA withdrawal action that will trigger the rule. For example, will the severability provisions be invoked when the EPA action is published in the Federal Register or on the effective date of such action? In addition, it is not clear what standard, method, or rule might apply when such severing occurs, especially if the EPA withdrawal action is also accompanied by adoption of a different standard, method, or rule. For example, the EPA final rule reconsidering various PM ambient air standards contained in the “45CSR8 IBRs Combined 2025” file reconsidered an earlier EPA action that retained the primary PM<sub>2.5</sub> ambient air standard of 12.0 µg/m<sup>3</sup> and instead finalized a new more stringent standard of 9.0 µg/m<sup>3</sup>.<sup>20</sup> If the proposed changes to 45CFR8 were finalized as adopted, it appears that the 12.0 µg/m<sup>3</sup> PM<sub>2.5</sub> standard would be immediately severed and no longer incorporated and adopted into 45CSR8 without also adopting and incorporating the 12.0 µg/m<sup>3</sup> standard. This would mean there would be no primary PM<sub>2.5</sub> ambient air standard applicable in West Virginia, which would conflict with the requirements of the Clean Air Act. Finally, related to the discussion below, many EPA actions are challenged in Federal Court, and such litigation could lead to a vacatur of EPA’s withdrawal. It would be inefficient (and potentially illegal) to sever provisions from state law at the time of EPA’s withdrawal action if a court later finds such withdrawal was unlawful.
- “[I]s invalidated by a court of competent jurisdiction” – As DAQ is likely aware, challenges to federal standards, methods, or rules promulgated by EPA are often challenged in multiple federal courts and may proceed through appeal to higher federal courts.<sup>21</sup> First, it is not clear what DAQ means by a court of competent jurisdiction. The

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<sup>20</sup> See 45CSR8 IBRs Combined 2025 at PDF page 2.

<sup>21</sup> See, e.g., Matthew Daly, *What it means for the Supreme Court to block enforcement of the EPA’s ‘Good Neighbor’ pollution rule*, AP (June 27, 2024), <https://apnews.com/article/supremc-court-epa-good-neighbor-air-pollution-ca23421c78999293267339faf4453cdb> (describing the multiple challenge to the Good Neighbor rule and related EPA actions in various federal circuit courts and a stay of the rule by the Supreme Court pending the outcome of those appeals).

jurisdiction of a court to address EPA's Clean Air Act rules depends on multiple factors, and the decision of a court of competent jurisdiction can still conflict with the decision of another or be appealed to a higher court. Thus, a decision by one court – even one of “competent jurisdiction” – may not be the final word on the legality of a federal standard, method, or rule. It would be inefficient (and potentially illegal) to sever provisions from state law based on the decision on one court if a later court, such as DC Circuit Court of Appeals or the U.S. Supreme Court, could ultimately overturn that decision.<sup>22</sup>

- “[I]s invalidated by an act of the United States Congress” – Acts of Congress do not always provide clear direction, or they may require additional actions of regulatory agencies before taking effect. In addition, it is not clear what would be considered “invalidated.” For example, would Congress have to explicitly state in an Act that a specific federal standard, method, or rule is invalidated, or could they simply pass an EPA appropriation bill with riders restricting EPA from implementing that standard, method, or rule? And how do the severability provisions address acts of Congress that are later vetoed by the President?

As the above discussion makes clear, the proposed Severability additions to the Proposed Rules lack the clarity necessary to determine when they will be triggered. DAQ must make additional revisions to these Proposed Rules to address these deficiencies. In so doing, DAQ should also further revise the Proposed Rules to address what will happen if the withdraw or invalidation impacts only portions of the federal standard, method, or rule that has been adopted and incorporated in state rules. Federal standard, method, and rules can contain many separate but interconnected provisions, and determining the path forward when only one provision is invalidated or otherwise removed can be difficult. In such instances, the Proposed Rules must ensure that all remaining and still valid portions of a federal standard, method, and rules continue to be adopted and incorporated into the West Virginia rules.

In addition to providing more specificity on the particular events that will trigger the severability provisions as discussed above, DAQ should include additional provisions in the Proposed Rules that require DAQ to announce the timing and scope of any such severing and corresponding lack of adoption and incorporation. Such provisions would provide DAQ with a mechanism to address any remaining case-specific ambiguity in application of the Proposed Rules, while also providing the regulated community and the public at large with clear information that a federal standard, method, or rule is “severed...and no longer adopted and incorporated” under state air rules. Requiring affirmative action on DAQ's part to invoke the severability portions will be especially useful and important if a major standard, method, or rule is severed, because DAQ could clarify what – if anything – will be required to protect air quality and control pollution in the state going forward. For example, EPA often revokes the existing ambient air quality standards when it promulgates a new, more stringent standard. If that new standard is later withdrawn or invalidated without more direction, the DAQ would be able to

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<sup>22</sup> In addition, courts can find an EPA rule to be unlawful, but still allow the rule to remain in place while the Agency takes the appropriate steps to rescind and replace it (i.e., remand without vacatur). DAQ's severability clauses should not be triggered in such an instance.

clarify what standards would apply in West Virginia, as discussed above. Moreover, to the extent the “severed” federal standards, methods, or rules have already been adopted and incorporated in the federally approved SIP, DAQ could clarify the path forward since those SIP provisions could still be enforceable as a matter of federal law unless and until DAQ submits and EPA approves a SIP revision removing them.<sup>23</sup>

For these same reasons, DAQ should also revise the Proposed Rules to provide additional clarity on when and how the Secretary’s discretion to “terminate any permit or section of an existing permit issued pursuant to 45CSR13, 45CSR14, 45CSR19, and 45CSR30” can be invoked and process the Secretary would use to make such changes.<sup>24</sup> For example, will the Secretary address potential permit changes on a source-by-source or sector-wide basis; in a distinct permitting action or at the next renewal of the operating permit; simply remove the provision or replace it with another provision to ensure adequate pollution control? Without more specificity, the full impact of a severability decision on permitting will remain unknown, resulting in a lack of certainty for the regulated community and the public at large and potential confusion in on-going or future permitting actions.

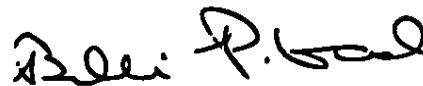
Given the multiple and serious procedural and substantive deficiencies identified by Commenters above, DAQ must revise the Proposed Rules and accompanying materials as appropriate and re-notice them for public comment so that the public can fully evaluate the proposed changes and comment on their appropriateness and compliance with West Virginia law.

Commenters would be happy to set up a time to discuss these issues with you or others at DEP. Please reach out to us at the email addresses provided below if you would like to arrange such a meeting.

Sincerely,



Frank A. Rocchio III, Founder  
Ohio Valley Environmental Advocates, Inc.  
oveadvocates@gmail.com



Billie Garde, Treasurer  
Jefferson County Foundation, Inc.  
jeffersoncountyfoundation@gmail.com

Cc (via email):

Adam Ortiz, Regional Administrator, EPA Region 3, at Ortiz.Adam@epa.gov

Cristina Fernandez, Director, EPA Region 3 Air and Radiation Division, at  
Fernandez.Cristina@epa.gov

MaryCate Opila, Air Permitting Branch Chief, EPA Region 3 Air and Radiation Division, at  
Opila.Marycate@epa.gov

Gregory Becoat, Air Quality SIP Contact, EPA Region 3, at Becoat.Gregory@epa.gov

Harold Ward, DEP Cabinet Secretary, at Harold.D.Ward@wv.gov

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<sup>23</sup> See *Gen. Motors Corp. v. United States*, 496 U.S. 530, 540 (1990) (“There can be little or no doubt that the existing SIP remains the ‘applicable implementation plan’ even after the State has submitted a proposed revision.”).

<sup>24</sup> Proposed Rules §§ 45-16-8.3, 45-25-9.3, and 45-34-8.3.

**Proposed 2025 Legislative Rules - Virtual Public Hearing (via Google Meets)**

**Tuesday, August, 6, 2024 at 6:00 p.m.**

**List of Registrants**

<b>Email Address</b>	<b>First name</b>	<b>Last name</b>	<b>Organization</b>	<b>Street address</b>	<b>City, state and zip code</b>	<b>Comment</b>
eric.a.anderson@toyota.com	Eric	Anderson	TMNA	151 Engineering Way	Georgetown KY 40324	No
laura.m.jennings@wv.gov	Laura	Jennings	DAQ	601 57th Street SE	Charleston, WV 25304	No
	Kristina	Guthrie	Court Reporter			No

*PROPOSED 2025 LEGISLATIVE RULES*

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*PUBLIC HEARING*

*August 06, 2024*

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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  
PROPOSED 2025 LEGISLATIVE RULES

August 6, 2024 - 6:05 p.m. To 6:26 p.m.  
Held remotely via Google Meet

Present: Nicole D. Ernest, Laura Jennings, Eric  
Anderson, Kristina Guthrie

Proceedings taken by Kristina Guthrie, Realtime Court  
Reporters, Notary Public

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Proceedings

(6:05 p.m. Eastern)

MS. EANEST: Okay. I have five after so we'll go ahead and get started.

Good evening and thank you for participating in the public hearing tonight. My name is Nicole Ernest with the West Virginia Department of Environmental Protection's Division of Air Quality.

Welcome to the public hearings for the Division of Air Quality's four proposed rules for the upcoming 2025 West Virginia Legislative Session. There will be a separate public hearing for each of the four DAQ proposed rules. The hearings will be held sequentially and will commence immediately following the conclusion of the hearing for the previous proposed rule.

With me this evening from the Division of Air Quality is Laura Jennings. Kristy Guthrie, a court reporter, is also in attendance this evening.

The purpose of the public hearing is to receive public comments on the record regarding each of the proposed Division of Air Quality rules. The Division is limiting public comments to the proposed revisions to the rules and is not soliciting comments not related to the proposed revisions.

1           Each public hearing is being recorded and a  
2 court reporter is in attendance to meet the Clean Air  
3 Act requirements and to consider comments during the  
4 rule-making process.

5           Because the purpose of the public hearing is  
6 to listen to your comments, it is not a forum to engage  
7 the DAQ in open discussion or debate about the proposed  
8 rules. Unlike a public meeting, the Division of Air  
9 Quality will not be responding to questions during the  
10 hearing.

11           All comments received will be addressed in a  
12 response to comment document that will be part of the  
13 official rule-making record made available on the  
14 Secretary of State's website.

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

18           Participants were asked to preregister to  
19 speak and will be called upon when it's their turn to  
20 speak.

21           When called upon, please unmute your mic, and  
22 proceed with your comment. Please clearly state your  
23 name and indicate if you are representing any group or  
24 organization and limit your comments to five minutes.  
25 Please specify when your comment is finished, and mute

1 your mic.

2 If you did not pre-register as a speaker but  
3 would like to speak, please use the "raise hand" feature  
4 in Google Meets.

5 As a reminder, video demonstrations and screen  
6 sharing by witnesses is not permitted. The chat feature  
7 in Google Meets will be monitored during the public  
8 hearing to assist with any technical issues.

9 We ask that everyone be respectful and  
10 considerate of each other by: Refraining from using  
11 foul language, refraining from name calling, refraining  
12 from interrupting others while they are speaking, and  
13 keeping comments on topic of the proposed DAQ Rule.

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

16 MS. JENNINGS: Thank Nicole.

17 Kristina, are you ready?

18 COURT REPORTER: I am.

19

20 45CSR8 - Ambient Air Quality Standards

21 MS. JENNINGS: The virtual public hearing for  
22 the proposed Legislative Rule 45CSR8, Ambient Air  
23 Quality Standards, will now come to order on this 6th  
24 day of August 2024.

25 Oral comments and testimony will be accepted

1 until the close of this hearing and will be made part  
2 of the rule-making record. Any question regarding  
3 revisions to the rules should be included with your  
4 comments and any such question will be addressed as part  
5 of the response to comments document in the rule-making  
6 record.

7           The purpose of this public hearing is to  
8 accept comments on proposed revisions to Rule 8 which  
9 was last promulgated in the 2024 session. This rule  
10 establishes and adopts ambient air quality standards in  
11 West Virginia for carbon monoxide, lead, nitrogen  
12 dioxide, ozone, particulate matter, and sulfur dioxide,  
13 equivalent to the national primary and secondary ambient  
14 air quality standards established under Section 109 of  
15 the Clean Air Act and promulgated by the United States  
16 Environmental Protection Agency (EPA) under 40 C.F.R.  
17 Part 50.

18           This rule also establishes and adopts ambient  
19 air monitoring reference methods and equivalent methods  
20 promulgated by the US EPA under 40 C.F.R. Part 53.  
21 Reference methods are used to determine attainment or  
22 non-attainment of the NAAQS.

23           Revisions to the rule include the annual  
24 incorporation by reference of 40 CFR Parts 50 and 53  
25 promulgated by EPA as of June 1, 2024, by updating the

1 IBR date in Section 1.6 and the adoption of standards  
2 dates in Sections 3.1 and 3.2 and adding severability  
3 clauses under Section 5.

4 The floor is now open for comments. As a  
5 reminder, please keep your comments on topic and limit  
6 them to five minutes.

7 Nicole, has anyone preregistered to provide  
8 comments on proposed rule 45CSR8? If so, please unmute  
9 their line & call on them now.

10 MS. ERNEST: Thanks, Laura. There is no one  
11 who has preregistered to speak; however, if you did not  
12 preregister to speak but would like to do so now, please  
13 use the "raise hand" option or unmute your mic, state  
14 your name, any organization that you may represent, and  
15 proceed with your comment.

16 MS. JENNINGS: Hearing and see nothing, the  
17 this public hearing for proposed Rule 45CSR8 is  
18 concluded. The public hearing for proposed Rule 45CSR16  
19 will begin momentarily.

20  
21 45CSR16 - Standards of Performance for  
22 New Stationary Sources

23 MS. JENNINGS: Is the court reporter ready for  
24 the next hearing?

25 COURT REPORTER: Yes, ma'am.

1 MS. JENNINGS: Okay. Thank you.

2 The virtual public hearing for the proposed  
3 Legislative Rule 45CSR16, Standards of Performance for  
4 New Stationary Sources, will now come to order on this  
5 6th day of August 2024.

6 Oral comments and testimony will be accepted  
7 until the close of this hearing and will be made part of  
8 the rule-making record. Any question regarding  
9 revisions to the rules should be included with your  
10 comments and any such question will be addressed as part  
11 of the response to comments in the rule-making record.

12 The purpose of this public hearing is to  
13 accept comments on proposed revisions to Rule 45CSR16.  
14 This rule last promulgated in the 2024 session  
15 establishes and adopts national standards of performance  
16 for new stationary sources and other regulatory  
17 requirements promulgated by the United States  
18 Environmental Protection Agency pursuant to Section  
19 111(b) of the Federal Clean Air Act.

20 This rule codifies general procedures and  
21 criteria to implement standards of performance for new  
22 stationary sources set forth in 40 CFR Part 60. The  
23 rule also adopts associated appendices, reference  
24 methods, performance specifications and other test  
25 methods which are appended to such standards.

1           Revisions to this rule are necessary to  
2 maintain consistency with current Federal regulations,  
3 and for the State to fulfill its responsibilities under  
4 the Clean Air Act and enable the WV Department of  
5 Environmental Protection to continue to be the primary  
6 enforcement authority for such national standards  
7 promulgated by the U.S. EPA.

8           Revisions to the rule include updating the  
9 annual incorporation by reference of the New Source  
10 Performance Standards, or NSPS, promulgated by EPA under  
11 40 CFR Part 60 as of June 1, 2024, by updating the IBR  
12 dates in Subsections 1.6 and 4.1.

13           Paragraph 4.1.2 was updated to add 40 CFR part  
14 60, subpart (b)(a) to the subparts excluded from the  
15 adoption of standards section. Severability clauses  
16 were added under Section 8.

17           The floor is now open for comments. As a  
18 reminder, please keep your comments on topic and limit  
19 them to five minutes.

20           Nicole, has anyone pre-registered to provide  
21 comments on proposed rule 45CSR16? If so, please unmute  
22 their line & call on them now.

23           MS. ERNEST: Thanks, Laura. There is no one  
24 who has preregistered to speak; however, if you did not  
25 preregister to speak but would like to do so now, please

1 use the "raise hand" option or unmute your mic, state  
2 your name, any organization that you may represent, and  
3 proceed with your comment.

4 MS. JENNINGS: Hearing or seeing no indication  
5 of comments, this public hearing for proposed Rule  
6 45CSR16 is concluded. The public hearing for proposed  
7 rule 45CSR25 will begin momentarily.

8

9 45CSR25 - Control of Air Pollution from Hazardous  
10 Waste Treatment, Storage and Disposal Facilities

11 MS. JENNINGS: Is the court reporter ready for  
12 the next hearing?

13 COURT REPORTER: Yes, ma'am. Thank you.

14 MS. JENNINGS: Thanks, Kristina.

15 The virtual public hearing for the proposed  
16 Legislative Rule 45CSR25, Control of Air Pollution from  
17 Hazardous Waste Treatment, Storage and Disposal  
18 Facilities, will now come to order on this 6th day of  
19 August 2024.

20 Oral comments and testimony will be accepted  
21 until the close of this hearing and will be made part of  
22 the rule-making record. Any question regarding  
23 revisions to the rules should be included with your  
24 comments and any such question will be address as part  
25 of a response to the comments in the rule-making record.

1           The purpose of this public hearing is to  
2 accept comments on proposed revisions to Rule 45CSR25  
3 which was last promulgated in 2020. The rule  
4 incorporates by reference emission standards for the  
5 treatment, storage, and disposal of hazardous waste  
6 including any reference methods, performance  
7 specifications, and other test methods that have been  
8 promulgated by the EPA pursuant to the Resource  
9 Conservation and Recovery Act, or RCRA, as amended.

10           The rule codifies the general procedures and  
11 criteria to implement emission standards set forth in 40  
12 CFR Parts 260, 261, 262, 264, 265, 266, 270 and 279.  
13 Revisions to this rule include an incorporation by  
14 reference update with 33CSR20 and updating the air  
15 quality related incorporation by reference amendments as  
16 of June 1, 2024, by revising the IBR dates in  
17 Subsections 1.6, 3.1, and 3.2.

18           The rule numbering and text formats were  
19 revised to comport with 153CSR1. Additionally, obsolete  
20 language, typographical errors, and numerical references  
21 were updated throughout. Severability clauses were  
22 added under Section 9.

23           The floor is now open for comments. As a  
24 reminder, please keep your comments on topic and limit  
25 them to five minutes.

1           Nicole, has anyone pre-registered to provide  
2 comments on proposed Rule 45CSR25? If so, please unmute  
3 their line & call on them now.

4           MS. ERNEST: Thanks, Laura. There is no one  
5 who has preregistered to speak; however, if you did not  
6 preregister to speak but would like to do so now, please  
7 use the "raise hand" option or unmute your mic, state  
8 your name, any organization that you may represent, and  
9 proceed with your comment.

10           MS. JENNINGS: Hearing and seeing no comments,  
11 the public hearing for proposed Rule 45CSR25 is  
12 concluded. The public hearing for proposed Rule 45CSR34  
13 will begin momentarily.

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15           45CSR34 - Emission Standards for  
16                   Hazardous Air Pollutants

17           MS. JENNINGS: Kristina, are you ready for the  
18 next hearing?

19           COURT REPORTER: I am, thank you.

20           MS. JENNINGS: Thank you.

21           The virtual public hearing for the proposed  
22 legislative Rule 45CSR34, Emission Standards for  
23 Hazardous Air Pollutants, will now come to order on this  
24 6th day of August 2024.

25           Oral comments and testimony will be accepted

1 until the close of this hearing and will be made part of  
2 the rule-making record. Any question regarding  
3 revisions to the rules should be included with your  
4 comments and any such question will be addressed as part  
5 of the response to comments in the rule-making record.

6 The purpose of this public hearing is to  
7 accept comments on proposed revisions to Rule 45CSR34.  
8 This rule last promulgated in 2024, incorporates and  
9 adopts national emission standards for hazardous air  
10 pollutants and other regulatory requirements promulgated  
11 by the US EPA pursuant to the Federal Clean Air Act.

12 Promulgation of this rule is necessary for the  
13 State to fulfill its responsibilities under the Clean  
14 Air Act and will enable the WV Department of  
15 Environmental Protection to continue to be the primary  
16 enforcement authority for such national emission  
17 standards promulgated by the US EPA.

18 Revisions to the rule include the annual  
19 incorporation by reference of the National Emission  
20 Standards for Hazardous Air Pollutants promulgated by  
21 the US EPA under 40 CFR Parts 61 and 63 as of June 1,  
22 2024, and severability clauses were added under Section  
23 8.

24 The floor is now open for comments. As a  
25 reminder, please keep your comments on topic and limit

1 them to five minutes.

2 Nicole, has anyone pre-registered to provide  
3 comments on proposed Rule 45CSR34? If so, please unmute  
4 their line and call on them now.

5 MS. ERNEST: Thanks, Laura. There is no one  
6 who has preregistered to speak; however, if you did not  
7 preregister to speak but would like to do so now, please  
8 use the "raise hand" option or unmute your mic, state  
9 your name, any organization that you may represent, and  
10 proceed with your comment.

11 MS. JENNINGS: Hearing and seeing no comments  
12 the public hearing for proposed Rule 45CSR34 is  
13 concluded.

14 There are no further public hearings this  
15 evening. Thank you very much for your interest and  
16 participation in the public hearings this evening.  
17 Responses to the comments provided will be addressed in  
18 the response to comment document as part of the official  
19 rule-making record and will be available on the  
20 Secretary of State's website.

21 Have a good night. Thank you.

22 (Proceedings concluded at 6:26 p.m.)  
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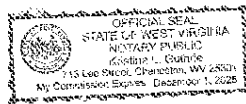
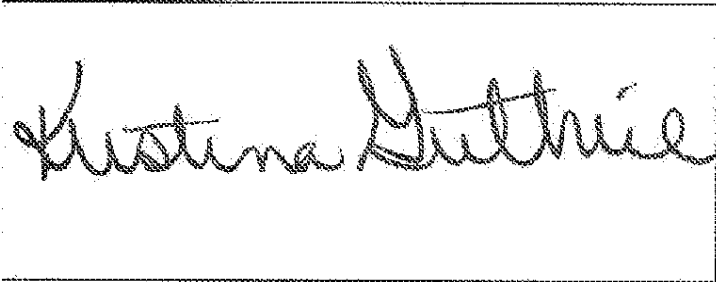
1 STATE OF WEST VIRGINIA

2 COUNTY OF KANAWHA, to wit:

3 I, Kristina Guthrie, Professional Reporter and  
4 Notary Public within and for the County and State  
5 aforesaid, duly commissioned and qualified, do hereby  
6 certify that the foregoing proceedings were duly  
7 transcribed by me from stenographic notes taken in the  
8 foregoing proceedings to the best of my skill and  
9 ability.

10 I do further certify that the said proceedings  
11 were correctly taken by me in shorthand notes, and that  
12 the same were accurately written out in full and reduced  
13 to typewriting by means of computer-aided transcription.

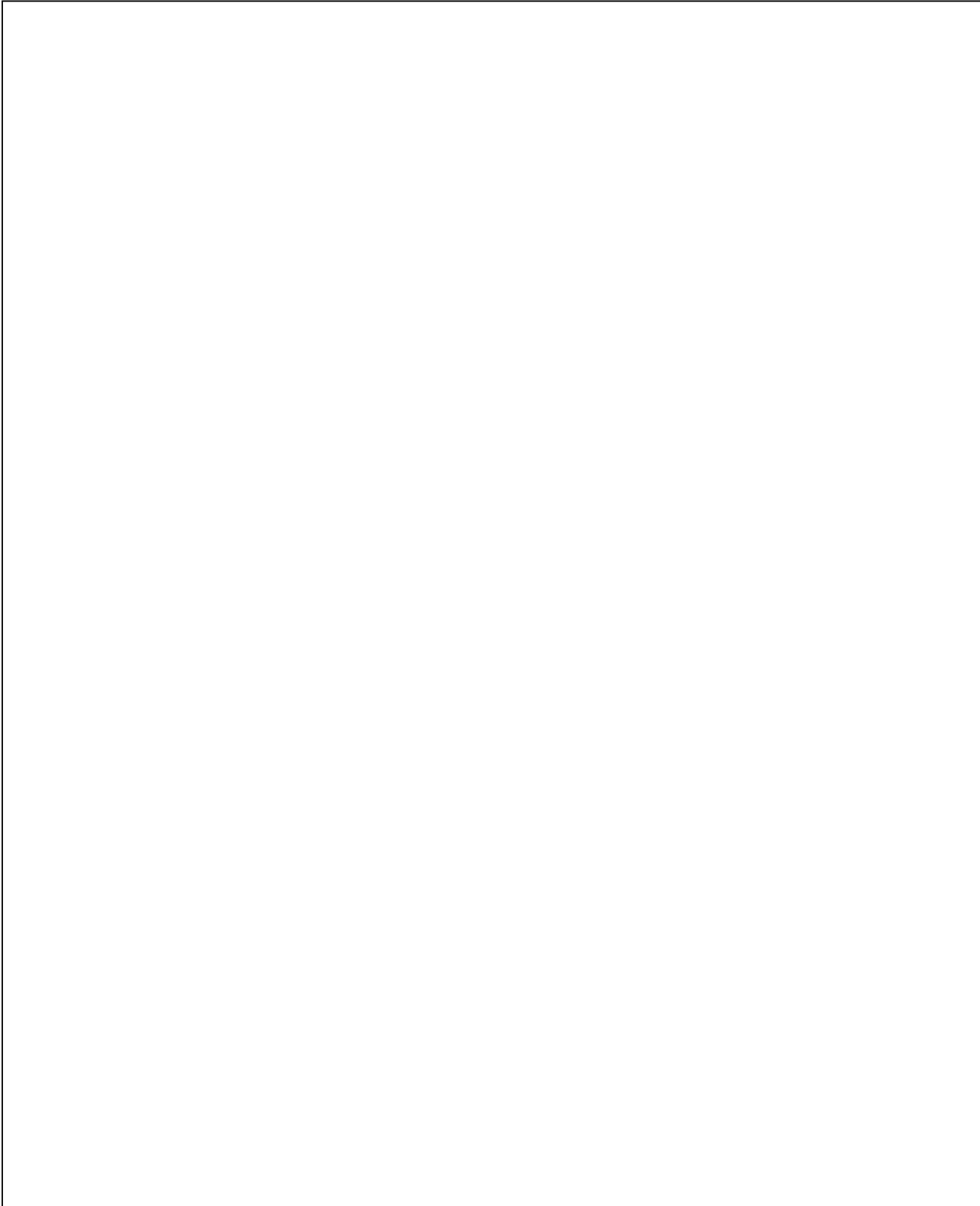
14 Given under my hand this 7th day of August,  
15 2024.



Kristina Guthrie, Professional  
Reporter and Notary Public

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