

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #1

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2005 JUN 15 P 4: 33

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE**

AGENCY: WV Department of Environmental Protection, Division of Air Quality TITLE NUMBER: 45

RULE TYPE: Legislative CITE AUTHORITY: W.V. Code §22-5-4

AMENDMENT TO AN EXISTING RULE: YES \_\_\_ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 40

TITLE OF RULE BEING PROPOSED: Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate  
Transport of Ozone and Nitrogen Oxides

DATE OF PUBLIC HEARING: July 18, 2005 TIME: 6:00 p.m.

LOCATION OF PUBLIC HEARING: West Virginia Department of Environmental Protection  
Cooper's Rock Conference Room  
601 57th Street, S.E.  
Charleston, WV 25304

COMMENTS LIMITED TO: ORAL \_\_\_ , WRITTEN \_\_\_ , BOTH X  
COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

The Department requests that persons wishing to make  
comments at the hearing make an effort to submit written  
comments in order to facilitate the review of these comments.

**Legislative Rule Making**

**JUN 15 2005**

The issues to be heard shall be limited to the proposed rule.

**Review Committee**

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

John A. Benedict, Director  
WV Department of Environmental Protection  
Division of Air Quality

601 57th Street, S.E.  
Charleston, WV 25304

Stephanie R. Timmermeyer

Authorized Signature

Stephanie R. Timmermeyer, Director

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

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05 JUL 29 PM 2:41  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Form #3

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE  
AND  
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: WV Dept. of Environmental Protection Division of Air Quality TITLE NUMBER: 45

CITE AUTHORITY: W.V. Code §22-5-4

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 40

TITLE OF RULE BEING PROPOSED: Control of Ozone Season Nitrogen Oxide Emissions to  
Mitigate Interstate Transport of Ozone and Nitrogen Oxides

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

  
Authorized Signature

**Legislative Rule Making**

JUL 29 2005

**Review Committee**

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

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2006 APR 28 P 3:50

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Form #6

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

AGENCY: WV Dept. of Environmental Protection, Div. of Air Quality TITLE NUMBER: 45

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 40

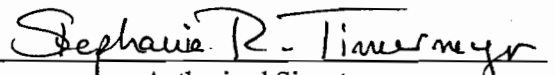
TITLE OF RULE BEING PROPOSED: Control of Ozone Season Nitrogen Oxide Emissions to  
Mitigate Interstate Transport of Ozone and Nitrogen  
Oxides

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) HB 4135

SECTION §§64-3-1-(h), PASSED ON March 11, 2006

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE  
FOLLOWING DATE: May 1, 2006

  
Authorized Signature

Stephanie R. Timmermeyer, Secretary



WEST VIRGINIA LEGISLATURE  
Legislative Rule-Making Review Committee

Senator Joseph Minard, Cochair  
Delegate Virginia Mahan, Cochair  
Debra A. Graham, Counsel  
Joseph A. Altizer, Associate Counsel

Rita A. Pauley, Associate Counsel  
Connie A. Bowling, Associate Counsel  
Brian Skinner, Associate Counsel  
Felisha N. Sutherland, Administrative Assistant

December 13, 2005

NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Betty Ireland, Secretary of State, State Register

TO: John A. Benedict, Director  
Office of Air Quality  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304

FROM: Legislative Rule-Making Review Committee

Proposed Rule: Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides, 45CSR40

The Legislative Rule-Making Review Committee Recommends that the West Virginia Legislature:

- 1. Authorize the agency to promulgate the Legislative rule:
  - (a) as originally filed   X
  - (b) as modified by the agency
- 2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached.
- 3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.
- 4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.
- 5. Recommends that the Legislature rule be withdrawn; a statement of reasons for such recommendation is attached.

**QUESTIONNAIRE**

*(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)*

DATE: July 29, 2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV Department of Environmental Protection  
Division of Air Quality  
601 57th Street, S.E.  
Charleston, West Virginia 25304  
Phone: 304-926-0499 ext. 1237

LEGISLATIVE RULE TITLE: 45CSR40 - Control of Ozone Season Nitrogen Oxide  
Emissions to Mitigate Interstate Transport of Ozone and  
Nitrogen Oxides

1. Authorizing statute(s) citation W.Va. Code §22-5-4

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:  
June 15, 2005

b. What other notice, including advertising, did you give of the hearing?  
Published notice on June 17th and 21st in the Charleston Newspapers; The Charleston Daily  
Mail and The Charleston Gazette. Sent Public Hearing Notice via e-mail to an  
extensive Division of Air Quality mailing list and posted on the Department of Environmental  
Protection's web site under "Calendar of Events".

c. Date of Public Hearing(s) *or* Public Comment Period ended:  
July 18, 2005

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.  
Attached X No comments received \_\_\_\_\_

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 29, 2005

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- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

John A. Benedict, Director  
601 57th Street, S.E.  
Charleston, WV 25304

Tamra Mowrer, Administrative Secretary  
601 57th Street, S.E.  
Charleston, WV 25304

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Phone: 304 926-0499  
Fax: 304 926-0488  
e-mail: jbenedict@wvdep.org

Phone: 304 926-0499  
Fax: 304 926-0488  
e-mail: tmowrer@wvdep.org

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- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

James Mason, Technical Analyst II  
601 57th Street, S.E.  
Charleston, WV 25304

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Phone: 304 926-0499 ext. 1200  
Fax: 304 926-0479

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3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

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b. Date of hearing or comment period:

\_\_\_\_\_ N/A \_\_\_\_\_

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

\_\_\_\_\_ N/A \_\_\_\_\_

d. Attach findings and determinations and reasons:

Attached \_\_\_\_\_ N/A \_\_\_\_\_

West Virginia Department of Environmental Protection

**ADVISORY COUNCIL MEETING MINUTES**

Wednesday - June 8, 2005

601 57<sup>th</sup> Street, SE, Charleston, WV

Dolly Sods Conference Room – 1st Floor

**ATTENDEES:**

**Advisory Council Members:**

Larry Harris

Jackie Hallinan

Rick Roberts

Lisa Dooley

Bill Raney

Karen Price

**DEP:**

Stephanie R. Timmermeyer, Cabinet Secretary

Karen G. Watson, Assistant General Counsel

Ken Ellison, Director - Division of Land Restoration

Lisa McClung, Director – Division of Water and Waste Management

John Benedict, Director – Division of Air Quality

Mike Zeto, WVDEP

Charlie Sturey, WVDEP

Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office

James Martin, Chief, WVDEP - Office of Oil & Gas

Brett Loflin, WV Oil and Gas Conservation Commission

Dave Bassage- WVDEP

Greg Adolpson – WVDEP

Jim Mason – WVDEP

Fred Durham – WVDEP

Jim Mason – WVDEP

Mike Johnson – WVDEP

**VISITORS:**

Linda Tennant, Spilman, Thomas, Battle

Don Garvin – WVEC

Bob Asplund - Dominion

Karen Watson, WVDEP – Assistant General Counsel, called the meeting to order at 10:00 a.m.

Proposed rules for the 2006 legislative session are as follows:



- **45CSR1 “Control and Reduction of Nitrogen Oxides from Non-Electric Generating Units as a Means to Mitigate Transport of Ozone Precursors”**

This rule partially fulfills the State’s obligations in response to U.S. EPA’s final rule, *Findings of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group region for Purposes of Reducing Regional Transport of Ozone* 27 Oct 1998, herein referred to as the *NO<sub>x</sub> SIP Call*). Essentially, the federal rule requires that large emitters of Nitrogen Oxides (NO<sub>x</sub>) significantly reduce emissions and constrains them to set budgets, starting in 2004 and maintaining them thereafter. Flexibility is built in through market-based “cap and trade” provisions which allow sources to buy/sell NO<sub>x</sub> emission allowances from/to other program participants. For example, a source which has emitted NO<sub>x</sub> in excess of its NO<sub>x</sub> allowance allocation may purchase NO<sub>x</sub> allowances under the federal NO<sub>x</sub> Budget Trading Program to obtain the needed NO<sub>x</sub> emission allowances to cover its actual NO<sub>x</sub> emissions during an ozone season. Conversely, a source which emits fewer tons of NO<sub>x</sub> than its NO<sub>x</sub> allowance allocation may either bank or sell (trade) the excess NO<sub>x</sub> allowances to another sources which needs them to cover its excess NO<sub>x</sub> emissions.

45CSR1 applies to large fossil fuel-fired stationary sources (large industrial boilers) with heat inputs greater than 250 mmBtu/hr. The Department of Environmental Protection, Division of Air Quality (DAQ) addresses Electric Generation Units (EGUs) in a separate rulemaking, 45CSR26. 45CSR1 also applies to large cement kilns and internal combustion engines which emitted more than one ton per day of NO<sub>x</sub> from May 1 through September 30, 1995, although these sources are not subject to the NO<sub>x</sub> Budget Trading Program.

**Comments:**

How will this relate to the new rule 40?

*Rule 40 will repeal Rule 1 in 2009.*

Are these kinds of trading effective in lowering NO<sub>x</sub> emission?

*Yes, West Virginia has dropped from one of the highest to one of the lowest states.*

If one is testing, how do you see which sources account for improvement?

*Have CEMS on stacks so we can analyze data.*

- **45CSR15 – “Emission Standards for Hazardous Air Pollutants Pursuant to 40CFR Part 61”**

This rule establishes and adopts national emission standards for hazardous air pollutant (NESHAP) and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) pursuant to 40CFR part 61 and section 112 of the federal clean Air Act, as amended (CAA). This rule codifies general procedures and

criteria to implement emission standards for stationary sources that emit (or have the potential to emit) one or more to the eight substances listed as hazardous air pollutants in 40 CFR §61.01(a). The rule incorporated by reference the NESHAP standards of 40 CFR Parts 61 and 65 (consolidated Federal Air Rule), to the extent referenced in 40CFR part 61, promulgated as of June 1, 2005. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 CSR parts 61 and 65. Any person who constructs, reconstructs, modifies or operates any source subject to the provisions of 40 CFR Part 61 must comply with the applicable NESHAPS and this rule.

45CSR15, in conjunction with 45CSR34, establishes general provisions for emission standards for hazardous air pollutants (NESHAP) and other regulatory requirements promulgated by USEPA pursuant to section 112 of the federal Clean Air Act, as amended. 45CSR34 incorporates hazardous air pollutant standards codified by USEPA under 40CFR part 63 whereas 45CSR15, incorporates hazardous air pollutant standards promulgated by USEPA under 40 CFR Part 61.

This revised rule incorporates by reference the following new or revised NESHAP standards promulgated as of June 1, 2005: National Emission Standards for Hazardous Air Pollutants for Asbestos.

#### **No Comments**

- **45CSR16 – “Standards of Performance for New Stationary Sources Pursuant to 40CFR Part 60”**

This rule establishes and adopts national standards of performance for new stationary sources and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) pursuant to section 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 incorporates by reference New Sources Performance Standards (NSPS) promulgated as of June 1, 2005. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to such standards. Any person who constructs, modifies, reconstructs or operates an affected facility after the effective date of any NSPS under 40 CFR Part 60 must comply with the applicable NSPS and this rule.

This revised rule incorporates by reference the following new or revised NSPS standards promulgated as of July 1, 2005: Standards of performance for Industrial-Commercial-Institutional Steam Generating units; Stationary Gas Turbines: Steel Plants; and new and Existing Stationary Sources: Electric Utility Steam Generating Units (CAMR).

#### **No Comments**

- **45CSR25 – “To Prevent and Control Air Pollution from Hazardous Waste Treatment Storage or Disposal Facilities.”**

This rule establishes and adopts national standards of performance for new stationary sources and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) pursuant to the Resource Conservation and Recovery Act, as amended (RCRA). This rule codifies general procedures and criteria to implement emission standards set forth in the Code of Federal Regulations as listed in Table 25-A of the rule. The rule also adopts associated appendices, reference methods, performance specifications and other test methods, which are appended to these standards. Any person, who constructs, reconstructs, modifies or operates any hazardous waste treatment, storage, or disposal facility must comply with the West Virginia Hazardous Waste management Program, the codified federal emission standards, and this rule.

45CSR25 establishes a program of regulation over the treatment, storage, and disposal of hazardous wastes in order to achieve and maintain such levels of air quality as will protect the public health and safety and the environment from the effects of improper, inadequate, or unsound treatment, storage, or disposal of hazardous wastes.

This revised rule incorporates by reference the following provisions of 40 CFR Part 262 promulgated as of June 1, 2005: National Environmental Performance Track Program.

**Comments:**

What does the term “constituents” mean and how does one decide whether a source has prevented emissions that would cause harm under section 1.1.b of the rule?

*Look at the definition of “hazardous waste” and prevention language is meant to set forth overall purpose of the rule.*

Does the agency consult with DHHR or other public health officials?

*No, the agency uses a risk-based approach and has a toxicologist employed. It also looks to EPA.*

- **45CSR33 – “Acid Rain Provisions and Permits”**

This rule establishes and adopts the general provisions and operating permit program requirements for affected sources under the Acid Rain Program promulgated by the United States Environmental Protection Agency (USEPA) under title IV of the Clean Air Act, as amended (CAA). The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these provisions. Under the Acid Rain Program and 45CSR33, no person may construct, modify, or operate or cause to be constructed, modified, or operated, an Acid Rain Source in violation of 40CFR Parts 72 through 77.

Title IV of the CAA requires each state to implement an operating permit system conforming to Title IV and Title V of the CAA, as amended. 45CSR33 incorporates by reference the federal counterpart regulation 40 CFR Parts 72 through 77. USEPA approved West Virginia's Acid Rain Program with its approval of the state's Title V Operating Permit Program on December 15, 1995.

This revised rule incorporates by reference the following revisions to 40CFR Parts 72 through 77 promulgated as of June 1, 2005: Permits Regulation, Sulfur Dioxide Allowance System, Sulfur Dioxide Opt-Ins, continuous Emission Monitoring, Excess Emissions (CAIR & CAMR).

### **No Comments**

- **45CSR34 – “Emission Standards for Hazardous Air Pollutants For Source Categories Pursuant to 40 CFR Part 63**

This rule establishes and adopts national emission standards for hazardous air pollutants (NESHAP) and other regulatory requirements promulgated by the United States Environmental Protection Agency (U.S. EPA) pursuant to section 112 of the federal Clean Air Act, as amended (CAA). This rule codifies general procedures and criteria to implement emission standards for stationary sources that emit, or have the potential to emit, one or more of the hazardous air pollutants set forth in section 112(b) of the CAA. The rule incorporates by reference the NESHAP standards of 40 CFR Parts 63 and 65 (Consolidated Federal Air Rule), to the extent referenced in 40 CFR Part 63, promulgated as of June 1, 2005. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 CFR Parts 63 and 65. Any person who constructs, reconstructs, modifies or operates any source subject to the provisions of 40 CFR Part 63 must comply with the applicable NESHAPS and this rule.

45CSR34, in conjunction with 45CSR15, establishes general provisions for emission standards for hazardous air pollutants and other regulatory requirements promulgated by U.S. EPA pursuant to section 112 of the federal Clean Air Act, as amended. 45CSR34 incorporates hazardous air pollutant standards codified by U.S. EPA under 40 CFR Part 63 whereas 45CSR15 incorporates hazardous air pollutant standards promulgated by U.S. EPA under 40 CFR Part 61.

This revised rule incorporates by reference the following new or revised NESHAP standards promulgated as of June 1, 2005: National Environmental Performance Track Program, National Emission Standards for Hazardous Air Pollutants for Source Categories, Chromium Emissions From Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, Plywood & Composite Wood Products; Effluent Limitations Guidelines and Standards for Timber Products Point Source Category; List of HAPs, Lesser Quantity Designations, Source Category List, Printing, Coating & Dyeing of Fabrics and Other Textiles, Stationary Combustion Turbines, Solvent Extraction for Vegetable Oil Production, Industrial, Commercial, Institutional Boilers and Process Heaters, Secondary Aluminum Production, Coke Ovens: Pushing, Quenching, and Battery Stacks, List of Hazardous Air Pollutants, Petition Process, Lesser Quantity Designations, Source Category List; Petition to

Delist of Ethylene Glycol Monobutyl Ether, Organic Hazardous Air Pollutants from Synthetic Organic Chemical Manufacturing Industry and Other Processes Subject to the Negotiated Regulation for Equipments Leaks, Coke Ovens: Pushing, Quenching, and Battery Stacks, Leather Finishing Operations, Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units, Revision of December 2000 Regulatory Finding on the Emissions of HAPs from Electric Utility Steam Generating Units & Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from Section 112(c) List, Generic MACT; Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations, Coke Oven Batteries, Miscellaneous Coating Manufacturing, Pharmaceuticals Production, Asphalt Processing & Asphalt Roofing Manufacturing and Iron and Steel Foundries.

### **No Comments**

- **45CSR37 – “Mercury Budget Trading Program to Reduce Mercury Emissions”**

This rule establishes the general provisions and designated representative, permitting, allowance and monitoring provisions for the Mercury (Hg) Budget Trading Program, as a means of reducing national mercury emissions, pursuant to the federal Clean Air Mercury Rule (CAMR) established under Section 111 of the Clean Air Act (CAA) and 40 CFR 60, Subpart HHHH.

This rule partially fulfills the State’s obligations in response to the United States Environmental Protection Agency’s (U.S. EPA) final rule, *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units* (15 March 2005, at FR XXXXX). The federal rule establishes standards of performance for mercury (Hg) for new and existing coal-fired electric utility steam generating units (utility units). This rule establishes a mechanism by which Hg emissions from new and existing coal-fired utility units are capped at specific nation-wide levels. U.S. EPA has specified that annual Hg emission reductions be implemented in two phases. The first phase of Hg reductions starts in 2010 and the second phase begins in 2018, and continues thereafter. Flexibility is built in through market-based “cap and trade” provisions which allow sources to buy or sell Hg emission allowances from or to other program participants.

45CSR37 applies to coal-fired electric utility steam generating units that have greater than 25 MW<sub>e</sub> generating capacity.

### **Comments:**

How will this affect Industrial boilers?

*The rule does not cover these sources.*

What kind of monitoring is required?

*Have to install CEMS.*

What happens when there is litigation?

*If court remands, we would withdraw the rule.*

Does the rule apply to natural gas-fired units?

*No, only coal-fired.*

Does the rule establish new fees?

*No.*

John Benedict informed the Council of the following reductions:

Nationally

2010 – 22%

2018 – 69%

WV:

2010 – 43%

2018 – 77%

- **45CSR39 – “Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides”**

This rule establishes general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR NO<sub>x</sub> Annual Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AA through II, and 40 CFR §51.123 for state implementation plans as a means of mitigating interstate transport of fine particulates and nitrogen oxides (NO<sub>x</sub>).

This rule partially fulfills the State’s obligations in response to the United States Environmental Protection Agency’s (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of NO<sub>x</sub> reduce annual emissions through the constraint of set budgets. U.S. EPA is specifying that annual NO<sub>x</sub> emission reductions be implemented in two phases. The first phase of NO<sub>x</sub> reductions starts in 2009; the second phase starts in 2015, and continues thereafter. The NO<sub>x</sub> emission reduction requirements are based on controls that are known to be highly cost effective for electric generating units. Flexibility is built in

through market-based “cap and trade” provisions which allow sources to buy or sell NO<sub>x</sub> emission allowances from or to other program participants. Reducing upwind NO<sub>x</sub> emissions will assist downwind PM<sub>2.5</sub> and 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

45CSR39 applies to large fossil fuel-fired electric generating units that have greater than 25 MW<sub>e</sub> generating capacity. The CAIR NO<sub>x</sub> Ozone Season Trading Program requirements are set forth in 45CSR40.

**Comments:**

How will this affect industrial boilers?

*It will not. It only affects electric utilities.*

Is there a set-aside provision?

*Yes.*

Agency should consider using the money to clean up streams impacted by acid rain.

- **45CSR40 – “Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides”**

This rule establishes the general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR NO<sub>x</sub> Ozone Season Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AAAA through IIII, and 40 CFR §51.123 for state implementation plans as a means of mitigating interstate transport of ozone and nitrogen oxides (NO<sub>x</sub>).

This rule partially fulfills the State’s obligations in response to the United States Environmental Protection Agency’s (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of NO<sub>x</sub> reduce ozone season emissions through the constraint of set budgets. U.S. EPA is specifying that ozone season NO<sub>x</sub> emission reductions be implemented in two phases. The first phase of ozone season NO<sub>x</sub> reductions starts in 2009; the second phase starts in 2015, and continues thereafter. The NO<sub>x</sub> emission reduction requirements are based on controls that are known to be highly cost effective for electric generating units and large industrial boilers. Flexibility is built in through market-based “cap and trade” provisions which allow sources to buy or sell NO<sub>x</sub> emission allowances from or to other program participants. Reducing upwind ozone season NO<sub>x</sub> emissions will assist downwind 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

Because CAIR subsumes the ozone season NO<sub>x</sub> SIP Call trading program, existing NO<sub>x</sub> SIP Call rules 45CSR1 and 45CSR26 and their ozone season NO<sub>x</sub> reduction provisions must be “sunsetting” by January 1, 2009. Therefore, 45CSR40 contains a repeal clause which effectively “sunset” these rules, meeting the approvability requirement for implementing CAIR.

45CSR40 applies to large fossil fuel-fired electric generating units that have greater than 25 MW<sub>e</sub> generating capacity and large fossil fuel-fired industrial boilers with a heat input greater than 250 mmBtu/hr. This rule also applies to affected cement kilns and internal combustion engines, by retaining the NO<sub>x</sub> SIP Call ozone season NO<sub>x</sub> emission reduction requirements for these sources from 45CSR1. These existing requirements do not provide for inclusion in any cap and trade program for cement kilns and internal combustion engines. The CAIR NO<sub>x</sub> Annual Trading Program requirements are set forth in 45CSR39.

#### **No Comments.**

- **33CSR41 – “Control of Annual Sulfur Dioxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Sulfur Dioxide”**

This rule establishes general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR SO<sub>2</sub> Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AAA through III, and 40 CFR §51.124 for state implementation plans as a means of mitigating interstate transport of fine particulates and sulfur dioxide (SO<sub>2</sub>).

This rule partially fulfills the State’s obligations in response to the United States Environmental Protection Agency’s (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of SO<sub>2</sub> reduce annual emissions based upon the implementation of retirement ratios for SO<sub>2</sub> allowances allocated under the Acid Rain Program. U.S. EPA is specifying that annual SO<sub>2</sub> emission reductions be implemented in two phases. The first phase of SO<sub>2</sub> reductions starts in 2010 and requires retiring SO<sub>2</sub> allowances at a 2:1 ratio; the second phase starts in 2015 and requires retiring SO<sub>2</sub> allowances at a 2.86:1 ratio, and continues thereafter. The SO<sub>2</sub> emissions reductions requirements are based on controls that are known to be highly cost effective for electric generating units. Flexibility is built in through market-based “cap and trade” provisions which allow sources to buy or sell SO<sub>2</sub> emission allowances from or to other program participants. Reducing upwind SO<sub>2</sub> emissions will assist downwind PM<sub>2.5</sub> and 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

45CSR41 applies to large fossil fuel-fired electric generating units that have greater than 25 MW<sub>e</sub> generating capacity.

How was the fiscal note derived?



*It is based on how many persons will be necessary to implement the rule.*

When will these rules be filed with EPA?

*September of 2006 for the CAIR rules and November 2006 for the mercury rule.*

- **33CSR1 – “Solid Waste Management Rule”**

This legislative rule establishes requirements for the siting (including location standards), financial assurance, installation, establishment, construction, design, groundwater monitoring, modification, operation, permitting, closure and post-closure care of any solid waste facility that processes, recycles, composts, transfers or disposes of solid waste pursuant to W. Va. Code §22-15-1 et seq. The rule revision will clarify that the State Division of Highways is subject to an exemption from permitting for its construction/demolition wastes associated with highway construction. The rule will also clarify that the beneficial reuse of clean bituminous concrete (asphalt) is not subject to permitting requirements, just as the beneficial reuse of Portland cement is not subject to permitting.

Comments:

Has the agency worked with the Division of Highways on the rule?

*Yes.*

- **33-CSR20 – “Hazardous Waste Management”**

The purpose of this rule is to provide for the regulation of the generation, treatment, storage, and disposal of hazardous waste to the extent necessary for the protection of the public health and safety and the environment. The rule changes pick up two new federal regulations.

**No Comments.**

- **35CSR3 – “Coalbed Methane Wells Rule”**

This rule applies to coalbed methane wells. The rule changes are necessary to conform to recent statutory revisions related to spacing. The changes also address new technology allowing for the horizontal drilling of wells.

**Comments:**

Are operators required to sample both water quality and quantity?

*Just quality.*

A question was raised about the 100' and 1000' distance requirements from water wells and the agency explained how these provisions work.

A comment was made that landowners are confused by the rule's requirements and some further explanations would be helpful.

- **39CSR1 – “Rules of the Commission”**

The rule is designed to prevent waste, protect correlative rights and to conserve oil and gas in the State of West Virginia and is applicable to all activities subject to the jurisdiction of the Oil and Gas Conservation Commission. Where special field rules apply, the special field rules shall govern to the extent of any conflict. The rule changes are to clarify the agency can enter consent agreements and establish escrow accounts.

**No comments.**

- **60CSR8 “Environmental Excellence Program Rule”**

This legislative rule establishes the eligibility, procedures, standards and legal documents required for establishing a voluntary environmental excellence program, consisting of incentives to reward facilities that go beyond regulatory requirements.

Comments:

Will the reports that are filed be shared with the public?

*Yes, they will be posted on the internet.*

Will people pay the \$1000 fee?

*From pre-comments, most are willing to pay some amount. The administrative fund will cover the agency's operating costs.*

A comment was made that there should be more programs like this, where companies are rewarded for good performance.

Lisa McClung, Director of DWWM, presented several rules under the water program that will be filed in the future. One was the concentrated animal feeding operation (CAFO) rule that was withdrawn by the agency in the 2005 session. As soon as EPA repromulgates its rule, the State will need to do so, perhaps by an emergency rule.

Then the new law transferring the authority to adopt water quality standards to the DEP was discussed. A question was raised concerning the public's involvement in the process. Ms. McClung responded that the process would be somewhat different from the agency's normal rulemaking.

Karen Watson then presented a list of bills passed by the Legislature during the 2005 regular session and

signed by the Governor as follows:

**1. SB 428. Creating the Revitalization Environmental Action Plan.**

This legislation transfers the litter control and recycling programs from DNR to DEP and transfers the waste tire remediation program from DOH to DEP. The legislation was amended by the House to require the excess funds to be transferred to the state road fund rather than the solid waste reclamation and environmental response fund. SB 428 bill also incorporates the provisions of Senate Bill 42 at 22-15A-12(f) and (k). These provisions provide liability protection on waste tire remediation to bona fide purchasers of property containing waste tires.

**2. SB 603. Higher Education Bill – Brownfield Assistance Centers.**

This legislation creates a provision in W.Va. Code § 18B11-7 that authorizes Marshall University and West Virginia University to each create Brownfield Assistance Centers for the purpose of acquiring and developing property; seeking federal brownfield assistance funds; and providing assistance to municipalities and local governments for brownfields development.

**Comments:**

*The Council discussed the funding mechanisms under the new law.*

**3. HB 3354. Oil and Gas Permit Fee Increase.**

This legislation increases the permit fees for shallow wells from \$250 to \$400; the permit fees for deep wells from \$250 to \$650; and the reclamation fees for all well activity from \$100 to \$150. This legislation also includes some technical amendments to the statutes governing oil and gas and coal bed methane drilling and production. As introduced, the legislation increased the permit fees for coal bed methane wells from \$250 to \$650 but the legislation was amended by the Senate to eliminate this permit fee increase. In total, this legislation will generate approximately \$350,000 for the Office of Oil and Gas.

**4. SB 406. Uniform Environmental Covenant Act.**

This legislation clarifies that environmental covenants containing affirmative obligations issued pursuant to the Voluntary Remediation and Redevelopment Act or other federal or state response actions are enforceable and perpetual; provides notice requirements for those placing environmental covenants on real property; and authorizes the department and local governments to enforce environmental covenants.

**Comments:**

A question was raised as to local governments.

*The agency responded that they are included and have authority under the new law.*

**5. HB 2723. Environmental Rules Bundle.**

This legislation consolidates the rules proposed by DEP and EQB. The DEP rules include revisions to the air, waste, water and mining programs. The EQB's rule relates to water quality standards. The EQB's rule was amended to eliminate Fill Hollow Creek in Preston County that the Board recommended to be included on the Tier 2.5 list. Tier 2.5 waters are waters of special concern and include naturally reproducing trout streams.

**6. HB 3236. Thin Seam Coal Tax Applicability.**

This legislation clarifies that the special tax on coal production and the special reclamation tax apply to coal produced from thin seams.

**7. HB 2333. Environmental Good Samaritan Act.**

This legislation protect landowners, groups and individuals who volunteer to reclaim abandoned mineral extraction lands and abate water pollution caused by abandoned mine lands from civil and environmental liability provided such activities are approved by the department and implemented in accordance with the plans approved by the department.

**8. HB 3033. Continuation of Special Reclamation Tax.**

This legislation extends the temporary special reclamation tax of seven cents for an additional eighteen months thereby maintaining the total special reclamation tax at fourteen cents per ton of coal produced. The legislation also requires the Secretary to evaluate and consider additional bonding mechanisms, such as full cost bonding and the creation of a water quality trust fund.

**9. SB 154. Beneficial Reuse of Water Treatment Plant Sludge.**

This legislation authorizes the beneficial reuse of water treatment plant sludge and requires the department to develop rules establishing criteria for the beneficial reuse of water treatment plant sludge.

**10. SB 287. Transfer of Rulemaking Authority for Water Quality Standards.**

This legislation transfers the authority to promulgate water quality standards and the authority to grant reming variances from the Environmental Quality Board to the department.

**11. SB 748. Credit for Mitigation.**

This legislation authorizes the secretary to grant credit for mitigation required by the Corps of Engineers pursuant to permit issued under Section 404 of the Clean Water Act when such mitigation satisfies mitigation required by the West Virginia Water Pollution Control Act.

**12. SB 700. Creation of the Community Infrastructure Investment Program.**

This legislation authorizes department to grant approval for the construction of privately financed water and sewage treatment facilities without the requirement of a certificate of need and convenience from the Public Service Commission provided that the project results in economic development and improvement of water quality. This legislation also authorizes municipal utilities and public service districts to enter into community service agreements with private developers for the purpose of constructing or expanding public utilities. This legislation also requires the secretary to promulgate emergency rules to implement the program.

**Comments:**

*Two members expressed interest in the future rulemaking efforts and any stakeholders group.*

**13. HB 3356. Increasing authority of the Solid Waste Management.**

This legislation requires the SWMB to conduct biannual performance reviews of county and regional solid waste authorities and grants the SWMB with the authority to supersede or exercise the powers granted to county or regional solid waste authorities that operate a solid waste facility

**14. SB 455. Financing of Environmental Control Activities.**

This Legislation authorizes the public service commission to review and approve the use of environmental control bonds for environmental control activities by certain qualified electric utilities.

The next meeting date was scheduled for September 15, 2005 – 1:00 p.m. – 3:00 p.m. – Trish will contact everyone with room location and agenda.

Karen Watson adjourned meeting.

**DEPARTMENT OF ENVIRONMENTAL PROTECTION  
DIVISION OF AIR QUALITY**

**BRIEFING DOCUMENT**

**Rule Title:** 45CSR40 - "Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides"

**A. AUTHORITY:** W.Va. Code §22-5-4

**B. SUMMARY OF RULE:**

This rule establishes the general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR NO<sub>x</sub> Ozone Season Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AAAA through IIII, and 40 CFR §51.123 for state implementation plans as a means of mitigating interstate transport of ozone and nitrogen oxides (NO<sub>x</sub>).

This rule partially fulfills the State's obligations in response to the United States Environmental Protection Agency's (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of NO<sub>x</sub> reduce ozone season emissions through the constraint of set budgets. U.S. EPA is specifying that ozone season NO<sub>x</sub> emission reductions be implemented in two phases. The first phase of ozone season NO<sub>x</sub> reductions starts in 2009; the second phase starts in 2015, and continues thereafter. The NO<sub>x</sub> emission reduction requirements are based on controls that are known to be highly cost effective for electric generating units and large industrial boilers. Flexibility is built in through market-based "cap and trade" provisions which allow sources to buy or sell NO<sub>x</sub> emission allowances from or to other program participants. Reducing upwind ozone season NO<sub>x</sub> emissions will assist downwind 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

Because CAIR subsumes the ozone season NO<sub>x</sub> SIP Call trading program, existing NO<sub>x</sub> SIP Call rules 45CSR1 and 45CSR26 and their ozone season NO<sub>x</sub> reduction provisions must be "sunsetting" by January 1, 2009. Therefore, 45CSR40 contains a repeal clause which effectively "sunsets" these rules, meeting the approvability requirement for implementing CAIR.

45CSR40 applies to large fossil fuel-fired electric generating units that have greater than 25 MW<sub>e</sub> generating capacity and large fossil fuel-fired industrial boilers with a heat

input greater than 250 mmBtu/hr. This rule also applies to affected cement kilns and internal combustion engines, by retaining the NO<sub>x</sub> SIP Call ozone season NO<sub>x</sub> emission reduction requirements for these sources from 45CSR1. These existing requirements do not provide for inclusion in any cap and trade program for cement kilns and internal combustion engines. The CAIR NO<sub>x</sub> Annual Trading Program requirements are set forth in 45CSR39.

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:**

In the final CAIR rule, U.S. EPA finds that 28 States and the District of Columbia contribute significantly to nonattainment of the NAAQS for fine particles (PM<sub>2.5</sub>) and/or 8-hour ozone in downwind States. U.S. EPA is requiring these upwind states to revise their SIPs to include control measures to reduce ozone season emissions of NO<sub>x</sub>. Consequently, the 28 states, including West Virginia, are required to submit SIP revisions implementing CAIR by September 11, 2006.

**D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:**

A federal counterpart to this proposed rule exists. To the extent practicable, the proposed rule emulates the model rule contained in the final CAIR rule. Because the proposed rule follows the presumptive federal rules for the source categories to which it applies, the Secretary has determined that the proposed rule is no more or less stringent than the applicable federal counterpart regulations.

**E. CONSTITUTIONAL TAKINGS DETERMINATION:**

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

**F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:**

At its June 8, 2005 meeting, the Environmental Protection Advisory Council reviewed and discussed this proposed rule. The Council's comments are contained in the attached minutes.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: 45CSR40 - "Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides"

Type of Rule:  Legislative  Interpretive  Procedural

Agency: Division of Air Quality

Address: 601 57<sup>th</sup> Street SE  
Charleston, WV 25304

Phone Number: 926-0475

Email: tmowrer@wvdep.org

**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

Although the rule will increase the resources required for implementation compared to current regulations, the net difference should be marginal and offset by fee income.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

**FISCAL YEAR**

Effect of Proposal	2006 Increase/Decrease (use "-")	2007 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>	<b>\$ 0</b>	<b>\$ 0</b>	<b>\$ 0</b>
Personal Services	\$ 12,400	\$ 14,900	\$ 14,900
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Equipment	\$ 625	0	0
Other	0	0	0
<b>2. Estimated Total Revenues</b>	<b>0</b>	<b>0</b>	<b>0</b>



Rule Title: 45CSR40 - "Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides"

**3. Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

Costs anticipated to be incurred during implementation of this rule in FY 2006 are approximately 16.7% of 1 FTE plus benefits, office and equipment costs. In fiscal years 2007 and upon full implementation, personal costs increase to 20% of 1 FTE due to annual agency allocation responsibilities under the program.

**MEMORANDUM**

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: June 15, 2005

Signature of Agency Head or Authorized Representative

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John A. Benedict, Director

**ENROLLED**

COMMITTEE SUBSTITUTE

FOR

**H. B. 4135**

( By Delegates Mahan, Palumbo, Cann, Pino, Armstead and Overington )

[Passed March 11, 2006; in effect from passage.]

AN ACT to amend and reenact article 3, chapter 64 of the code of West Virginia, 1931, as amended; all relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; legislative mandate or authorization for the promulgation of certain legislative rules by various executive or administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate certain legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing certain of the agencies to promulgate certain legislative rules as amended by the legislature; authorizing certain of the agencies to promulgate certain legislative rules with various modifications presented to and recommended by the legislative rule-making review committee and as amended by the legislature; directing studies and reports to the Legislature and further rulemaking in certain circumstances; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the Nox Budget Trading Program as a means of the control and reduction of nitrogen oxides from non-electric generating units as a means to mitigate the transport of ozone precursors ; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to emission standards for hazardous air pollutants pursuant to 40 CFR Part 61; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to standards of performance for new stationary sources Pursuant to 40 CFR Part 60; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to acid rain provisions and permits ; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to emission standards for hazardous air pollutants for source categories pursuant to 40 CFR Part

63; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the Mercury Budget Trading Program to reduce mercury emissions ; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the control of annual nitrogen oxide emissions to mitigate interstate transport of fine particulate matter and nitrogen oxides; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the control of ozone season nitrogen oxide emissions to mitigate interstate transport of ozone and nitrogen oxides; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the control of annual sulfur dioxide emissions to mitigate interstate transport of fine particulate matter and sulfur dioxides; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to surface mining reclamation; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to coalbed methane wells; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the Oil and Gas Conservation Commission; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to solid waste management; authorizing the Department of Environmental Protection to promulgate a legislative rule relating to hazardous waste management; relating to authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the requirements governing water quality standards; relating to authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the Community Infrastructure Investment Program ;

authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the prevention and control of air pollution from hazardous waste treatment, storage or disposal facilities ; and authorizing the Department of Environmental Protection to promulgate a legislative rule relating to the Environmental Excellence Program .

*Be it enacted by the Legislature of West Virginia:*

That article 3, chapter 64 of the code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

**ARTICLE 3. AUTHORIZATION FOR BUREAU OF ENVIRONMENT TO PROMULGATE LEGISLATIVE RULES.**

**§64-3-1. Division of environmental protection.**

(a) The legislative rule filed in the state register on the twenty-second day of March, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, relating to the Department of Environmental Protection (Nox Budget Trading Program as a means of the control and reduction of nitrogen oxides from non-electric generating units as a means to mitigate the transport of ozone precursors, 45 CSR 1), is authorized.

(b) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, relating to the Department of Environmental Protection (emission standards for hazardous air pollutants pursuant to 40 CFR Part 61, 45 CSR 15), is authorized.

(c) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, relating to the Department of Environmental Protection (standards of performance for new stationary sources Pursuant to 40 CFR Part 60, 45 CSR 16), is authorized.

(d) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, relating to the Department of Environmental Protection (acid rain provisions and permits, 45 CSR 33), is authorized.

(e) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, relating to the Department of Environmental Protection (emission standards for hazardous air pollutants for source categories pursuant to 40 CFR Part 63, 45 CSR 34), is authorized.

(f) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, relating to the Department of Environmental Protection (Mercury Budget Trading Program to reduce mercury emissions, 45 CSR 37), is authorized.

(g) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, relating to the Department of Environmental Protection (control of annual nitrogen oxide emissions to mitigate interstate transport of fine particulate matter and nitrogen oxides, 45 CSR 39), is authorized.

(h) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, relating to the Department of Environmental Protection (control of ozone season nitrogen oxide emissions to mitigate interstate transport of ozone and nitrogen oxides, 45 CSR 40), is authorized.

(i) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, relating to the Department of Environmental Protection (control of annual sulfur dioxide emissions to mitigate interstate transport of fine particulate matter and sulfur dioxides, 45 CSR 41), is authorized.

(j) The legislative rule filed in the state register on the second day of November, two thousand five, authorized under the authority of section four, article three, chapter

twenty-two, of this code, relating to the Department of Environmental Protection (West Virginia surface mining reclamation, 38 CSR 2), is authorized, with the following amendments:

On page seventy-one, section two, paragraph §38-2.7.2.e.1, after line five, by inserting a new paragraph, designated §38- 2.7.2.e.1, to read as follows:

§38-2.7.2.e.1. Bio-oil Cropland. Agricultural production of renewable energy crops through long-term intensive cultivation of close-growing commercial biological oil species (such as soybeans, rapeseed or canola) for harvest and ultimate production of bio-fuels as an alternative to petroleum based fuels and other valuable products;

On page seventy-one, section two, paragraph §38-2.7.3.d, after §38-2.7.3.c, by inserting a new paragraph, designated §38- 2.7.3.d, to read as follows:

§38-2.7.3.d. A change in postmining land use to bio-oil cropland constitutes an equal or better use of the affected land, as compared with pre-mining use for purposes of W. Va. Code §22- 3-13(c) in the determination of variances of approximate original contour for mountaintop removal operations subject to §38-2-7.8 of this rule;

On page one hundred two, after §38-2-7.7.f.3, by inserting a new subsection, designated §38-2-7.8, to read as follows:

### **7.8. Bio-oil Crop Land.**

7.8.1. Criteria for Approving Bio-oil Cropland Postmining Land Use.

7.8.1.a. An alternative postmining land use for bio-oil cropland may be approved by the secretary after consultation with the landowner and or land management agency having jurisdiction over state or federal lands: *Provided*, That the following conditions have been met.

7.8.1.a.1. There is a reasonable likelihood for the achievement of bio-oil crop production (such as soybeans, rapeseed or canola) as witnessed by a contract between the landowner and a commercially viable individual or entity, binding the parties to the production of bio-oil crops for a measurement period of at least two years after the completion of all restoration activity within the permitted boundaries;

7.8.1.a.2. The bio-oil crop reclamation plan is reviewed and approved by an agronomist employed by the West Virginia Department of Agriculture. The applicants shall pay for any review under this section;

7.8.1.a.3. The use does not present any actual or probable hazard to the public health or safety or threat of water diminution or pollution;

7.8.1.a.4. Bio-oil crop production is not:

7.8.1.a.4.A. Impractical or unreasonable;

7.8.1.a.4.B. Inconsistent with applicable land use policies or plans;

7.8.1.a.4.C. Going to involve unreasonable delays in implementation; or

7.8.1.a.4.D. In violation of any applicable law.

7.8.2. Soil reconstruction specifications for bio-oil crop postmining land use shall be established by the W. Va. Department of Agriculture in consultation with the U. S. Natural Resources Conservation Service and based upon the standards of the National Cooperative Soil Survey and shall include, at a minimum, physical and chemical characteristics of reconstructed soils and soil descriptions containing soil-horizon depths, soil densities, soil pH, and other specifications such that constructed soils will have the capability of achieving levels of yield equal to, or higher than, those required for the production of commercial seed oils species (such as soybeans, rapeseed or canola) and

meets the requirement of 14.3 of this rule.

### 7.8.3. Bond Release.

7.8.3.a. Phase I bond release shall not be approved until W. Va. Department of Agriculture certifies and the secretary finds that the soil meets the criteria established in this rule and has been placed in accordance with this rule. The applicants shall pay for any review under this section.

7.8.3.b. The secretary may authorize in consultation with the W. Va. Department of Agriculture, the Phase III bond release only after the applicant affirmatively demonstrates, and the secretary finds, that the reclaimed land can support bio-oil production; and there is a binding contract for production which meets the requirements of subdivision 7.8.1.a of this rule; and the requirements of paragraph 9.3.f.2 of this rule are met. The applicant shall pay for any review under this section.

7.8.3.c. Once final bond release is authorized, the permittee's responsibility for implementing the bio-oil cropland reclamation plan shall cease.

(k) The legislative rule filed in the state register on the twenty-eighth day of July, two thousand five, authorized under the authority of section four, article twenty-one, chapter twenty-two, of this code, relating to the Department of Environmental Protection (coalbed methane wells, 35 CSR 3), is authorized.

(l) The legislative rule filed in the state register on the nineteenth day of July, two thousand five, authorized under the authority of section five, article fifteen, chapter twenty-two, of this code, relating to the Department of Environmental Protection (solid waste management, 33 CSR 1), is authorized.

(m) The legislative rule filed in the state register on the twenty-eighth day of July, two thousand five, authorized under the authority of section six, article eighteen, chapter twenty-two, of this code, relating to the Department of Environmental Protection (hazardous waste management, 33 CSR 20), is authorized.

(n) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section seven-b, article eleven, chapter twenty-two, of this code, relating to the Department of Environmental Protection (requirements governing water quality standards, 47 CSR 2), is authorized.

(o) The legislative rule filed in the state register on the twenty-sixth day of October, two thousand five, authorized under the authority of section nine, article twenty-eight, chapter twenty-two, of this code, relating to the Department of Environmental Protection (Community Infrastructure Investment Program, 47 CSR 61), is authorized.

(p) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article five, chapter twenty-two, of this code, modified by the Department of Environmental Protection to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-first day of November, two thousand five, relating to the Department of Environmental Protection (to prevent and control air pollution from hazardous waste treatment, storage or disposal facilities, 45 CSR 25), is authorized.

(q) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand five, authorized under the authority of section four, article twenty-five, chapter twenty-two, of this code, modified by the Department of Environmental Protection to meet the objections of the legislative rule-making review committee and refiled in the state register on the eighteenth day of January, two thousand six, relating to the

Department of Environmental Protection (Environmental Excellence Program, 60 CSR 8), is authorized.

**§64-3-2. Oil and Gas Conservation Commission.**

The legislative rule filed in the state register on the twenty-eighth day of July, two thousand five, authorized under the authority of section five, article nine, chapter twenty-two- c, of this code, relating to the Department of Environmental Protection (rules of the Commission, 39 CSR 1), is authorized.

**§64-3-3. Directing further study of 45CSR37.**

(a) The Legislature declares that mercury is highly toxic, persistent and bioaccumulates in the food chain and is transported through the atmosphere and deposits on land and water bodies, and according to the Environmental Protection Agency, other serious human health risks, known and unknown, may result from human exposure of mercury in any amount. Emissions from electric utility coal fired steam generating units and other industrial activities cause significant discharges of mercury in West Virginia, therefore, it is appropriate to closely monitor these activities and study this pollutant.

(b) The Commissioner of the Bureau for Public Health, pursuant to and consistent with section six, article one, chapter sixteen of this code, is directed to participate with the Department of Environmental Protection to conduct an assessment on the actual and potential human health pathways and risks from mercury consumption and make appropriate recommendations to the Department of Environmental Protection.

(c) Pursuant to and consistent with section three-a, article one, chapter twenty-two of this code, The Division of Air Quality and the Department of Environmental Protection are directed to further study 45CSR37 [Mercury Budget Trading Program to Reduce Mercury Emissions] to evaluate scientific evidence, considering specific environmental characteristics of West Virginia, hold public hearings and accept and review appropriate evidence regarding mercury exposure, including recommendations from the Bureau for Public Health. The Department of Environmental Protection shall also conduct an assessment which is also to include an evaluation of the available mercury control technologies for coal-fired steam generating units and other industrial activities that emit mercury, the availability and cost of mercury measurements technology and an analysis of feasibility of implementation of these technologies. The Division of Air Quality shall also consider and address any Bureau for Public Health recommendations considering health risks of West Virginians, and enter a finding as to whether the citizens of West Virginia or regions of West Virginia are exposed to a potential health risk because of mercury contamination, and if so, to propose for legislative promulgation prior to the first day of January, two thousand seven, revisions to 45 CSR 37 and any other appropriate rulemaking to effectuate its findings. The division may also recommend legislation that may be necessary to protect human health and the environment consistent with the division's findings.

**§64-3-4. Directing further study of 35CSR3.**

(a) Department of Environmental Protection's Office of Oil and Gas's Legislative Rule 35CSR3, [Coalbed Methane Wells] authorized pursuant to section one of this article, addresses the new technology of horizontal drilling of coalbed methane, the process of drilling along coal seams to increase production of a single coalbed methane well. However, the Legislature finds, because of the newness of the technology and drilling methods, further review and study is required to consider and address any potential

adverse environmental impacts from coalbed methane wells. The Office of Oil and Gas is directed to conduct a study of this new process as follows:

- (1) Conduct an analysis of literature and seek input from experts in hydrology, geology and engineering, to develop a thorough understanding of coalbed methane drilling, how the drilling is physically done, the type of equipment utilized, fluids used or encountered, and pressures induced or encountered in the drilling process;
  - (2) Review the regulatory scheme of other states in the Appalachian basin to determine if innovative regulatory approaches would be instructive and should be incorporated into West Virginia's regulatory scheme;
  - (3) Review the potential effect of drilling coalbed methane wells in areas where abandoned or active gas or oil wells are located; and
  - (4) Assess whether special requirements should be adopted providing protections for groundwater and water wells, to prevent contamination and other adverse impacts.
- (b) The Office of Oil and Gas shall call upon other divisions of the Department of Environmental Protection as needed to assist in this review, and report to the Legislature by the first of January, two thousand seven, and propose further legislative rule amendments to the rule as are necessary and appropriate.