





BUREAU OF ENVIRONMENT  
10 McJunkin Road  
Nitro, WV 25143-2506

GASTON CAPERTON  
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.  
COMMISSIONER

July 9, 1996

Ms. Judy Cooper  
Director, Administrative Law Division  
Office of the Secretary of State  
Capitol Complex  
Charleston, West Virginia 25305

RE: 45CSR31 - "Confidential Information"

Dear Ms. Cooper:

This is to advise you that I am giving approval for filing with your office the above-referenced rule as Notice of Public Hearing and Comment Period on a proposed rule.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Mark Scott at 759-0515..

Sincerely yours,

A handwritten signature in black ink, appearing to read "Laidley Eli McCoy", written over a horizontal line.

Laidley Eli McCoy, Ph.D.  
Commissioner

LEM:cc

Attachment

BUREAU OF ENVIRONMENT  
DIVISION OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

**Rule Title:** 45CSR31 - "Confidential Information"

**A. AUTHORITY:** W.Va. Code §§22-5-1 et seq.

**B. SUMMARY OF RULE:**

45CSR31 "Confidential Information" establishes requirements for claiming information that is submitted to the Director as confidential as well as the procedures for requesting the disclosure of information that is claimed to be confidential. The rule is not intended to replace procedures under the Freedom of Information Act, but rather to determine how information that is claimed as confidential by regulated industry is to be handled by the agency prior to any request for disclosure.

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

W.Va. Code §22-5-10 requires the promulgation of a legislative rule regarding the protection of records, reports, data or information, or trade secrets. Amendment to the rule is sought in order to make the rule administratively workable and to resolve conflicts with existing requirements in the West Virginia Code.

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

Because this rule is mandated by the West Virginia Code, a federal counterpart does not exist. However, to the extent practicable, concepts found in 40 CFR 2.208 and 40 CFR 2.301 dealing with confidential information have been incorporated in the rule.

**E. CONSTITUTIONAL TAKINGS DETERMINATION:**

The Director has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America. The Director further finds that this rule is consistent with the requirements of chapter 22, article 1A of the West Virginia Code.

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

This proposed amendment will be reviewed by the Council at its meeting on July 17, 1996. Recommendations of the Council and the Director's response to the Council's recommendations will be included in the proposed rule filing with the Secretary of State's Office and Legislative Rulemaking Review Committee.

## APPENDIX B

### FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR31 - Confidential Information

Type of Rule:  Legislative  Interpretive  Procedural

Agency: Office of Air Quality

Address: 1558 Washington Street, East

Charleston, WV 25311-2599

1. Effect of Proposed Rule	Annual		Fiscal Year		
	Increase	Decrease	Current	Next	There-after
Estimated Total Cost	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-
Personal Service	-0-	-0-	-0-	-0-	-0-
Current Expense	-0-	-0-	-0-	-0-	-0-
Repairs and Alterations	-0-	-0-	-0-	-0-	-0-
Equipment	-0-	-0-	-0-	-0-	-0-
Other	-0-	-0-	-0-	-0-	-0-

2. Explanation of above estimates: The above estimates reflect the anticipation that the amendment to the existing rule will not result in a change in the cost of administering the rule.
  
3. Objectives of these rules: The objective of the rule is to establish requirements for claiming as confidential information that is submitted to the Director as well as the procedures for requesting the disclosure of information that has been claimed to be confidential. Amendment is sought to improve implementation of the existing rule, to ensure protection from public dissemination information that is properly claimed as confidential, and to provide complete disclosure of unprotected information to the public.

Rule Title: 45 CSR 31 - "Confidential Information"

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Please see section 2.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

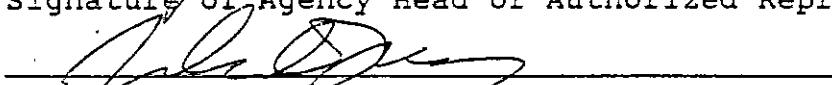
No impact other than impact of current rule.

C. Economic Impact on Citizens/Public at Large.

No impact.

Date: July 9, 1996

Signature of Agency Head or Authorized Representative

  
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G. Dale Farley  
Chief, Office of Air Quality

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

SERIES 31  
CONFIDENTIAL INFORMATION

FILED  
JUL 10 4 30 PM '95  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

§45-31-1. General.

1.1. Scope. -- This series establishes the requirements for claiming information submitted to the Director as confidential and the procedures for requesting the disclosure of such information in accordance with the provisions of W.Va. Code §§22-5-10.

1.2. Authority. -- W. Va. Code §§22-5-1 et seq.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal of Former Rule. This legislative rule repeals and replaces 45 CSR 31, "Confidential Information" which became effective on July 7, 1993.

§45-31-2. Definitions.

2.1. "Director" means the Director of the Division of Environmental Protection or such other person to whom the Director has delegated authority or duties pursuant to W.Va. Code §§22-1-1 et seq.

2.2. "Division of Environmental Protection" or "DEP" means West Virginia Division of Environmental Protection created by the provisions of W. Va. Code §§22-1-1 et seq.

2.3. "Types and amounts of air pollutants discharged" means, with reference to any source of emission of any substance into the air --

2.3.a.

a.1. Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

a.2. Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized

to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

a.3. A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

2.3.b. Notwithstanding paragraph a of this subsection, the following information shall be considered to be emission data only to the extent necessary to allow the Director to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow the Director to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

b.1. Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

b.2. Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

2.4. "Information" means any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics and all air quality data, emission data, and permit applications.

2.5. "Person" means any and all persons, natural or artificial, including the state of West Virginia or any other state, the United States of America, any municipal, statutory, public or private corporation organized or existing under the laws of this or any other state or country, and any firm, partnership, or association of whatever nature.

2.6. "Designee" means the person identified in the cover document as the designated representative who shall receive notice of the Director's determination in accordance with this rule. Notice shall be deemed sufficient if the Director provides notice to the designee.

#### §45-31-3. Claim of Confidentiality.

3.1. Made When Information Submitted. A claim of confidentiality shall be made in accordance with this rule at the time the information claimed to be confidential is submitted to the Director. If no claim of confidentiality is made at the time

of submission or is not made in accordance with this rule, the Director may make the information available to the public without further notice.

3.2. Information Previously Submitted. Information claimed as confidential and submitted prior to the effective date of this rule may be made available to the public unless the person who submitted the information establishes their claim of confidentiality in accordance with this rule and within one hundred eighty (180) days of the effective date of this rule.

3.3. Submission of Information Claimed Confidential.

3.3.a. Confidential Information. Any information that is claimed to be confidential shall be submitted on colored paper measuring 8 ½" by 11." The person submitting the information claimed as confidential shall mark each page with "Claimed Confidential" with the date of such claim of confidentiality.

3.3.b. Justification for Confidentiality in Cover Document. Each submission of information to the Director, any portion of which is claimed to be confidential shall be accompanied by a cover document which shall be available for public disclosure. The document shall, at a minimum, identify the person making the submission of information claimed as confidential, identify the reason for the submission of information, identify the name, address and telephone number of the designee who shall be contacted in accordance with this rule, identify each segment of information within each page that is submitted as confidential, provide the justification for each such segment of information that is claimed confidential, and provide the date upon which each such claim of confidentiality expires.

3.3.c. Cover Document as Basis for Review. In the event that a written request for disclosure is received in accordance with this rule for information that is claimed confidential, the cover document justifying the claim of confidentiality shall form the basis for the Director's review of the confidentiality claim.

3.4. Redacted Submission of Information Claimed Confidential for Public Disclosure. For each submission of information of which any portion is claimed to be confidential, a complete set of the information, including the document justifying the claim of confidentiality shall be submitted simultaneously on uncolored paper with the information claimed to be confidential blacked out, and with the words "redacted copy - claim of confidentiality" marked clearly on each such page, so that such a set of information is suitable for public disclosure and provides notice to the public that a claim of confidentiality has been made.

§45-31-4. Request for Disclosure.

4.1. Written Request. A person may request disclosure of information claimed to be confidential by filing a written request for disclosure to the Director at the Office of Air Quality. Such a request for disclosure shall identify each item of information sought to be disclosed by identifying the facility name, permit or file number, the redacted page number, the designee identified by the cover document, and by cover document date. In addition, the written request for disclosure shall include the basis upon which the person requesting disclosure disputes the claim of confidentiality.

4.2. Notice of Determination by the Director. The Director shall provide written notice of his or her determination of the request for disclosure to the person requesting disclosure and to the designee. If the Director determines that disclosure of the information shall be made, the notice shall advise the designee and the person requesting disclosure of the information that will be disclosed, the time not less than ten (10) days from the date of the notice, and place at which the person may inspect and copy the documents. The written notification shall constitute an exhaustion of administrative remedies for the purposes of judicial review in accordance with W.Va. Code §22-5-10.

§45-31-5. Criteria for Confidentiality.

5.1. In the course of his or her review of a request for disclosure made in accordance with this rule, the Director may consider the following criteria:

5.1.a. The person asserting a claim of confidentiality which has not expired by its terms, nor been waived or withdrawn;

5.1.b. The person asserting the claim of confidentiality has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;

5.1.c. The information claimed confidential is not, and has not been, reasonably obtainable without the person's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

5.1.d. No statute specifically requires disclosure of the information; and

5.1.e. Either--

e.1. The person has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or

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e.2. The information is voluntarily submitted information, and its disclosure would likely to impair the State's ability to obtain necessary information in the future.

§45-31-6. Use of Confidential Material by the Director.

6.1. A claim of confidentiality shall in no way limit the Director in the exercise of his or her powers or duties under the West Virginia Code or any rule promulgated thereunder.

§45-31-7. Types and Amounts of Air Pollutants Discharged.

7.1. No person shall claim as confidential information concerning the types and amounts of air pollutants discharged.

§45-31-8. Severability.

8.1. The provisions of this legislative rule are severable and if any provision or part thereof shall be held invalid, unconstitutional, or inapplicable to any person or circumstance, such invalidity, unconstitutionality, or inapplicability shall not affect or impair any other remaining provisions, sections, or parts of this legislative rule or their application to any persons and circumstances.