WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #3

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2006 MAY -1 P 4:25

WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: West Virginia Div of Homeland Security and Emergency Mgmt TITLE NUMBER: 170

CITE AUTHORITY: §15-5B-5

AMENDMENT TO AN EXISTING RULE: YES x NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Mine and Industrial Accident Rapid Response System

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ____

TITLE OF RULE BEING PROPOSED: ____

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.

James J. Beane Director

Authorized Signature

Summary of Changes
May 1, 2006

2.1.b - Emergency Operations Center and is the official and primary state facility for dealing with mine and industrial accidents *has been substituted for* the facility, communications equipment, personnel and procedures utilized to perform the reporting and initial notification functions of the
Deleted: Rapid Response System

2.1.c – "MIAARS is defined as the Mine and Industrial Accident Response System. (Included per comment from IOGA.) Also, the word serious has been deleted and the sentence completed with "requires a response that exceeds the capabilities of the covered facility or responding agency".

2.1.d – 'Covered facilities' means all underground mining operations, surface mining operations, *or mining related operations*, regardless of the source of the hazard.
(Removed due to comments of the WV Manufacturers Association and to be reviewed during the study being initiated for this summer.)

2.1.e – 'Accident' is defined in W. Va. Code §22A-2-66 to include to following:
Deleted: and industrial

2.1.e.13 – Removed 13 pursuant to comments from WVMA. *Deleted* 'Similar events in industrial operations other than mining operations.

3.1 – Changed the word *cause* to *establish* per comment from IOGA. To clarify definition as indicated by IOGA *covered incident* was deleted and replaced with *accident or emergency.*

3.6 – Was required in the emergency rule and no longer required as per comments of IOGA and DHSEM.
Deleted: The reporting telephone line and its associated numbers are to be obtained and published by the Director not later than March 1, 2006. These telephone numbers shall be distributed to all local jurisdiction emergency management personnel, local jurisdiction 911 centers, and industrial operations. The Director shall also cause these numbers to be published to the general public. The Director shall also provide these telephone numbers to the Office of

Miners' Health, Safety and Training for distribution to all mine operatiors and state mine inspector staff.

4.1 – The word *accidents* was correctly used and the word *emergencies* was added. The word *incidents* was deleted. Also *deleted because number has been established and published*: current agency telephone number until such time as a statewide toll-free number is established and published.

4.3 – The words *approved the request* was *deleted.* Also *deleted:* At no time will recordings be released to any agency not involved in an active investigation until after notification of next of kin in the event of death or injuries which may result in death. (This was revised pursuant to conversations with the WV Press Associations.)

5.1 – *Deleted:* Requests for information pursuant to the Freedom Of Information Act, W. Va. Code §29B-a et seq., shall be held in abeyance until appropriate notification of next of kin of any deceased or victims that are grievously injured.

5.1.a – *Deleted:* Approximate dates and times of incidents on which information records are requested.

5.1.c – *Deleted:* The intended use of any information provided. (Per WV Press Association comments).
Deleted: and organization

6.2 – Per WV Press Association and included in 3.4 above, *Deleted:* All information received and recorded by Center personnel will be held confidential, except as otherwise provided. Information regarding the identity and physical condition of potential deceased victims of mining or industrial incidents or grievously inured victims and their immediate families shall be held in strictest confidence and shall not be released without the expressed consent of the next of kin or an individual with appropriate power of attorney.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 170, Series 1 - Mine and Industrial Accident Rapid Response System

Type of Rule: [X] Legislative [ ] Interpretive [ ] Procedural

Agency: West Virginia Division of Homeland Security and Emergency Management

Address: 1900 Kanawha Boulevard, East
Building 1, Room EB-80
Charleston, WV 25305

Phone Number: (304) 558-5380 Email: jgianato@wvdmaps.gov

Fiscal Note Summary

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

These proposed rules will require a minimum of eight full-time equivalent positions in order to provide full, around the clock operations and the acquisition of a toll-free reporting line service, recording equipment and other office equipment over and above the agency's current organization. These new positions and additional equipment will result in a first year additional cost of approximately $412,476.80 for the remainder of the current fiscal year. The net increase of $28,738.40 reflects the increase in converting the personnel costs to a full fiscal years less a reduction in equipment costs to those of maintenance and continuing services versus first year acquisitions. The resulting full-year costs are estimated at $441,215.20.

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	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	412,476.80	28,738.40	441,215.20
Personal Services	287,476.80	143,738.40	431,215.20
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	125,000.00	115,000.00	10,000.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: 170, Series 1 - Mine and Industrial Accident Rapid Response System

3. Explanation of above estimates (including long-range effect):
Please include any increase or decrease in fees in your estimated total revenues.

The current year estimates above represent the initial start up costs, including additional personnel and the purchase of equipment needed to outfit the call center for the Mine and Industrial Accident Rapid Response System, through the end of the current fiscal year. The net increase shown above represents the extension of personnel costs to a full year, less a reduction in equipment costs from initial acquisition to routine maintenance and supplies for the equipment. The total costs on an annual basis for the call center are shown in the far right column. This program and the proposed emergency rules do not generate revenue to offset these costs.

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.

The emergency rules, as submitted, do not appear to have any other fiscal impacts. However, there may be adjustments required subsequent to the study of other reporting systems currently operated by other state agencies required under Senate Bill No. 247, as passed and enrolled January 2006. There may be certain other statewide reporting processes combined with or absorbed into the Mine and Industrial Accident Rapid Response System. The results of the study required by the referrenced legislation are to be reported in November of this year. The impacts of those adjustments would accompany appropriate amendments to these emergency rules and/or legislative rules to follow.

Date: 1-Feb 06

Signature of Agency Head or Authorized Representative

Philip A. Reale
Attorney at Law

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MAR 30 2006

March 29, 2006

Mr. James J. Gianato, Director
WV Div. of Homeland Security &
Emergency Mgmt.
1900 Kanawha Blvd., East
Bldg. 1, Room EB80
Charleston, WV 25305-0360

RE: Official Comments of West Virginia Press Association, Title 170, Series 1

Dear Mr.Gianato:

In representation of the West Virginia Press Association, I herewith transmit the official comments of such body in response to the Emergency Rule for Mine and Industrial Accident Rapid Response System set forth in Series 1 of Title 170.

Should you have any questions or comments, please feel free to direct them to me at the above physical or email address.

In thanking you for you time and attention hereto, I am

Very truly yours,

Philip A. Reale

PAR:khl
Enc.

Ccs: Mr. Ed Given
Ms. Gloria Flowers

OFFICIAL COMMENTS

OF

WEST VIRGINIA PRESS ASSOCIATION

IN RESPONSE TO:

EMERGENCY RULE
FOR
MINE AND INDUSTRIAL ACCIDENT RAPID RESPONSE SYSTEM

Title 170, Series 1

March 29, 2006

Now comes the West Virginia Press Association and for response to Emergency Rule for Mine Industrial Accident and Rapid Response System, being Title 170, Series 1, filed with the Office of the West Virginia Secretary of State on February 1, 2006, and respectfully represents and comments as follows:

The West Virginia Press Association is a trade association, the membership of which consists of approximately 85 newspapers situate throughout the entire State of West Virginia. The association is governed by a board of 14 persons affiliated with member. The West Virginia Press Association represents the collective voice of the member newspapers and their employees.

The subject rule has been submitted by the West Virginia Division of Homeland Security and Emergency Management in furtherance of the implementation of Enrolled Senate Bill 247, an act of the 2006 Regular Session of the West Virginia Legislature that passed on January 23, 2006, duly signed by the Governor of West Virginia and effective from passage.

Within said act, there is a specific legislative finding *"that the health and safety of persons working in and around the mining industry and other industries is of paramount concern to the people of West Virginia and that deaths and serious injuries resulting from dangerous working conditions cause grief and suffering to workers and their families."* Chapter 15, Article 5B, Section 1 of the Code of West Virginia as established by said Enrolled Senate Bill 547.

The West Virginia Press Association is in complete agreement with such finding. The people of West Virginia and others situate beyond the borders of the State of West Virginia have a genuine concern for the health and safety of persons working in and around the mining industry in West Virginia and other jurisdictions as well. Without citing statistics or proving the obvious, this very fact was established by the extensive print, radio and television media coverage of the coal mine accident at Sago in Upshur County, West Virginia, the drama of which was captured in early January 2006 and which, undoubtedly, became the motivation for enactment of Enrolled

Senate Bill 247. Public desire to know of the facts and circumstances of this accident was the driving force by media outlets of all forms to extensively cover the story. The most efficient and effective means of informing citizens having a genuine concern about mining and industrial accidents is through the publication and distribution of facts by the media and particularly newspapers.

Enrolled Senate Bill 247 and the Emergency Rule for which these comments are offered provide a structured means by which accidents of the nature of the Sago Mine accident are to be reported to the Division of Homeland Security and Emergency Management. This is for the purpose of facilitating a rapid response to the incident for which a report is made. That is and should always be the highest purpose and priority of the legislation and accompanying rule. However, the reporting structure provided in Title 170, Series 1, also represents a key component in the flow of information regarding highly newsworthy events that is of *"paramount concern to the people of West Virginia."* Further, it is the people of West Virginia that have such concern that rely on members of the West Virginia Press Association to accurately report information about incidents such as the Sago Mine accident.

Regrettably, some provisions of Title 170, Series 1, have the impact of impeding the ability of the state's newspapers to timely obtain and report highly newsworthy information about mine and industrial accidents and the response of appropriate authorities in relationship thereto. Some provisions also appear to conflict with West Virginia's Freedom of Information Act.

The express terms of Section 4.3 of Series 1 have a retardant effect on the ability of a newspaper to timely obtain accurate information that is not otherwise precluded or exempt from disclosure under Section 4, Article 1, of Chapter 29B of the Code of West Virginia as amended. Said Section 4 of Article 1 is that part of the West Virginia Freedom of Information Act that specifically exempts certain types of information from disclosure under the act's general provisions.

Additionally, Section 5 of Series 1 (the rule) presents additional intrusions on the established right to obtain non-exempt (from FOIA) public information routinely available to newspapers and the media seeking to cover important news stories that the public wants to know about and has a right to know about. Section 5.2 (a) for example requires requests for information to contain the *"Exact dates and times of information records requested,"* when in all likelihood the ability to know the exact dates and times of information could not be known. Without the ability of a newspaper reporter to first investigate by examining records maintained of accidents reported to the Center defined in the rule and established as the facility to receive reports and initial notification of accidents as part of the Mine and Industrial Accident Rapid Response System, there is no way that a reporter could make a request for information with the specificity of information that is required just to make the request. Without previously inspecting the information that the rule seeks to protect from disclosure, there is no way that a news reporter or other person can make a request for information that meets the precedent

requirement of relating the request to the *"Exact dates and times of information records requested."*

Moreover, Section 6.2 transfers to private parties the decisional authority over whether public information shall be released. That section requires that no information regarding a deceased or grievously injured victim and their immediate families be released without the prior written consent of the next of kin or an individual with an appropriate power of attorney. These provisions substantially obstruct the ability of a newspaper or any media outlet to timely report to the public the condition of persons for which the public has much concern. The ability to locate next of kin and secure written consent is obviously time consuming and, in some cases where next of kin may reside in other states or foreign jurisdictions, wholly impractical. Moreover, it is equally highly unlikely that there would be those with a power of attorney for these purposes in most cases. Accordingly, reporters would have to rely on unofficial sources, perhaps uninformed sources to timely report the news. This is not unlike what happened in the reporting of the Sago Mine incident when credible persons without official knowledge of the situation related that there were several survivors to the accident as opposed to merely one. To the extent that there is official information collected in a central facility with some measure of reliability, it would seem to do far more public good to be able to report accurate information rather than information that must be disclaimed.

Universally, newspapers respect the non-disclosure of accident victims until next of kin have been notified. However, the additional requirements of obtaining written consent from next of kin – which may involve significant investigation and a multitude of logistical dynamics before reporting otherwise public information – is an unwarranted intrusion into the public's right to know and the media's right to access public information. Carried to its ultimate end, the policy established by the rule may even preclude the timely publication of obituaries and funeral notices of person who die in mining or industrial accidents.

The attempt to secure the confidentiality of mine and industrial accident deaths and injuries in the manner of the regulation does not justify a reclassification of public information to non-public information or to cause a de facto exemption from the provisions of the Freedom of Information Act of information that is not exempt from the act. The practical effect of the relevant provisions of the rule is to transform an otherwise public record into a private record for the purpose of the Freedom of Information Act. See Daily Gazette Co. v. Withrow, 177 W. Va. 350 S.E.2d 738 (1986).

There is no reference to West Virginia's Freedom of Information Act in the language of Enrolled Senate Bill 247. Had the West Virginia Legislature intended for information reported under the provisions of its act to be exempt from the provisions of the act, or the release of such information to be restrained in any way, it would have said so through the express language of the bill. However, it did not and to the extent it did not, exemptions from the provisions of the act – whether directly or indirectly – cannot be achieved through the implementation of the

within rule. The language of Title 170, Series 1, as it relates to restrictions on the release of public information, exceeds the provisions of the underlying statutory law created by Enrolled Senate Bill 247 and therefore must be set aside or revised in that particular.

The basic premise of a freedom of information act is to break down the wall of government secrecy and promote accountability. The purpose has often been stated at the federal level as a means by which "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Dept. of Air Force v. Rose, 425 U. S. 352, 361, (1976). The Freedom of Information Act is crucial in promoting an informed citizenry – a virtue vital to a functioning democracy and to preventing government corruption. NLRB v. Robbins Tire & Rubber Co. 437 U. S. 214, 242, (1978).

By attempting to establish the confidentiality of public information or, in the alternative, imposing unrealistic restrictions to the access of such information, Title 170, Series 1, adversely impacts the public's right to know – the same public that the legislature found to have such deep concern about mining and industrial accidents. In a democratic society, the need for the public to be informed is that which is of the highest priority and should not be diminished except in those limited situations for which exemptions are provided in the West Virginia Freedom of Information Act.

The West Virginia Freedom of Information Act is the mechanism that affords West Virginians with a *"paramount concern"* regarding *"deaths and serious injuries resulting from dangerous working conditions,"* (legislative finding in Enrolled Senate Bill 247) the ability to be accurately informed when mining and industrial accidents occur having an impact on the lives of members of the community. Restraint of access to public information in these circumstances significantly impedes the effective dissemination of accurate information to those concerned West Virginians who deserve to know what is going on in their community and how its government is acting in response to a given situation.

The entire purpose of the Freedom of Information Act is to allow the public the right to go to the government and request information and have it provided as the law requires. This furthers the public understanding of how its government functions in response to such occurrences as mining and industrial accidents. Series 170, Title 1, represents significant obstructions to achievement of the good and noble purposes of the West Virginia Freedom of Information Act.

On its ultimate journey, the Freedom of Information Act takes us down a path of promotion of honest and open government, assuring us of the existence of an informed citizenry in order to hold the governors accountable to the governed. Grand Cent P'Ship, Inc. v. Cuomo, 166 F.3d 473, (2nd Cir. 1999).

The West Virginia Press Association and its member newspapers comment that the indicated provisions of Title 170, Series 1, represent a significant intrusion into the public's ability to be informed of matters of importance to them and over which their government is functioning; have no statutory basis from which to evolve as written; work to promote misinformation to the public; indirectly exempt from the public domain and the West Virginia Freedom of Information Act, information that is clearly public and discoverable under the provisions of said act; and, are inconsistent with the objective of honest and open dealings by government. Accordingly, it is the further comment of the West Virginia Press Association that such provisions of Title 170, Series 1, that are inconsistent with the West Virginia Freedom of Information Act be eliminated from the final rule to be promulgated. To that end, the West Virginia Press Association commits to working cooperatively with the West Virginia Division of Homeland Security and Emergency Management to modify the language of the rule to the extent that it is in the public interest to preserve the ability of newspapers to timely and accurately report to a concerned citizenry news of the nature generated by a mining or industrial accident.

Respectfully submitted in behalf of the West Virginia Press Association by:

Philip A. Reale, Counsel
State Bar I.D. No. 3029
1206 Virginia Street East
Charleston, WV 25311

Ph. No.: (304) 342-1891

Jimmy Gianato

From: wvonga [wvonga@charter.net]
Sent: Thursday, March 30, 2006 11:01 AM
To: Jimmy Gianato
Subject: FW: SB247

Jimmy
This is the original e-mail I sent last week.

Corky

Jimmy,
On behalf of my membership, WV Oil and Natural Gas Association, we'd like to have the opportunity to discuss SB247 and the implications for our industry. Our first look was that compliance was targeted for the coal industry but as the bill passed in its final form, O&G and others may have been included. We have several concerns; some examples include definitions such as industrial applications, life threatening/human life is affected endangered and notification within 15 minutes etc.
As an example, DEP requires us if we have a spill to contain; then notify. Much of what we do is in remote areas where fulfilling notification requirements, to comply w/SB247 within the timeframes suggested is nearly impossible. Additionally, we are required by other Federal and State regulatory agencies to take certain first step actions that will keep us from complying with SB247.

Please let me know if we can meet and discuss our participation in any implementation meetings.

Corky DeMarco
343-1609

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March 31, 2006

HAND DELIVERY

Mr. James J. Giamato, Director
West Virginia Division of Homeland Security
Security and Emergency Management
1900 Kanawha Boulevard, East
Building 1, Room EE-80
Charleston, WV 25305 -- 0360

Enclosed please find the comments of the West Virginia Manufacturers Association and the West Virginia Oil and Natural Gas Association on Emergency Rule on Mine and Industrial Accident Rapid Response System, Title 170, Series 1. Please contact me if you have any questions.

Sincerely,

David L. Yaussy

DLY:shb

Enclosure

{R0126726.1}

COMMENTS OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION AND THE WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION ON EMERGENCY RULE ON MINE AND INDUSTURIAL ACCIDENT RAPID RESPONSE SYSTEM, TITLE 170, SERIES 1

In response to Senate Bill No. 247 ("the Act"), passed by the West Virginia Legislature on January 23, 2006, the West Virginia Division of Homeland Security and Emergency Management ("WV DHS") issued an emergency rule, Mine and Industrial Accident Rapid Response System, 170 CSR 1, *et seq.* ("the Rule") on February 1, 2006. The West Virginia Manufacturers Association ("WVMA") and the West Virginia Oil and Natural Gas Association ("WVONGA") are made up of numerous manufacturing and oil and gas industry members throughout the state. As such, these associations represent a large portion of industry in West Virginia which could be affected by the emergency rule.

WVMA and WVONGA applaud the agency's efforts in implementing an effective rapid response system for mining accidents, due to the recent mining tragedies. We support reasonable notification requirements that facilitate a prompt response for the state's workers that are involved in industrial accidents. However, we believe that the rule is premature as it relates to non-mining industry and that it exceeds the scope of Senate Bill 247.

I. General Comments.

Senate Bill 247 creates the Mining and Industrial Accident Rapid Response System as a means to provide quick and efficient emergency services in the event of an accident. The Act requires the implementation of a twenty-four hour, seven day a week, emergency operations center to be readily accessible at a statewide telephone number to deal with mining and industrial accidents. Further, the Act specifically addresses

emergency responses for mining accidents. The clear intent of the Act is to address mining accidents and to provide a means for quick and efficient emergency responses through the response system.[1]

In contrast to the detailed reporting obligations that apply to mines, the Act mandates a study to determine the feasibility of providing emergency coverage to "other industrial, manufacturing, chemical or other emergencies through the Mine Industrial Accident Rapid Response System."[2] The study must be submitted by November 2006, setting forth recommendations for legislation consistent with the purposes of the Act. The Legislature has not given WV DHS the authority to regulate industry prior to conducting that study, and the WV DHS has exceeded the scope of its authority in including industry in the emergency rule prior to conducting the required study. As such, WVONGA and WVMA urge the agency to remove regulation of the non-mining industry from the rule.

It is reasonable to require a study of emergency reporting for industry because it is such a broad category, and it is important to consider all the ramifications of a reporting requirement. Mining is a specific type of activity, with well-defined practices and regulations, and as such it is conducive to the establishment of specific reporting requirements. "Industry" is a much broader concept, and potentially encompasses a host of unrelated activities. What is a reasonable reporting obligation for one industrial activity may not be appropriate for another. For example, depending on what constitutes

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[1] Senate Bill 247 makes clear that the reporting obligations apply only to mining operations. An emergency contact list is only required for mines (*see W. Va. Code* 15-5B-3), and most of the remaining sections of the Act amend Chapter 22A, Article 2 of the *West Virginia Code*, dealing with underground mines. In addition, only accidents in and around a mine are referenced in the revisions to the Public Service Commission's local emergency telephone system, *W. Va. Code* 24-6-14.

[2] For purposes of clarity and ease of reference, we refer to "other industrial, manufacturing or chemical" activities as simply "industry" or "the non-mining industry."

industry, some activities take place in areas where there are no phones or cell phone reception that would allow a report of an accident within 15 minutes.

Furthermore, there may be opportunities for coordinating or consolidating reporting requirements for industry. For example, many industrial operations are already required to report certain types of emergencies under various federal and state statutes, regulations and permits, including the Occupational Safety and Health Administration ("OSHA"), the National Response Center ("NRC"), the Clean Water Act ("CWA"), the Clean Air Act ("CAA"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), Resource Conservation and Recovery Act ("RCRA"), the state's Safety and Welfare of Employees Act, the West Virginia Occupational and Safety and Health Act, the West Virginia Air Pollution Control Act, the West Virginia Water Pollution Control Act, the West Virginia Hazardous Waste Management Act, and the West Virginia Underground Storage Tank Act. Therefore, it might be unnecessary to require additional reporting of emergencies for those industrial activities that are already highly regulated.

II. Definitions.

The difficulty in applying the Rule to all non-mining industry is apparent from a review of the definitions. Perhaps most important, there is no definition of an industrial operation that is subject to the Rule. Are there Standard Industrial Classification Codes that apply? Does the term include construction operations, or construction operations at an industrial plant? Are oil and gas drilling or transmission covered? One of the important responsibilities of the study group will be to distinguish between where the

reporting of emergencies will be required, and where it might not be not feasible, or might be redundant.

This definition of a qualifying facility is crucial because it affects the rest of the Rule. For example, Section 2.1.c of the Rule defines "covered facilities" as "all underground operations, surface mining operations, and industrial operations, regardless of the source of the hazard." Without knowing what an industrial operation is, one cannot determine whether an activity is covered and required to report an emergency. Furthermore, the phrase "regardless of the source of the hazard" lends some uncertainty to the reporting obligation. Is a construction superintendent who is operating at an industrial facility required to report an emergency at the facility even when it does not affect his or her employees? These are important matters, because failure to report an accident may have civil and administrative consequences.

In addition, the Rule misrepresents the proper definition of the term "accident." The only definition of that term in the Act is found in the amendment to *W.Va. Code* §22A-2-66 in the Miners' Health, Safety and Training Act, and the Rule specifically refers to that section as the basis for its definition of "accident." However, the Rule goes on to add a thirteenth category, "similar events in industrial operations other than mining operations." 170 CSR 1-2.1.a.13. That phrase is not found in either the Act or the Miner's Health, Safety and Training Act. This statement is extremely vague and does not provide any guidance as to what types of incidents are considered "accidents" in the industrial sector. It is a perfect example of the type of issue that should be resolved by the study commission that was formed by the Legislature.

III. Notification of Emergency Incidents by Covered Facilities.

Under Section 4 of rule, WV DHS requires that "all covered facilities are to report incidents to the Division of Homeland Security and Emergency Management." The term "incident" is not defined in the rule. However, the rule does define the term "accident" as discussed above. Therefore, this provision is unclear and the rule should be revised to define "incident" or to require reporting of "accidents" under this provision.

IV. Freedom of Information Act Provisions.

The Rule specifies certain restrictions on the availability of information regarding accidents. Some of these may be necessary and appropriate, such as withholding information about accidents until family members have been notified. However, these and other limitations on responses to requests for information found in Sections 4 and 5 of the Rule may conflict with the requirements of the Freedom of Information Act (FOIA), *W. Va. Code* 29B -1-1 *et seq.* The Act does not authorize the WV DHS to revise the FOIA, and without such authorization the WV DHS must find an existing exemption in the FOIA that would justify withholding information from the public.

V. Conclusion.

The WVMA and WVONGA appreciate the opportunity to offer these comments. We would note that, during the negotiations over the Act, with its focus on mining accidents, other industries avoided interfering with negotiations because it was clear that all non-mining industrial activities would be the subject of a study before reporting was required. By adding other industries to this Rule, the WV DHS is imposing a reporting obligation on activities that have not had an opportunity to present their own circumstances to the Legislature, as it intended. We urge the WV DHS to conduct the

study as instructed by the Legislature, and drop non-mining industries from coverage under this Rule until such time as the Legislature has had time to consider the conclusions of that study.

Karen S. Price DLY

Karen S. Price
President
West Virginia Manufacturers Association
2001 Quarrier Street
Charleston, WV 25311

Nicholas DeMarco DLY

Nicholas DeMarco
Executive Director
West Virginia Oil & Natural Gas Association
P. O. Box 3231
Charleston, WV 25332-3231

IOGA WEST VIRGINIA

Filed MAR 31 2006

March 31, 2006

Mr. James J. Gianato, Director
West Virginia Division of Homeland
Security and Emergency Management
1900 Kanawha Boulevard, East
Building 1, Room EB-80
Charleston, WV 25305-0360

Re: Proposed Rule 170 CSR 1 establishing the Mine and Industrial Accident Rapid Response System

Dear Mr. Gianato:

The West Virginia Division of Homeland Security and Emergency Management ("WVDHSEM") is seeking public comment on the proposed rules for the Mine and Industrial Accident Rapid Response System ("MIARRS"). These comments are offered on behalf of the Independent Oil and Gas Association of West Virginia, Inc. ("IOGA") and its members who are involved in the exploration, production, and development of oil and gas resources in this state. IOGA has a long-standing commitment to safety and it is in this spirit that these comments are offered.

This rule has been proposed as a result of the passage of Senate Bill 247 ("SB 247") during the 2006 Regular Session of the Legislature. SB 247 established the MIARRS and charged the WVDHSEM with proposing rules to implement and administer this system. IOGA is concerned, however, that the rule as proposed exceeds the scope of the mandate contained in SB 247.

In SB 247, now codified at W.Va. Code § 15-5B-4, the Director of the WVDHSEM is instructed to undertake a study of the feasibility of providing emergency coverage to the other "industrial, manufacturing, chemical, or other emergencies" through the MIARRS. The WVDHSEM is to report the findings of the study before November 1, 2006. The proposed rule, however, appears to include industrial accidents before the feasibility study has been completed. This appears to be in clear contradiction of express legislative intent. As such, IOGA believes that all references to industrial, manufacturing, chemical, or other emergencies should be removed from the proposed rule until the feasibility study has been completed and the Governor and the Legislature have had an opportunity to review it and take appropriate legislative action.

INDEPENDENT OIL & GAS ASSOCIATION OF WEST VIRGINIA
405 Capitol Street, Suite 507 Charleston, WV 25301 Phone (304) 344-9867 Fax (304) 344-5836

Mining facilities should be the only facilities that should be covered by the rule until the feasibility study and accompanying recommendations have been reviewed.

IOGA also believes that the rule is generally confusing and inconsistent. It should be revised to eliminate the possibility for confusion among those working at the facilities and the staff of at the MIARRS Center. The unintended consequences that are possible due to this proposed version of the rule are also of great concern to IOGA. Many important definitions are entirely too vague when applied to non-mining facilities. Until these definitions are clarified, the rule cannot fairly be applied to any non-mining facility.

The following points identify some of IOGA's specific areas of concern with this rule:

- "MIARRS" should be included in the definitions and not simply the introductory comment to the rule. Explicit clarification of what the system is and how it will operate will be of great benefit to all concerned.
- §170-1-2.1.b. – Center should be defined as it is defined in W.Va. Code § 15-5B-2 to be the Mine and Industrial Accident Emergency Operations Center and to be the official and primary state facility for dealing with mine and industrial accidents. The current definition is confusing.
- §170-1-2.1.c. – The definition for covered facility is too broad in light of the Legislature's mandate that the WVDHSEM undertake a study regarding the feasibility of extending this system to industrial facilities. In addition, "industrial operations" are nowhere defined in this rule so facilities will not know if they have a duty to report to the MIARRS.
- §170-1-2.1.d. – The words after 'Accident' should be deleted and replaced with "means:" since this is a definition.
- §170-1-2.1.d.13. – IOGA renews its contention that this subsection should be deleted because it exceeds the intended scope of this rule. If the subsection remains, the WVDHSEM should revise this subsection to include a more thorough definition of industrial accidents. "Similar events" in industrial operations is too vague to offer any concrete guidance to industrial facilities or the WVDHSEM. The other definitions are taken from W.Va. Code § 22A-2-66(a), a statute that applies only to coal mining accidents and these types of accidents may not be applicable to other contexts.
- §170-1-2.1.e. – The word "includes" should be deleted and replaced with "means" since this is a definition.
- §170-1-2.1.g. – The definition of "Release Authority" is unclear. The Release Authority appears to be the Director of the WVDHSEM or his or her designee, but it also applies to the release of information. The term cannot be both a person and a power held by that person.
- §170-1-2.2. – This subsection should be deleted in its entirety. Terms not defined in this section cannot be given the meaning ascribed to them in other applicable regulations,

codes, or rules because these definitions may well be conflicting and there is no guidance on what definition should be used. Any term that could be controversial should be defined in this rule for both ease of reference and to avoid any question of meaning.

- §170-1-3.1. – The word "cause" should be deleted and replaced with the word "establish" so that it is clear that the Director is responsible for establishing a standard operating guide for the Center. In addition, this guide is supposed to detail the initial and subsequent steps to be taken in response to a "covered incident." The term covered incident is not defined and should be deleted and replaced by a term or description found in the definition section of this rule. Finally, this subsection is unclear as to whether the operating procedures are for the Center alone or also for facilities that have to report accidents to the system.
- §170-1-3.2. – This subsection is overbroad and unnecessary in that SB 247 gives the Director sufficient guidance on how to staff and equip the Center. It should be deleted in its entirety.
- §170-1-3.5. – The word "cause" should be replaced with either "establish" or "develop."
- §170-1-3.6. – The deadline for establishing the reporting telephone line as of March 1, 2006 has already passed. As it is superfluous information, this provision should be deleted.
- §170-1-4.1. – This subsection refers to "covered facilities" and "incidents." Neither of these terms has been defined in this proposed rule. Facilities cannot know if they are covered simply by looking at this rule. Even if they suspect that they may be covered and have a duty to report to the MIARRS, they have no guidance on what sort of incidents need to be reported under this rule. These are both flaws that must be corrected so that facilities can comply with the requirements of the rule.
- §170-1-4.3. – This subsection cannot create an exception or exemption to the Freedom of Information Act as it purports to do. No rule can abrogate the Freedom of Information Act without specific statutory support. SB 247 does not create any exemptions to the Freedom of Information Act.
- §170-1-4.4. – Unless the recording of a call can be considered "records of law-enforcement agencies" as defined by 29B-1-4, then this section is flawed for the same reason that §170-1-4.3 is: it cannot create an exception or exemption to the Freedom of Information Act as it purports to do. No rule can abrogate the Freedom of Information Act without specific statutory support. SB 247 does not create any exemptions to the Freedom of Information Act.
- §170-1-5.1. – This subsection is flawed for the same reasons as stated for §170-1-4.3: it cannot create an exception or exemption to the Freedom of Information Act as it purports to do. W.Va. Code § 29B-1-3(4) mandates that the custodian of these records has five business days, not including legal holidays, to inform the person requesting the information of a place and time where that person can inspect or copy the records, or deny the request and provide justification for that denial. The WVDHSEM cannot grant

itself the power to hold these requests in abeyance by the promulgation of a legislative rule.

- §170-1-5.2. – This subsection attempts to impose additional requirements for submitting Freedom of Information Act requests above and beyond that required in the Freedom of Information Act. The code requires only that the person requesting the information state with "reasonable specificity" the information sought. W.Va. Code § 29B-1-3(4). It is clearly illegal to require that the requests state the "intended use" of the information. The other information required by the rule also violates the "reasonable specificity" standard. As such, this section should be deleted in its entirety.
- §170-1-6.2. – This subsection goes beyond the statutory exemption for information of a personal nature contained in the Freedom of Information Act. W.Va. Code § 29B-1(a)(2). This protection only extends to information that would be an unreasonable invasion of privacy if disclosed to the public.
- §170-1-6.3. – Unless the recording of a call or other information received and recorded by the Center can be considered "records of law-enforcement agencies" as defined by 29B-1-4, then this section is flawed for the same reason that §170-1-4.3 is: it cannot create an exception or exemption to the Freedom of Information Act as it purports to do. No rule can abrogate the Freedom of Information Act without specific statutory support. SB 247 does not create any exemptions to the Freedom of Information Act.

IOGA's concerns with this proposed rule are numerous and wide-ranging. We recognize that the Response System is important for ensuring the safety of miners in this state, but we do not believe that this rule should apply to industrial facilities until the mandated feasibility study has been completed and submitted for review. Furthermore, this rule must comply with the requirements of SB 247 and the Freedom of Information Act and as currently comprised it does neither. This issue is too important to the future of West Virginia to address in a rushed or haphazard manner that may have unintended consequences for facilities and workers.

Thank you for the opportunity to comment on this proposed rule for the Mine and Industrial Accident Rapid Response System.

Very truly yours,

Charlie Burd /ABM

Charlie Burd

Comments of
Arch Coal, Inc.

Submitted to the
West Virginia Division of
Homeland Security & Emergency Management
and
Office of Miners Health Safety & Training
March 31, 2006

In Response to
Emergency Rules Governing
Mine and Industrial Accident
Rapid Response System
Title 170 Series 1

Prepared by
Tony Bumbico

INTRODUCTION

These comments are submitted by Arch Coal, Inc. (Arch). Arch is the second largest coal producer in the United States. Our corporate office is located in St. Louis, Missouri. We have more than 3,500 employees and operate mines in Colorado, Kentucky, Utah, Virginia, West Virginia and Wyoming. Our subsidiary mining companies in West Virginia are Coal-Mac Inc. and the Mingo Logan Coal Company, which operates the Ben Creek and Mountain Laurel Complexes.

These comments are submitted in response to the Emergency Rule filed by the West Virginia Division of Homeland Security and Emergency Management establishing the Mine and Industrial Accident Rapid Response System (Title 170 Series 1).

The intent of this Emergency Rule is to establish a rapid response system for serious mining and industrial accidents. Arch strongly supports the objectives of this Emergency Regulation. We agree with the need to notify emergency response personnel promptly to assist mine operators in dealing with mine emergencies. When incidents occur that threaten the safety of coal miners, a rapid response system is appropriate and essential.

In life threatening situations, or situations requiring a potential rescue and recovery response, it is essential to immediately dispatch emergency resources to the accident scene. While we agree with the intent of this Emergency Rule, we maintain that many of the immediately reportable accidents requiring 15-minute notification do not justify a rapid response. As a result, we recommend the development of a rapid response notification system that requires notification and response proportional to the nature of the incident.

This Emergency Rule requires all incidents that fall within one of the categories listed below to be reported within 15 minutes.

- Death of an individual at a mine.
- An injury to an individual at a mine which has a reasonable potential to cause death.

- The entrapment of an individual.
- The unplanned inundation of a mine by a liquid or gas.
- The unplanned ignition or explosion of gas or dust.
- The unplanned ignition or explosion of a blasting agent or an explosive.
- An unplanned fire in or about a mine not extinguished within five minutes of ignition.
- An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use, or an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage.
- A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour.
- An unstable condition at an impoundment, refuse pile or Culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area, or the failure of an impoundment, refuse pile or Culm bank.
- Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with the use of equipment for more than thirty minutes.
- An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

Clearly, many of the events listed should require a mine operator to notify the appropriate agencies within the proscribed 15 minutes. We contend, however, that each event must be evaluated on its own merits. An appropriate evaluation of the facts, on a case-by-case basis, is necessary to determine whether a true emergency exists. It makes no sense to activate emergency resources for incidents that occur on a routine basis, especially when the health and safety of miners is not at risk.

ACCIDENT REPORTING TRENDS

For years, West Virginia mine safety law has required mine operators to report all events defined as immediately reportable accidents. Information detailing industry reporting trends is available in the West Virginia Office of Miners' Health Safety and Training's (MHST) Annual Report. A review of reportable accidents for the period 2001-2004 (the most current) indicates

that MHST is notified of 400 immediately reportable accidents on average per year.

Approximately 90% of the 400 incidents reported each year do NOT involve an injury to a miner. They involve incidents in two categories:

- Unplanned roof falls at or above the anchorage point, and
- Damage to hoisting equipment which interferes with its use for more than 30 minutes.

Currently, MHST documents the fact that they were notified of incidents that fall into these two categories. An MHST inspector may (or may not) visit the mine site to conduct a follow-up investigation into these minor incidents. They follow-up according to the seriousness of the incident reported. If an inspector does conduct a follow-up inspection related to these types of incidents, it usually occurs a day or two after the incident is reported.

It would be counter productive to the Rapid Response System, and a misuse of resources, to activate mine rescue personnel and local emergency response resources for all immediately reportable accidents. Early notification and rapid response should be in proportion to the seriousness of the incident. (It is also worth noting that many of the remaining 10% of the calls received by MHST during the period 2001-2004 did NOT involve an injury to a coal miner).

In our opinion, immediately reportable accident trends indicate that no benefit will be derived from early notice or rapid response for these types of non-emergency (non-injury) events. The 15-minute notification period required by this Emergency Rule should be reserved for fatalities, serious injuries and incidents with the potential to require a mine rescue and/or recovery response.

RECOMMENDATION

A system that fails to differentiate between serious and non-serious events will generate numerous "false alarms" and eventually lead to complacency. It may also contribute to the unavailability of emergency response resources when a legitimate emergency occurs.

We recommend that the Director revise the Emergency Rule. The revised Rule should distinguish between serious and minor "reportable" accidents. In addition, we recommend that the Director should develop an early notice/rapid response protocol that:

- Defines what constitutes a legitimate emergency and what response is required for each type of event.
- Defines the types of legitimate emergency situations that should be reported within 15 minutes.
- Defines the types of non-emergency (non-injury) incidents that do not require notification within 15 minutes.
- Establishes a clearly defined notification/response protocol that will minimize "false alarms".
- Provides enough flexibility to permit mine operators to investigate each immediately reportable accident and determine whether an emergency exists prior to calling the Rapid Response Hotline.

An emergency notification/response protocol that incorporates these concepts will better serve the health and safety of West Virginia's coal miners. It will minimize "false alarms" and facilitate the deployment of emergency response resources to address "true" emergencies.

We appreciate the opportunity to comment.

Jimmy Gianato

From: Chris R Hamilton [chamilton@wvcoal.com]
Sent: Friday, March 31, 2006 5:03 PM
To: Jimmy Gianato; James.dean@mines.state.wv.us

Jimmy Joe

Hopefully we can sit down sometime in the future and have another conversation about these...thought we should put something on the record!

Thank, Chris

Comments of the West Virginia Coal Association to the Emergency Rules Title 170 Series 1 Mine and Industrial Accident Rapid Response System/ Requiring Immediate Notification of Mining Accidents. March 31, 2006.

The West Virginia Coal Association is a trade association comprised of coal producing companies that account for approximately 75% of the state's coal production. Our membership also includes land companies, equipment manufacturers, mine supply and service companies.

We remain committed to operating the safest mines in the country and the world and offer the following comments to enhance the overall effect of SB 247 and implementing rules.

We appreciate the opportunity to comment on the Emergency rules filed on February 1, 2006 and certified by the Secretary of State.

The emergency rules are designed to implement the specific provisions of SB 247 adopted by the Legislature on January 23, 2006 requiring the immediate notification of mining accidents.

Our recommendations are intended to strengthen these requirements while at the same time, safeguard against unintended consequences, unrealistic performance outcomes or unrealized expectations that may result.

As an initial comment we express concern over the additional layer of bureaucracy in the notification chain. This could potentially lead to confusion and unnecessary delay in the proper notice and communication received and acted on by the WV Office of Miner's Health Safety & Training. Instead of notifying the Office of Miners" Health, Safety & Training directly, the system established in these rules provides for the operator to notify the division of Homeland Security and Emergency management who then notifies the OMHS&T. We question how this added step involving an entity and personnel who may not possess the experience or knowledge of mining and mining terminology could possibly lead to a faster and more appropriate response!

One possible way to alleviate this potential problem would be for the "Rapid Response System" to be physically located in the OMHS&T. This would make perfect sense, particularly, during the near term with mining being the only industrial group subject to these requirements

and to this new "System". This would also place the individual receiving the call at least in the presence of mine safety professionals who would immediately understand the nature and extent of the accident and the appropriate type of response or action.

Another problem with the rule as it is presented is that it does not make any distinction between an accident and an emergency. Many of the items set forth in the rules may technically fall within the definition of an "accident" but do not necessarily connote an "emergency. Unplanned roof falls in a remote area of the mine is the most vivid example of this concern. Hundreds or even thousands of these incidents may occur over a period of time but nay not pose an immediate hazard to miners but yet are required to be reported and will account for a large number of calls into the system that do not constitute an emergency. There are many other examples of incidents that do not warrant immediate notification.

We submit for the record as part of our testimony the "Report of the West Virginia Roundtable on the Challenges and Opportunities for Implementing WV SB 247". The report was prepared by the National Research Center For Coal and Energy at West Virginia University and summarizes a facilitated discussion of these requirements and related concerns.

As in industry, we remain committed to operating the safest mines in the country and world and pledge our full support to the director and Task Force towards the achievement of that goal.

We appreciate the opportunity to comment on these rules

Jimmy Gianato

From: Chris R Hamilton [chamilton@wvcoal.com]
Sent: Friday, March 31, 2006 4:35 PM
To: Jimmy Gianato
Subject: FW: Commments on Emergecy Rules

From: System Administrator
Sent: Friday, March 31, 2006 4:32 PM
To: jjianato@wvdmaps.gov
Subject: Undeliverable:Commments on Emergecy Rules

Your message did not reach some or all of the intended recipients.

Subject: Commments on Emergecy Rules

Sent: 3/31/2006 4:32 PM

The following recipient(s) could not be reached:

jjianato@wvdmaps.gov on 3/31/2006 4:32 PM

The e-mail account does not exist at the organization this message was sent to. Check the e-mail address, or contact the recipient directly to find out the correct address.

<iscexchms01.wv2000.state.wv.us.ad #5.1.1>

Philip A. Reale
Attorney at Law

1206 Virginia Street, E.
Suite 202 • Charleston, WV 25301

Phone: (304) 342-1891
Fax: (304) 342-1893

E-Mail: pareale@wvreale.com

April 14, 2006

Mr. James J. Gianato, Director
WV Div. of Homeland Security &
Emergency Mgmt.
1900 Kanawha Blvd., East
Bldg. 1, Room EB80
Charleston, WV 25305-0360

Re: Further Response of the West Virginia Press Association
Relative to Emergency Rule, Series 1 of Title 170 for Mine
And Industrial Accident Rapid Response System

Dear Mr. Gianato:

This letter provides the response of the West Virginia Press Association invited by your email to me of April 5, 2006. First, please let me again express my appreciation for the opportunity to make further comment to the above referenced legislative rule and say that it is my fervent hope that the comments herein made be found as constructive and helpful in making a more workable policy.

By way of suggestion, I would respectfully recommend that §170-1-4.3 be struck in its entirety and in lieu thereof I will suggest language that will appear below. My reasoning is that the section in question effectively denies the general public, including an injured or deceased miner's family, from getting information about the incident in a timely fashion. More to the point, the requirement that there be a determination of next of kin and that person first notified prior to release of information is troublesome and could prove to be unworkable in today's mobile society. I would think it more appropriate that something less precise than next of kin be the determining standard. Perhaps the term "family member" could be utilized. Determining and then locating the "next of kin" in today's global society could be a difficult and time consuming exercise. Language that I would suggest be used is as follows:

4.3 Voice and data recordings of calls received at the Center containing information about a deceased miner or person, or miner or person sustaining injuries in an industrial accident that may result in death shall not be released to the public, pursuant to the Freedom of Information Act or other authority for request, until the Release Authority has confirmed that a member of the miner's or person's family or next of kin has been notified of the miner's or person's death or injuries which may result in death, but in no event shall such information be withheld for a period of longer than 24 hours

> **following the occurrence of the accident or tragedy befalling the miner or injured person. Documented evidence of the time and date of notification of a family member or next of kin shall be maintained by the Release Authority. Additionally, the Director shall establish a means for securing the voice and data recordings to insure that they remain intact and unaltered at all times. The Director shall establish reasonable fees to recover the costs associated with the production of information pursuant to any Freedom of Information request.**

It should be remembered that the community at large has an immense interest in having an accurate account of mining and industrial accidents from various perspectives including not only what their government is doing in reaction to the situation being reported on by the media, but from that of knowing of and sharing the pain, suffering and other conditions being experienced by those most directly impacted by the circumstances. Further, while most of what would likely be contained on voice and data recordings has likely entered the public domain through the scanning of police, fire and emergency radio communications, a considerate media will most always observe the privacy of family members of deceased or injured parties and not report the names of such persons until it is confirmed that family and/or next of kin have been notified. Given that factor, it makes far more sense for the media to have access to the voice and data recordings in a timely manner (should it be requested) so that the most accurate information can be reported. One of the more distasteful memories of the Sago disaster is the regrettable circumstance in which it was erroneously reported by the national and local media that there were more survivors than there were in actuality. Had there been an established protocol for the accurate dissemination of information, that unfortunate situation may never have occurred.

Section 5.1 should be eliminated. What it attempts to accomplish is covered by §4.3. As written, §5.1 would modify existing code (FOIA) without having an act of the legislature doing so. There is no such provision in the Freedom of Information Act that requires the withholding of public information until the next of kin of victims of accidents are notified.

Section 5.2 would then become §5.1 with modifications. Subparagraph a., as written, contains requirements for requesting information that go beyond the statutory requirements of the Freedom of Information Act. Subparagraph a. should be changed as follows:

> a. **All requests for information must state with reasonable specificity the information sought.** [This mirrors the language of the West Virginia Freedom of Information Act §29B-1-3(4)]

Subparagraph c. should be eliminated as there is no provision in the Freedom of Information Act that requires one making a request of public information to make a statement as to what use they intend to make of the information. To compel someone making a request to do

so would be well beyond the requirements of the Freedom of Information Act. It would constitute a significant and ill-advised intrusion of the public's right to know.

Subparagraph d. should be modified by eliminating the words "and organization." Again, there is no provision in the statute that would require the person making the request for information to disclose what organization they are affiliated with. The current language of subparagraph d. implies that everyone making a request is affiliated with an organization and that, quite obviously, may not be the case. More importantly though, as written, subparagraph d. requires more than the statute. The statute §29B-1-3(1) says: ***Every person has a right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided by section four [§29B-1-4] of this article.*** There is no subsequent provision that would require any information about organizations with which the person requesting the information may or may not be affiliated.

In subparagraph e., it is unreasonable to require that the time of the information be provided. There is no way that a person requesting information could reasonably be expected to specify the time of a phone call or time that data was recorded. At a minimum, this standard should be reduced to a range of date and time. Without inspecting the voice or recorded data, it would be impossible for a requesting party to specify the time it was received by the agency.

Section 6.2 contains similar issues to ones raised above. Section 6 deals with Trade Secrets and Confidential Information which is something expressly dealt with in the Freedom of Information Act. Certainly, trade secrets and information associated with a pending criminal investigation are considered within the category of being exempt from disclosure under the provisions of the Freedom of Information Act. However, §6.2 makes the further reach and includes information regarding the identity and physical condition of those injured in a mining or industrial accident as being confidential and not to be disclosed without ***"the expressed consent of the next of kin or an individual with appropriate power of attorney."*** Again, the underlying statute makes no provision for a private party to be able to consent to the disclosure of public information. Further, it would seem that §4.3 of the rule already deals with this circumstance.

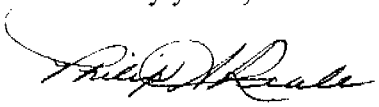
On the other hand, if for the protection of the disclosing agency, it would like to have something on record evidencing the fact that the family of a victim has been notified of the fact of an injury causing accident, nothing precludes the agency from having a family member or next of kin execute a document or form that verifies the fact that they have been so notified. Nevertheless, the fact that no such express (taken to mean written) consent from a next of kin or person with an appropriate power or attorney has been given for the release of public information, is of no legal significance. The agency has no discretion when it comes to releasing public information other than what is provided for in the Freedom of Information Act and no rule – emergency or otherwise – can lawfully modify that policy. It requires an act of the legislature.

By requiring the "express written consent" of a third party, the rule effectively confers authority on a private party to make a determination as to the disclosure of public information.

After some inquiry, it is my personal view that the newspapers of our state have had few problems with the workings of the Freedom of Information Act as it is now constructed – even though in the purest since those that work in the media would like to have unfettered access to all government information. It is also my personal view that the media in West Virginia is extremely courteous in its observation of the needs of families of victims of any accident – mining, industrial, automobile, shooting or otherwise – to be notified of the fact of injury to their loved one. However, to do as Title 170, Series 1 does by going beyond the statutory constraints of the Freedom of Information Act and creating barriers to obtaining public information that is of great interest to the community at large, including government leaders, such as legislators and agency officials that may not be on the front line of response to a particular circumstance but rely on the print media to keep them informed, access to the information sought to be protected by the subject rule is essential. Indeed, it is a fundamental underpinning of a democratic society and attempts to weaken that underpinning should be very carefully considered.

In conclusion, I do not know if what I have written in this letter is of assistance to you as you move forward, but I hope it is. Additionally, I am not one to complain and fail to offer to be of assistance in arriving at an alternative solution. Please know that in behalf of my client, The West Virginia Press Association, I am more than willing to meet and collaborate with you and others to fashion the subject rule in a way that meets your objectives and more nearly adheres to the tenets of the well established public policy in our state that appears in the form of the Freedom of Information Act. In thanking you for your time and attention hereto, I remain

Sincerely yours,



Philip A. Reale

CC: Carte Goodwin, Esq.
Ed Given
Gloria Flowers

TITLE 170
LEGISLATIVE RULE
WEST VIRGINIA DIVISION OF HOMELAND SECURITY
AND EMERGENCY MANAGEMENT

SERIES 1
MINE AND INDUSTRIAL ACCIDENT RAPID RESPONSE
SYSTEM

§170-1-1. General.

1.1. Scope. Pursuant to Chapter 15, Article 5B, Section 5 of the West Virginia Code, the West Virginia Division of Homeland Security and Emergency Management does hereby adopt the following rules governing the establishment and operation of the Mine and Industrial Accident Rapid Response System (MIARRS) for the purpose of coordinating rapid and appropriate response to mining and industrial accidents; governing participation by public agencies in response to mining or industrial accidents; and, governing protections of privacy for the state's citizens and of the homeland security during the project, as well as governing the distribution generally of records and information collected during response operations.

1.2. Authority. -- W. Va. Code §15-5B-5.

1.3. Filing Date. --

1.4. Effective Date. --

§170-1-2. Definitions.

2.1. The following terms shall have the meaning as used in this Rule unless in a context that requires a different meaning:

a. "Director" is defined as the Director of the Division of Homeland Security and Emergency Management.

b. "Center" is defined as Mine and Industrial Accident Emergency Operations Center and is the official and primary state facility for dealing with mine and industrial accidents.

- "MIAARS is defined as the Mine and Industrial Accident Response System.
- 'Covered facilities' means all underground mining operations, surface mining operations, or mining related operations, regardless of the source of the hazard.
- 'Accident' is defined in W. Va. Code §22A-2-66 to include the following:

1. Death of an individual at a mine;

2. An injury to an individual at a mine which has a reasonable potential to cause death;

3. The entrapment of an individual;

4. The unplanned inundation of a mine by a liquid or gas;

5. The unplanned ignition or explosion of gas or dust;

6. The unplanned ignition or explosion of a blasting agent or an explosive;

7. An unplanned fire in or about a mine not extinguished within five minutes of ignition;

8. An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use or an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;

9. A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;

10. An unstable condition at an impoundment, refuse pile or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area, or the failure of an impoundment, refuse pile or culm bank;

11. Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with the use of equipment for more than thirty minutes;

12. An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs;

c. 'Emergency shall mean a situation or occurrence that happens unexpectedly and demands immediate action to protect life and property or that requires a response that exceeds the capabilities of the covered facility or responding agency.

- 'Emergency mine response' includes all incident reporting, rescue and on-scene operations and coordination of all involved parties.

- 'Response procedures' means those procedures developed by the Director regarding the Mine and Industrial Accident Rapid Response System and distributed internally in the Center and externally to effected agencies and operators.

- 'Release Authority' is the Director or his or her designee and applies to the release of information, records, recordings and other pertinent materials collected or in the possession of the Center under the terms of the Freedom Of Information Act, W. Va. §29B-1 et seq. and the identity of victims or their families.

2.2. Terms not defined in these rules, nor having a meaning ascribed to them pursuant to W. Va. Code §15-5B shall have the meaning and definition ascribed to them by other applicable regulations, codes, or rules.

§170-1-3. Center Establishment and Operations.

3.1. The Director will establish a standard operating guide to be developed for the Center. This standard operating guide will detail the initial and subsequent steps to be taken in response to a reported accident or emergency.

3.2. The Director will establish the Center in an appropriate space near the State Emergency Operations Center. This new Center will be equipped with appropriate telephone, telephone recording equipment, caller identification equipment, facsimile, internet access, furniture and other equipment relative to the Center. The Director will also staff the Center with personnel necessary to the operation of the Center.

3.3. The Division of Homeland Security and Emergency Management may accept grants and donations toward any cost associated with establishing, equipping and operating the MIARRS.

3.4. All personnel who work for the MIARRS must undergo an appropriate background check prior to being employed by the director.

3.5. The Director shall cause an appropriate method and process for coordinating emergency response assets including industry inspectors from regulatory agencies, response equipment and supplies and other response data. Such coordination methods and processes may include electronic information manipulation and retrieval and appropriate geospatial information systems.

§170-1-4. Notification of Emergency Incidents by Covered Facilities.

4.1 All covered facilities are to report accidents or emergencies to the Division of Homeland Security and Emergency Management at the West Virginia Mine and Industrial Accident Call Center at 1-866-987-2338 or other such number as may be identified by the director.

4.2 All calls received on the published line are to be recorded for documentation purposes. Such recording of calls is to be automatic and the recorded call information, to include time of call and complete voice transcripts, shall be made available to any appropriate, approved and authorized representative of regulatory, enforcement, or investigative agencies upon written request. Such requests must describe the nature of the need for such information and the purpose for which it will be used.

4.3 Voice and data recordings of calls received at the Center

Center containing information about a deceased miner or person, or miner or person sustaining injuries in an industrial accident that may result in death shall not be released to the public, pursuant to the Freedom of Information Act or other authority for request, until such time as the Release Authority has determined that a member of the miner's or person's family or next of kin has been notified of the miner's or person's death or injuries which may result in death, but in no event longer than the amount of time specified in the law.. The release authority shall make every effort to determine that the notification of family or next of kin has been made by the appropriate entity and once verified shall document the date and time of such notification and by whom the notification was made. The director shall establish a policy for securing the recordings of such calls to insure that they remain intact and unaltered at all times. The Director shall establish an appropriate fee schedule to recover costs associated with any Freedom of Information request.

4.4 Any call received at the center on any line that involves the reporting of a crime, law enforcement information or such information as may be detrimental to any investigation shall not be released subject to any Freedom of Information request until such time as it may be deemed appropriate by the director after consultation with the appropriate law enforcement agency having jurisdiction or the appropriate prosecutorial authority for the jurisdiction in which the incident occurred.

§170-1-5. Requests for Information – General Provisions.

- All requests for information must include the following information in order for the request to be considered. The minimal information is as follows:

a. All requests for information must state with reasonable specificity the information sought.

General information regarding the incident to aid in identifying the specific records required,

- Name of the individual making the request,
- The date and time information is required, and,
- Any other related information regarding the individual request.
- Requests for information shall be processed in accordance with W. Va. Code §29B-1et seq. to include appropriate fees for duplication and other costs.

§170-1-6. Trade Secrets and Confidential Information

6.1 Covered facilities requesting protection of information considered as trade secrets or proprietary information must provide justification for such requests in accordance with W. Va. Code §29B-1-4.

- Information received and recorded by the Center or its personnel which contains law enforcement information or information involved in the reporting of an actual or potential crime is exempt from Freedom of Information Act release without prior approval of appropriate law enforcement officials.
- Information received shall be released to appropriate regulatory or investigative agencies upon written request and upon

upon approval by the Director or his or her designee.