

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #5

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2002 FEB 20 P 1:15

WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: WV DEP - Division of Air Quality TITLE NUMBER: 45

CITE AUTHORITY: W. Va. Code §§22-5-1et seq; 45CSR13

RULE TYPE: PROCEDURAL _____ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

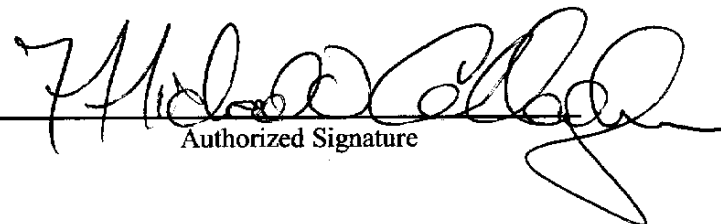
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 13A

TITLE OF RULE BEING PROPOSED: "The Permitting of Research and Development (R&D)
Activities Under 45CSR13"

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS March 30, 2002


Authorized Signature

FILED

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

FEB 28 P 1:15

WEST VIRGINIA
SECRETARY OF STATE

SERIES 13A
THE PERMITTING OF RESEARCH AND DEVELOPMENT (R&D) ACTIVITIES
UNDER 45CSR13

§45-13A-1. General.

1.1. Scope. -- The purpose of this rule is to provide guidance and clarification regarding the permitting of Research and Development (R&D) activities under 45CSR13 while ensuring compliance with all applicable requirements and at the same time providing operational flexibility.

1.2. Authority.-- W. Va. Code §§22-5-1 et seq. and WV 45CSR13.

1.3. Filing Date. -- February 28, 2002.

1.4. Effective Date. -- March 30, 2002.

§45-13A-2. Definitions.

2.1. "Research and Development (R&D) Activities" means activities the primary purpose of which is at least one of the following:

2.1.a. To evaluate process changes in connection with pollution prevention efforts (including improved process efficiencies);

2.1.b. To develop data for correction of manufacturing facility operational problems and customer product quality concerns;

2.1.c. To produce products for commercial sale for the purpose of customer evaluation, market development or testing, provided that such activity is not the principal purpose of the facility; or

2.1.d. To conduct "scale-up" from laboratory or bench-scale studies for the purpose of collecting information and data for engineering and design of a commercial facility.

2.2. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in 45CSR13 and W. Va. Code § 22-5-2.

§45-13A-3. Applicability.

3.1 Emissions from laboratory facilities associated with R&D activities shall not be considered R&D activities subject to this rule. Such emissions shall be subject to the provisions of 45CSR13B.

§45-13A-4. Activities Exempt from Permitting.

4.1. R&D activities shall be exempt from permitting requirements under 45CSR13, provided the following terms and conditions are met:

4.1.a. The R&D activities do not result in any new or increased actual emissions of regulated pollutants or the applicability of any new requirements; nor do such activities constitute a "major modification" under 45CSR14 or 45CSR19; or

4.1.b. The R&D activities have new or increased actual emissions of regulated

pollutants and meet one of the following criteria:

4.1.b.1. The R&D activities do not increase actual emissions more than 6 pounds per hour or 2 tons per year of a criteria pollutant;

4.1.b.2. The R&D activities do not increase actual emissions more than 2 pounds per hour or 1 ton per year of aggregated hazardous air pollutants (HAPs), including any new or different HAPs; provided that the new or different HAPs do not result in the applicability of any new or revised requirements; or

4.1.b.3. The R&D activities do not increase actual emissions of toxic air pollutants more than the amounts listed in subdivisions 2.17.c and 2.17.d of 45CSR13.

4.2. R&D activities eligible for the permitting exemption under subdivisions 4.1.a or 4.1.b shall maintain records on-site for at least two (2) years which records shall be available to the Director upon request and shall include the following:

4.2.a. Description of the research and development activity;

4.2.b. The operating data to support methods, procedures and/or techniques used to control emissions;

4.2.c. The estimated actual emissions of regulated pollutants and supporting calculations; and

4.2.d. The date and duration of regulated pollutant emissions.

4.3. A source which is not operated at least 500 hours in one 12-month period within the previous five (5)-year time period may be

considered permanently shutdown, unless such source can provide to the Director, with reasonable specificity, information to the contrary.

§45-13A-5. Effect on Other Rules.

5.1. For application of the exemptions for particulate matter and mineral acids provided by section 10 of 45CSR7 and of the exemptions for sulfur dioxide provided by section 4 of 45CSR10, actual emissions from R&D activities will be regarded the same as potential to emit.

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Union Carbide Corporation
A Subsidiary of The Dow Chemical Company
PO Box 8004
437 McCorkle Avenue SW
South Charleston, WV 25303
U.S.A.

October 16, 2001

Mr. John A. Benedict, Deputy Chief
WV Division of Air Quality
7012 MacCorkle Avenue, SE
Charleston, WV 25304

**Subject: Division of Air Quality Proposed Interpretative Rules
Comments Regarding Series 13A and Series 13B**

Dear Mr. Benedict,

We have reviewed the WV Division of Air Quality Proposed Interpretative Rules – Series 13A the Permitting of Research and Development Activities Under 45 CSR 13 and Series 13B The Permitting of Laboratory Facilities. We believe proposed regulatory changes will result in a more effective air permitting program for laboratory and research activities while ensuring that air quality is protected. However, some of the proposed regulatory provisions are overly stringent and may be impractical for implementation. We request that the following concerns be addressed in final regulations.

Series 13A – The Permitting of Research and Development (R&D) Activities Under 45CSR13

Section 2.1 identifies activities that are considered research and development. It is requested that new items 2.1.d and 2.1.e be added which read as follows:

“2.1.d. to conduct scale-up of laboratory or bench-scale studies to evaluate equipment, technology, etc. in support of commercial production, or

2.21.e. to provide technical support to commercial facilities, or to obtain data, information or knowledge to support design engineering or process optimization.”

Section 4.3 provides that R&D equipment may be considered as permanently shutdown unless the equipment is not operated at least 500 hours in a 12-month period. This section is unnecessary and should be deleted. It is not unusual for R&D equipment to remain idle for many

Mr. John A. Benedict, Deputy Chief
October 16, 2001
Page Two

months. In fact, equipment may be operated for only minimal hours over a number of years as necessary to address research needs. To maintain a record identifying operating hours and dates is impractical and unnecessary.

If the Agency is unwilling to delete Section 4.3, it is requested that the provision be changed to shutdown of a facility.

Series 13B – The Permitting of Laboratory Facilities Under 45CSR13.

Section 4.1.a.3.d provides that the Good Laboratory Practices Plan must include “Procedures to estimate and record actual emissions of regulated pollutants, including supporting calculations and the date and duration of emissions.”

It is requested that the language supporting Good Laboratory Practices Plan be revised to read as follows:

“Procedures to estimate, record and report actual emissions as needed to satisfy air emission inventory regulatory requirements and as appropriate, other applicable requirements.”

The requirement to record the date and duration of emissions (no matter how miniscule) does not add value due to the small amounts of materials handled. Adoption of the above revised provision will ensure that proper information is recorded while allowing emission calculations to be conducted using techniques and at frequencies that will not disrupt research and development work.

If there are any questions concerning this correspondence, please contact Freddie Sizemore of my staff at 747-3713.

Sincerely yours,



J. L. Blatt

Responsible Care® Leader
West Virginia Operations

Cc: Mr. John Pitner, Chairman
WVMA Air Issues

Mr. David M. Flannery, Esq.
Jackson and Kelly

October 17, 2001

Mr. John Benedict
Deputy Chief
Division of Air Quality
West Virginia Department of Environmental Protection
7012 MacCorkle Avenue S.E.
Charleston, West Virginia 25304

Re: 45 CSR 13 A "The Permitting of Research and
Development (R & D) Activities Under 45 CSR 13"

Dear Deputy Chief Benedict:

The West Virginia Chamber of Commerce and the West Virginia Manufacturers Association are particularly pleased that DEP has proposed the issuance of an interpretive rule adding long needed and important guidance and clarification identifying the circumstances under which permits are required for research and development activities under West Virginia's minor source permitting program, 45 CSR 13.

It has been our pleasure to have worked with the Division of Air Quality for nearly two years in the development of a regulatory program to address research and development facilities. We commend DEP for its commitment to this project, and we strongly support the finalization of an appropriate interpretive rule on this subject at the earliest possible date. We would like to remind DAQ that the results of our joint working group resulted in a document dated May 4, 2001 in which the results of our discussions were captured. That document is in part the basis of our comments to follow.

45 CSR 13 recognizes that certain sources known as "de minimus sources" should be exempt from permitting and many other requirements of 45 CSR 13. The criteria for a "de minimus source" is set forth at 45 CSR 13. 2.6 and includes the following:

"A "de-minimus source" is deemed to have insignificant emissions and/or is not usually a source of quantifiable emissions which can be practically regulated in determining potential to emit or actual emissions for the purpose of determining whether a permit is required under this rule."

While Table 45-13B of 45 CSR 13 contains a list of sources which the rule itself deems to be insignificant, 45 CSR 13.2.6.c. authorizes a petition to be filed with the Director for a determination of regulatory applicability for a particular activity to be deemed a de minimus source. The West Virginia Chamber of Commerce and the West Virginia Manufacturers Association hereby petition the Director for a determination that the sources described in these comments are "de minimus sources" and therefore are not subject to the requirements of 45 CSR 13.

While there is much about DEP's proposed rule that we support, several areas require further revision. We urge that DEP review these areas and revise the proposed rule before it is finally adopted:

1. Definition of R & D Activities – The definition that has been proposed by DEP is consistent with the definition of the working group and its work product, except that the definition does not include within the scope of R & D activities those that relate to the scale up from laboratory bench-scale studies. We urge that this definition be revised to add a new category of activities that come within the scope of the definition of R & D activities. To add further clarity to the types of activities that would be included within the proposed expanded definition, we propose that the scale up be for the purpose of collecting data for engineering and design of a commercial facility. The language we propose is as follows:

2.1.d. to conduct "scale-up" from laboratory or bench-scale studies for the purpose of collecting information and data for engineering and design of a commercial facility.

2. Laboratories Associated with R & D Activities – Because not all laboratory facilities associated with R & D activities will be subject to the companion interpretive rule, 45 CSR 13B, we propose that the applicability section of this rule (Section 3.1.) be revised to make it clear that only those emissions from facilities that are subject to 45 CSR 13B will be excluded from the definition of R & D activities under the proposed rule. Accordingly, we would urge that Section 3.1 of the rule be revised to read as follows:

3.1. Emissions from laboratory facilities associated with R & D activities that are exempt under 45 CSR 13B shall not be considered R & D activities subject to this rule.

3. Permanent shutdowns - While we do not object to the proposed Section 4.3 of the rule related to permanent shutdowns, we would prefer for the section to be directed generally to "A source" rather than "R&D equipment". This change would make the section more like the comparable provision in Regulation 13. Undoubtedly, owners and operators of R&D equipment, will find themselves relying on this provision as they respond to inquiries of the Director about R&D equipment that almost certainly will not be operated as much as 500 hours a year.

We appreciate the opportunity to comment on this rule. We encourage DEP to move forward with making appropriate revisions to this rule as soon as possible and to the finalization of the rule so that it can be applied to all qualifying facilities. Attached is a revision to the proposed rule that incorporates the changes that we urge to be made.

The current circumstances involving the application of West Virginia's minor source permitting regulation to facilities of this kind creates difficult and burdensome regulatory requirements without commensurate environmental benefit. A properly

revised rule of this kind will go a long way towards reducing the unnecessary impact of this rule on these facilities.

Very truly yours,



David M. Flannery
Chair, Environmental Committee
West Virginia Chamber of Commerce



John K. Pitner
Team Leader, Air Team
Environmental, Safety & Health Committee
West Virginia Manufacturers Association

**TITLE 45
INTERPRETIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY**

**SERIES 13A
THE PERMITTING OF RESEARCH AND DEVELOPMENT (R&D) ACTIVITIES
UNDER 45CSR13**

§45-13A-1. General.

1.1. Scope. -- The purpose of this rule is to provide guidance and clarification regarding the permitting of Research and Development (R&D) activities under 45CSR13 while ensuring compliance with all applicable requirements and at the same time providing operational flexibility.

1.2. Authority.-- W. Va. Code §§22-5-1 et seq. and WV 45CSR13.

1.3. Filing Date. --

1.4. Effective Date. --

§45-13A-2. Definitions.

2.1. "Research and Development (R&D) Activities" means activities the primary purpose of which is at least one of the following:

2.1.a. to evaluate process changes in connection with pollution prevention efforts (including improved process efficiencies);

2.1.b. to develop data for correction of manufacturing facility operational problems and customer product quality concerns; or

2.1.c. to produce products for commercial sale for the purpose of customer evaluation, market development or testing, provided that such activity is not the principal purpose of the facility.

2.1.d. To conduct "scale-up" from laboratory or bench-scale studies for the purpose of collecting information and data for engineering and design of a commercial facility.

2.2. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in 45CSR13 and W. Va. Code § 22-5-2.

§45-13A-3. Applicability.

3.1 Emissions from laboratory facilities associated with R&D activities that are exempt under 45CSR13B shall not be considered R&D activities subject to this rule. ~~Such emissions shall be subject to the provisions of 45CSR13B.~~

§45-13A-4. Activities Exempt from Permitting.

4.1. R&D activities shall be exempt from permitting requirements under 45CSR13, provided the following terms and conditions are met:

4.1.a. The R&D activities do not result in any new or increased actual emissions of regulated pollutants or the applicability of any new requirements; nor do such activities constitute a "major modification" under 45CSR14 or 45CSR19; or

4.1.b. The R&D activities have new or increased actual emissions of regulated pollutants and meet one of the following criteria:

4.1.b.1. The R&D activities do not increase actual emissions more than 6 pounds per hour or 2 tons per year of a criteria pollutant;

4.1.b.2. The R&D activities do not increase actual emissions more than 2 pounds per hour or 1 ton per year of aggregated hazardous air pollutants (HAPs), including any new or different HAPs; provided that the new or different HAPs do not result in the applicability of any new or revised requirements; or

4.1.b.3. The R&D activities do not increase actual emissions of toxic air pollutants more than the amounts listed in subdivisions 2.17.c and 2.17.d of 45CSR13.

4.2. R&D activities eligible for the permitting exemption under subdivisions 4.1.a or 4.1.b shall maintain records on-site for at least two (2) years which records shall be available to the Director upon request and shall include the following:

4.2.a. Description of the research and development activity;

4.2.b. The operating data to support methods, procedures and/or techniques used to control emissions;

4.2.c. The estimated actual emissions of regulated pollutants and supporting calculations; and

4.2.d. The date and duration of regulated pollutant emissions.

4.3. ~~A source R&D equipment~~ which is not operated at least 500 hours in one, 12-month period within the previous five (5)-year time period may be considered permanently shutdown, unless such source can provide to the Director, with reasonable specificity, information to the contrary.

§45-13A-5. Effect on Other Rules.

5.1. For application of the exemptions for particulate matter and mineral acids provided by section 10 of 45CSR7 and of the exemptions for sulfur dioxide provided by section 4 of 45CSR10, actual emissions from R&D activities will be regarded the same as potential to emit.

45CSR13A

THE PERMITTING OF RESEARCH AND DEVELOPMENT (R & D) ACTIVITIES UNDER 45CSR13

RESPONSE TO COMMENTS

On September 14, 2001 the West Virginia Department of Environmental Protection's Division of Air Quality (DAQ) commenced a public comment period to accept comments on the proposed interpretive rule, 45 CSR 13A. Written comments as well as electronically submitted comments were accepted through 5:00 PM on Wednesday, October 17, 2001, which the DAQ addresses below.

I. COMMENTERS: West Virginia Chamber of Commerce and West Virginia Manufacturers Association (submitted joint comments)

COMMENT A: *45 CSR 13 recognizes that certain sources known as "de minimus sources" should be exempt from permitting and many other requirements of 45 CSR 13. 45 CSR 13.2.6.c authorizes a petition to be filed with the Director. The commenters petition the Director for a determination that the sources described in these comments are "de minimus sources" and therefore are not subject to the requirements of 45 CSR 13.*

RESPONSE A: DAQ disagrees with the commenters' suggestion/petition that all sources addressed under these interpretive rules be considered "de minimus" sources as defined in 45 CSR 13. Of the emissions and sources addressed under both interpretive rules, only certain "bench-scale" laboratory emissions are truly "de minimus" in DAQ's opinion, because the other emissions covered in these rules can be almost as high as the threshold limits under 45 CSR 13. It is appropriate, however, to exempt all these sources from the permit requirement, as long as the conditions specified in the interpretive rules are satisfied.

COMMENT B: *Definition of R & D Activities - The commenters urge that this definition be revised to add a new category relating to the scale-up from laboratory or bench-scale studies that come within the scope of the definition of R & D activities. To add further clarity to the types of activities that would be included within the proposed expanded definition, they propose that the scale-up be for the purpose of collecting data for engineering and design of a commercial facility.*

RESPONSE B: DAQ agrees with the comment and has revised the rule accordingly.

COMMENT C: *Laboratories Associated with R & D Activities - Because not all laboratory facilities associated with R & D activities will be subject to the companion interpretive rule, 45 CSR 13B, the commenters propose that the applicability section of this rule (Section 3.1) be revised to make it clear that only those emissions from facilities that are subject to 45 CSR 13B will be excluded from the definition of R & D activities under the proposed rule.*

RESPONSE C: DAQ disagrees with the comment. DAQ believes it is important to maintain a clear distinction between the two rules, one being for laboratory emissions and one for non-laboratory emissions associated with research and development activities. In addition, DAQ does not see any utility in the commenters' suggestion, especially because DAQ agrees with the commenters' suggestion that section 4 of Rule 13B be expanded to include all laboratory emissions not covered by section 3 of the rule.

COMMENT D: *Permanent shutdowns - While the commenters do not object to the proposed Section 4.3, they would prefer for the section to be directed generally to "A source" rather than "R & D equipment."*

RESPONSE D: DAQ agrees with the comment and has revised the rule accordingly.

II. COMMENTER: Union Carbide Corporation, a subsidiary of Dow Chemical Company

COMMENT A: *Section 2.1 identifies activities which are considered research and development. It is requested that new items 2.1.d and 2.1.e be added which read as follows:*

"2.1.d. to conduct scale-up of laboratory or bench-scale studies to evaluate equipment, technology, etc. in support of commercial production, or

2.21.e. to provide technical support to commercial facilities, or to obtain data, information or knowledge to support design engineering or process optimization."

RESPONSE A: See Response I.B. above. Further, DAQ believes the language proposed by Commenters I better describes an appropriate scale-up exemption.

COMMENT B: *Section 4.3 provides that R & D equipment may be considered as permanently shutdown unless the equipment is not operated at least 500 hours in a 12-month period. This section is unnecessary and should be deleted. It is not unusual for R & D equipment to remain idle for many months. To maintain a record identifying operating hours and dates is impractical and unnecessary. If the Agency is unwilling to delete Section 4.3, it is requested that the provision be changed to shutdown of a facility.*

RESPONSE B: DAQ disagrees with the commenter's suggestion that this section be deleted or revised. The language is the same as in the underlying legislative rule and is just as appropriate for R & D sources as for other sources. Although these sources may sit idle for periods of time, the rule language is flexible enough to allow a source to provide specific information to the agency demonstrating that the source is not permanently shutdown.