

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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RECEIVED
96 AUG 29 PM 3:47
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

Division of Environmental Protection
AGENCY: Office of Air Quality TITLE NUMBER: 45

CITE AUTHORITY W. Va. Code §§22-5-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES NO

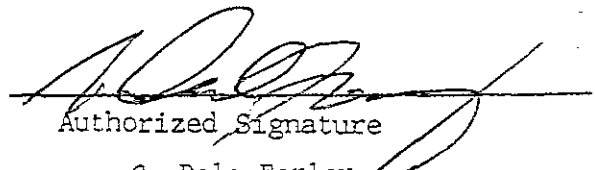
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 45CSR31

TITLE OF RULE BEING AMENDED: "Confidential Information"

IF NO, SERIES NUMBER OF NEW 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.


Authorized Signature
G. Dale Farley

15.40



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

GASTON CAPERTON
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.
COMMISSIONER

August 26, 1996

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

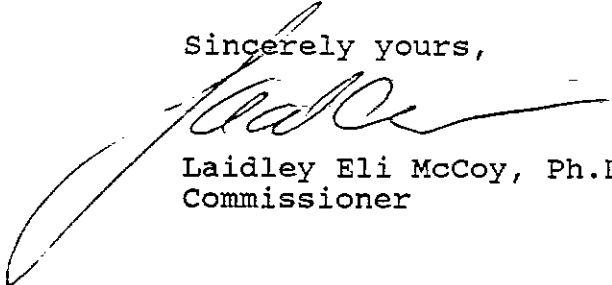
RE: 45CSR31 - "Confidential Information"

Dear Ms. Cooper:

This is to advise you that I am giving approval for filing with your office the above-referenced rule as an Agency-Approved Rule and submission to the Legislative Rule-Making Review Committee.

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,



Laidley Eli McCoy, Ph.D.
Commissioner

LEM:cc

Attachment

DATE: August 29, 1996
TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
FROM: G. DALE FARLEY
CHIEF, OFFICE OF AIR QUALITY
DIVISION OF ENVIRONMENTAL PROTECTION

LEGISLATIVE RULE TITLE: Series 31 - "Confidential Information"

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

2. a. Date filed in State Register with Notice of Hearing:
July 10, 1996

- b. What other notice, including advertising, did you give of the hearing?
Class I legal advertisement filed in the Charleston Daily Mail
and the Charleston Gazette, The Dominion Post and the
Wheeling News Register & Intelligencer. An extensive mailing
was also sent out to the DEP and OAQ mailing lists.

- c. Date of hearing(s): August 13, 1996

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

- e. Date you filed in State Register the agency approved proposed
Legislative Rule following public hearing: (be exact)
August 29, 1996

- f. Name and phone number of agency person to contact for additional information:

G. Dale Farley, Chief

Office of Air Quality

Phone: 558-2275

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

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

N/A

- b. Date of hearing: N/A

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

N/A

- d. Attach findings and determinations and reasons:

Attached N/A

**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:

At their July 17, 1996 meeting, the Environmental Advisory Council (the "Council") made no comments on this rule. (See attached minutes of the July 17, 1996 Council meeting).

MINUTES

DEP ADVISORY COUNCIL

July 17, 1996

The special meeting of the DEP Advisory Council was held July 17, 1996, at DEP's headquarters in Nitro, West Virginia. The meeting was called to order at 1:00 p.m. by Chairman Eli McCoy.

ATTENDING - Advisory Council:

Eli McCoy (Chairman)	William Raney
William Samples	Larry Harris
Rick Roberts	Jacqueline Hallinan

DEP:

Mark Scott	Jerry Ray
Dick Cooke	Mike Dorsey
Ken Ellison	Dale Farley
Britt Ludwig	Wendy Radcliff
Ken Politan	Charlie Sturey
Ken Ward	

Eli McCoy began the meeting by welcoming the Council members to the Nitro Office for a special meeting that was scheduled to discuss the proposed amendments to DEP's 1997 rules. Mark Scott said that in accordance with WV Code §22-1-3(c), which requires the Director of the Division of Environmental Protection to consult with the Advisory Council prior to proposing any new rule and that Council's recommendations will be recorded and made part of the rule package when it is filed with Legislative Rule-Making and the Secretary of State's Office the end of August.

Mark briefly reviewed the proposed rules provided to the Council. He noted that an amendment to an existing Environmental Quality Board rule was filed recently regarding water quality standards. Since this is a Board rule, and only requires the approval of the Director for filing, it is not part of the DEP rule package the Council has before them. He stated that a copy will be made available to them if they would like to review it.

47CSR35 - "Hazardous Waste Management Rule"

Mike Dorsey, Office of Waste Management, gave the Council a brief explanation of the Hazardous Waste Management Rule. He

explained that all the proposed amendments, excluding one sentence, were made to adopt the federal hazardous waste regulations by reference.

Bill Samples asked Mike whether someone complying with the federal rule would also be in compliance with the state requirements.

Mike replied that if you are complying with the federal rules, you are also considered in compliance with the state rule.

No specific comments on the rule were made by the Council.

46CSR32 - "Underground Storage Tank Insurance Trust Fund"

Ken Ellison, Office of Waste Management, gave a brief summary of the changes that are being proposed for the Underground Storage Tank Insurance Fund. General discussion was held concerning changes in the UST rule, but no specific comments were made by the Council.

Proposed Brownfields Legislation

Ken Ellison also explained the proposed Brownfields Legislation.

Bill Samples asked if remediation standards are being developed.

Ken answered yes, they are in the process, but they are very preliminary at this point.

Bill Raney asked if the Brownfields rule will supersede other existing federal or state requirements.

Ken said no - all other environmental rules have to be adhered to.

Bill Samples asked about the time frame on the proposed rule package.

Ken stated that the rule-drafting committee, which is totally voluntary, has set a date of September to try to get the first draft out. The law states that the agency only has to propose the rule within a year of the effective date of the law.

Bill Samples said he believes it is important to get this in place and implemented as soon as possible.

Larry Harris asked if the rule-drafting committee seems to be working toward a consensus.

Ken stated that the Governor had requested Dr. Mary Wimmer, Professor of Biochemistry at WVU, and Dr. Paul Hill, Chief Executive Officer of the National Institute for Chemical Studies, to co-chair the rule-making committee, and he feels they are the real strength to achieving a consensus. He believes that the participants are taking this task seriously and trying very hard to reach a consensus.

Jackie Hallinan asked Ken what appears to be the most contentious issue.

Ken replied that the most contentious issues are risk assessment and risk management. There still needs to be a consensus on a range of scientific and technical parameters to use in risk assessment, and there is a different degree of certainty as to what the results will be depending on which parameters are selected. Risk management decisions have to be made within a framework that recognizes that the risk assessor may not be able to quantify the risk for many constituents. At that point, the risk management decision becomes more of a combination of analysis and deliberation of all the interested and affected parties' issues.

Since these rules are still in draft form, no specific comments were made by the Council.

47CSR38 - "Solid Waste Management Rule"

Dick Cooke, Office of Waste Management, briefly described the changes proposed in the Solid Waste Management rule. To receive EPA approval, one sentence in the state code pertaining to the \$8,000 per acre cap on bonding needs to be removed.

Bill Samples asked if EPA has a limit set per acre. Dick said that EPA does not have a limit.

Bill Samples said that as far as the code change DEP is simply eliminating the \$8,000 cap without substituting and not imposing any restriction on bonding. Dick replied that is correct.

38CSR2 - "Surface Mining & Reclamation Rules"

Charlie Sturey, Office of Mining & Reclamation, explained the changes in the Surface Mining and Reclamation Rule. He also stated that all changes in the rule have a corresponding code change.

The main concerns in the surface mining rule were as follows:

11.6 - Site Specific Bonding - Removal of the \$5,000 cap: Bill Raney asked the basis for removing the cap. Director McCoy stated that removal of the \$5,000 cap was at the insistence of OSM. OSM believes that the cap when set at \$5,000 would be insufficient to reclaim some areas, i.e., coal preparation areas or sites we have bonded at higher costs.

14.11 - Procedures to Obtain Inactive Status - Bill Raney said he has concerns regarding the 10-year cap on inactive status for prep plants or load-out facilities; especially for the larger facilities that maintain good security.

Eli stated that prior to 1988 there was a problem with reclamation of inactive sites, and regulations were promulgated to take care of the problem. He said it doesn't seem to be a big problem now. He also stated that inactive status can be renewed and regardless of what the agency's action may be, the decision can be appealed before the Surface Mine Board, and they can overrule any agency decision if they believe otherwise.

Eli asked Bill Raney if, from industry's point of view, he would like to see those numbers removed and propose some idea to allow the inactive status to be extended longer.

Bill Raney stated that longer is not necessarily the concern; going into active and back into inactive is, but feels this is not the time to work out the details.

Larry Harris asked if we have a list of those inactive sites. Eli said DEP does have a database list of over 200 inactive sites.

After Section 14.15 "Contemporaneous Reclamation Standards" of the surface mining rule was explained, Bill Raney stated he would like to go on record stating that this requirement in the state rule is in excess of all federal requirements.

Larry Harris asked if there is a tax or fee charged on the basis of disturbed acres. Charlie Sturey replied that the bond is not released.

A discussion was then held on Section 28 of the Code as it relates to special authorization for reclamation of existing abandoned coal on 5 acres or less if they are doing a certain type of project.

The main concern with this proposed change was the removal is limited to 5 acres. Rick Roberts asked what happens if you

have a 40-acre development site and 20 acres of coal needs to be removed. Director McCoy stated he did not realize there is a 5-acre limit in the rule. He said DEP needs to look into that and weigh the pros and cons of limiting the removal to 5 acres.

47CSR30 - "WV/NPDES Regulations for Coal Mining Facilities"

Ken Politan, Office of Mining and Reclamation, explained the changes in the NPDES Regulation for Coal Mining Facilities. There was general discussion among the Council members but no specific comments concerning the changes.

47CSR11A - "Wasteloads"

Jerry Ray, Office of Water Resources, gave a brief review of the proposed new wasteload rule and explained the reason for the new rule. He said the Office of Water Resources had originally planned to file it as an Interpretative rule, but after review by the Secretary of State's Office, it will be filed as a Legislative rule.

Rick Roberts expressed his concern with limiting the wasteload allocation to 12 months. He believes that with limitations on funding to construct wastewater treatment facilities, or the time it takes to obtain other permits, the time frame should be extended and asked if there is a waiver to extend the permit in certain circumstances. Jerry Ray answered no, there is no waiver.

Director McCoy stated that the problem with wasteload allocations has only existed in the last 5 years. In the past, anyone could obtain a wasteload allocation and continue to get it renewed for an undetermined amount of time. There is a potential for someone to get a wasteload allocation, never use it, and then sell their property and believe they are selling a wasteload allocation with it to get greater value from the property.

38CSR10 - "Environmental Advocate"

Wendy Radcliff, DEP's Environmental Advocate, explained to the Council the circumstances behind refiling the Advocate rule. When the office was created in 1994, DEP was asked to promulgate rules setting forth the duties of the advocate office. DEP filed those rules as Interpretive rules with approval from the Secretary of State's office. A legislative performance audit of the Advocate office was conducted in April of this year. One of the recommendations was to refile the rules as legislative rules. These are identical to the interpretive rules filed in 1994.

There were no comments from the Council members.

45CSR1 - "Confidential Information"; 45CSR25 - "To Prevent and Control Air Pollution From Hazardous Waste Treatment, Storage, or Disposal Facilities"; "45CSR34 - Emission Standards for Hazardous Air Pollutants Pursuant to 40CFR Part 63"; and 45CSR16 - "Standards of Performance for New Stationary Sources Pursuant to 40 CFR Part 60"

Dale Farley, Chief of the Office of Air Quality said that three of these rules (45CSR25, 45CSR34, and 45CSR16) are incorporating by reference federal requirements that are necessary to keep the program up to date under Title 5. He then went on to explain the federal requirements to the Advisory Council.

There were no substantive comments from the Council members on these three DEP rules.

Dale briefed the Council members on the fourth DEP rule - "Confidential Information". Compared to the other sections in DEP, Air Quality seems to deal more with confidential information than any other. He said the most significant change in the rule would allow DEP to move away from the situation of inspecting the files, identifying all the documents, and then reviewing them again to determine if the files are confidential.

Jackie Hallinan said she had read the proposed rule and believes it is a step in the right direction to hopefully improve the FOIA process when information requested is contained in files that also house confidential information.

After the discussion of the Air Quality rules, Mark Scott reminded the Council members that they could also submit written comments on any of the proposed rules until the close of the public hearing for that particular rule. He told the Council that DEP will mail them a list of the public hearings that will include the date, time, and location.

Director McCoy then adjourned the meeting at approximately 4:00 p.m.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR31 - Confidential Information

Type of Rule: X 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.

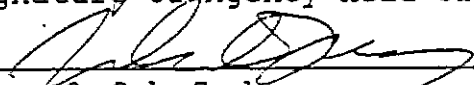
No impact other than impact of current rule.

C. Economic Impact on Citizens/Public at Large.

No impact.

Date: July 9, 1996

Signature of Agency Head or Authorized Representative



G. Dale Farley
Chief, Office of Air Quality

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

45CSR31
TITLE 45
LEGISLATIVE RULE
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

SERIES 31
CONFIDENTIAL INFORMATION

§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 determinations of confidentiality 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. "Trade Secrets" may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors.

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

2.4.a.

45CSR31

2.4.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;

2.4.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

2.4.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).

2.4.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:

2.4.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

2.4.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.

2.5. "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.

2.6. "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.

2.7. "Designee" means a natural person located in the State of West Virginia and identified in the cover document as the

45CSR31

designated representative who shall receive notice of the Director's determination of confidentiality 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. With the exception of documents of a size greater than 8 1/2" x 14", all information that is claimed to be confidential and which is submitted in hardcopy form should be submitted on colored paper in order to readily identify such information. 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, an address in the state of West Virginia, 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, including the criteria set forth in subsection 4.1, and provide the period of time for which the confidential treatment is desired by the business (e.g., until a certain date, until the occurrence of a specified event, or permanently).

3.3.c. Cover Document as Basis for Review. In the event that a written request for information is received in accordance

with W.Va. Code § 29B-1-1 et seq., and which triggers a confidentiality determination under this rule, 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 any portion of which 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.

3.5. Electronic Media. Information that is claimed to be confidential and which is submitted in electronic form shall be identified as confidential in accordance with the conventions of the applicable software program. Such submissions shall include a cover document meeting all of the requirements of this section regardless of whether that cover document is submitted in electronic form or in hardcopy form. The submitter of information in electronic form that is claimed to be confidential shall provide notice to potential reviewers of the electronic data that information has been redacted from the submission.

§45-31-4. Determination of Confidentiality.

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

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

4.1.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;

4.1.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);

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

4.1.e. Either--

45CSR31

4.1.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

4.1.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.

4.2. Notice of Determination by the Director. The Director shall provide written notice of his or her determination of confidentiality to the designee and to the person requesting information pursuant to a request under W.Va. Code § 29-1-1 et seq. If the Director determines that disclosure of information claimed confidential shall be made, the notice shall advise the designee and the person requesting disclosure of the information that will be disclosed, a time not less than ten (10) days from the date the notice was received by the designee, and place at which the person may inspect and copy the documents.

§45-31-5. Use of Confidential Material by the Director.

5.1. 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.

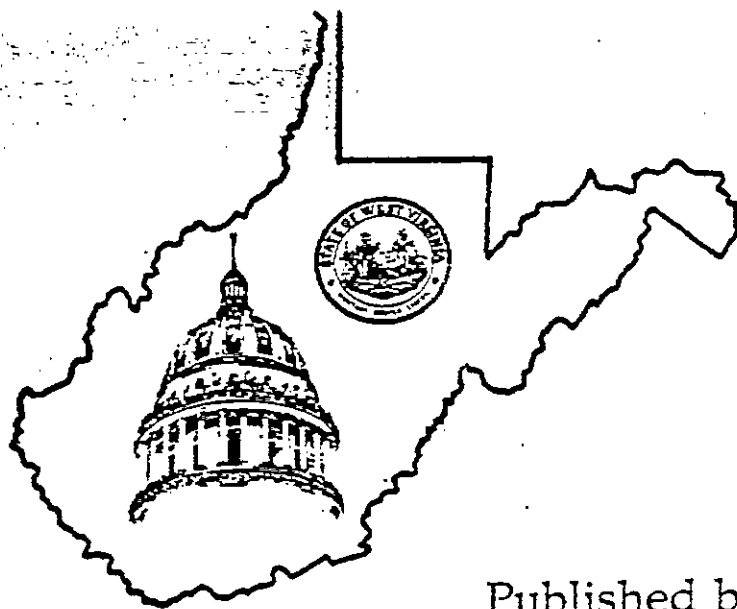
§45-31-6. Types and Amounts of Air Pollutants Discharged.

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

§45-31-7. Severability.

7.1. 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.

WEST VIRGINIA REGISTER



Published by Ken Hechler, Secretary of State

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Issue 28

July 12, 1996

Pages 1177-1231

A Weekly Publication

Administrative Law Division

*Judy Cooper
Director*

*Lisa Blake
Leah Powell
Administrative Assistants*

*Secretary of State
Administrative Law Division
Bldg. 1, Suite 157K
1900 Kanawha Blvd. E.
Charleston, WV 25305-0770*

(304)558-6000

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OTHER



WEST VIRGINIA AIR QUALITY BOARD

OFFICE OF WEST VIRGINIA SECRETARY OF STATE

1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311

FILED
NOTICE OF PUBLIC HEARING AND
PUBLIC COMMENT PERIOD
JUL 10 4 33 PM '96

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Fax: (304) 558-4116

July 2, 1996

The Honorable Ken Hechler
Secretary of State
Administrative Law Division
Building 1, Room 157K
Charleston, WV 25305

RE: Notice of Meeting for Publication
in the West Virginia Register

Dear Mr. Secretary:

In accordance with Chapter 6, Article 9A of the West Virginia Code, notice is hereby given that the West Virginia Air Quality Board (the "Board") will meet on August 12 & 13, 1996 at 9:00 a.m., hearings will be held in the hearing room located at 1615 Washington Street, E., Charleston, Kanawha County, West Virginia. The Board will consider the following agenda:

I. EVIDENTIARY HEARING

August 12, 1996, Appeal No. 93-06-P, Georgia-Pacific Corporation v. Dale Farley, Chief, Office of Air Quality, Division of Environmental Protection.

III. OTHER BUSINESS

The Board may also consider such other business as it may deem timely and appropriate. The hearings are open to the public.

Sincerely,
Margaret Chico-Eddy
Margaret Chico-Eddy
Clerk of the Boards

On Tuesday, August 19, 1996 beginning at 6:00 p.m., the West Virginia Division of Environmental Protection, Office of Air Quality will hold a public hearing on proposed revisions to the following legislative rules:

- 45CSR16 "Standards of Performance for New Stationary Sources"
- 45CSR25 "To Prevent and Control Air Pollution From Hazardous Waste Treatment, Storage, or Disposal Facilities"
- 45CSR31 "Confidential Information"
- 45CSR34 "Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 63"

Upon authorization and promulgation of revisions to 45CSR16 and 45CSR34, the Office of Air Quality will seek federal delegation of authority from the U. S. Environmental Protection Agency to implement and enforce the revised standards.

Upon authorization and promulgation of revisions to 45CSR25, the rule will be submitted to the U. S. Environmental Protection Agency as part of the State Hazardous Waste Management Program.

The hearing will be held in the Office of Air Quality's Conference Room located at 1658 Washington Street East, Charleston, West Virginia. The hearing is open to the public. Written and oral comments by the public will be accepted during the hearing on August 13th and will be made a part of the rulemaking record. The public may also submit written comments by mail or other delivery to the Office of Air Quality through August 13th for inclusion in the rulemaking record at the following address:

G. Dale Farley, Chief
Office of Air Quality
1658 Washington Street East
Charleston, WV 25311-2599

Copies of the proposed legislative rules will be available for public review on or before July 12, 1996 at the Office of Air Quality's Charleston office. The proposed legislative rules will also be available for public review on or before July 12, 1996 at the Office of Air Quality's regional offices located at 109 Adams Street, Room M-2, Fairmont; 1911 Warwood Avenue, Wheeling; and New Creek, WV.



DIVISION OF ENVIRONMENTAL PROTECTION

GASTON CAPERTON
GOVERNOR

1558 Washington Street East
Charleston, WV 25311-2599

LAIDLEY ELI MCCOY PH.D.
DIRECTOR

July 10, 1996

Charleston Newspapers
Legal Ad Department
P. O. Box 2993
Charleston, WV 25330

Dear Emerald:

Please publish the attached "Notice of Public Hearing and Public Comment Period" as soon as possible as a Class I legal advertisement in both the Gazette and Daily Mail. The publication must occur no later than Sunday, July 14, 1996 and must not be published on Sunday as a matter of law. We would like the ad to run in the Friday, July 12th editions, if at all possible. If you have any questions regarding this matter, please contact Tammy Mowrer at 558-2275.

You may submit your invoice and a tear sheet to the attention of Ms. Nadine Sitton, 1558 Washington Street, East, Charleston, West Virginia 25311.

Sincerely yours,

A handwritten signature in cursive script that reads "Dale Farley sam".

Dale Farley
Chief, Office of Air Quality

DF/tlm

Enclosure

Office of Air Quality
Phone: (304) 558-4022 Fax: (304) 558-3287



CHARLESTON NEWSPAPERS

P.O. Box 2093
 Charleston, West Virginia 25330
 Billing 348-4898
 Classified 348-4848
 1-800-WVA-NEWS
 FEIN 55-0676079

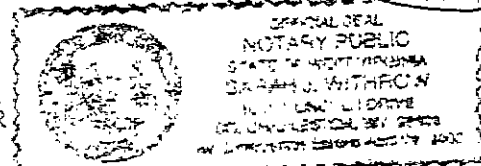
INVOICE DATE	07/15/96
ACCOUNT NBR	044921004
SALES REP ID	0014
INVOICE NBR	337416001

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			REFERENCE NBR	PURCHASE ORDER #		TOTAL RUN				
07/13	LEGF	GZ	NOTICE		L313635	1X0725				
			337416001			7.25		6.19	44.88	
07/13	LEGF	DM	NOTICE		L313635	1X0725				
			337416001			7.25		6.19	44.88	89.76
TOTAL INVOICE AMOUNT										89.76

State of West Virginia, AFFIDAVIT OF PUBLICATION

I, Sandra Leys of
 THE CHARLESTON GAZETTE, & DAILY DEMOCRATIC NEWSPAPER
 THE DAILY MAIL, A DAILY REPUBLICAN NEWSPAPER,
 published in the city of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of:



NOTICE
 was duly published in said paper(s) during the dates listed below, and was posted at the front door of the court house of said Kanawha County West Virginia, on the 15TH day of JULY 1996. Published during the following dates: 07/13/96-07/13/96
 Subscribed and sworn to before me this 16 day of July
 Printers fee \$ 89.76

Sarah J. Withrow
 Notary Public of Kanawha County, West Virginia

NOTICE OF PUBLIC HEARING AND PUBLIC COMMENT PERIOD

On Tuesday, August 13, 1996, beginning at 6:00 p.m., the West Virginia Division of Environmental Protection, Office of Air Quality will hold a public hearing on proposed revisions to the following legislative rules:
 45CSR16 "Standards of Performance for New Stationary Sources"
 45CSR25 "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities"
 45CSR31 "Confidential Information"
 45CSR34 "Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 63"
 Upon authorization and promulgation of revisions to 45CSR16 and 45CSR34, the Office of Air Quality will seek federal delegation of authority from the U.S. Environmental Protection Agency to implement and enforce the revised standards.
 Upon authorization and promulgation of revisions to 45CSR25, the rule will be submitted to the U.S. Environmental Protection Agency as part of the State Hazardous Waste Management Program.

The hearing will be held in the Office of Air Quality's Conference Room, located at 1558 Washington Street East, Charleston, West Virginia. The hearing is open to the public. Written and oral comments by the public will be accepted during the hearing on August 13th and will be made a part of the rulemaking record. The public may also submit written comments by mail or other delivery to the Office of Air Quality through August 13th for inclusion in the rulemaking record at the following address:
 G. Dale Farley, Chief
 Office of Air Quality
 1558 Washington Street East
 Charleston, WV 25311-7599

Copies of the proposed legislative rules will be available for public review on or before July 12, 1996 at the Office of Air Quality's Charleston office. The proposed legislative rules will also be available for public review in the Office of Air Quality's regional office located at 109 Adams Street, Room #42, Fairmont, WV. Warwood Avenue, Wheeling, and New Creek, WV. (313435)



DIVISION OF ENVIRONMENTAL PROTECTION

1558 Washington Street East
Charleston, WV 25311-2599

GASTON CAPERTON
GOVERNOR

LAIDLEY ELI MCCOY PH.D.
DIRECTOR

July 10, 1996

Wheeling News Register & Intelligencer
Legal Ad Department
1500 Main Street
Wheeling, WV 26062

Dear Sir:

Please publish the attached "Notice of Public Hearing and Public Comment Period" as soon as possible as a Class I legal advertisement. The publication must occur no later than Sunday, July 14, 1996 and must not be published on Sunday as a matter of law. We would like the ad to run in the Friday, July 12th editions, if at all possible. If you have any questions regarding this matter, please contact Tammy Mowrer at 558-2275.

You may submit your invoice and a tear sheet to the attention of Ms. Nadine Sitton, 1558 Washington Street, East, Charleston, West Virginia 25311.

Sincerely yours,

A handwritten signature in cursive script that reads "Dale Farley zsm".

Dale Farley
Chief, Office of Air Quality

DF/tlm

Enclosure

Office of Air Quality
Phone: (304) 558-4022 Fax: (304) 558-3287

NOTICE OF PUBLIC HEARING AND
PUBLIC COMMENT PERIOD

On Tuesday, August 13, 1996 beginning at 8:00 p.m., the West Virginia Division of Environmental Protection, Office of Air Quality will hold a public hearing on proposed revisions to the following legislative rules:

45CSR16 "Standards of Performance for New Stationary Sources"

45CSR25 "To Prevent and Control Air Pollution From Hazardous Waste Treatment, Storage, or Disposal Facilities"

45CSR31 "Confidential Information"

45CSR34 "Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 63"

Upon authorization and promulgation of revisions to 45CSR16 and 45CSR34, the Office of Air Quality will seek federal delegation of authority from the U.S. Environmental Protection Agency to implement and enforce the revised standards.

Upon authorization and promulgation of revisions to 45CSR25, the rule will be submitted to the U.S. Environmental Protection Agency as part of the State Hazardous Waste Management Program.

The hearing will be held in the Office of Air Quality's Conference Room located at 1558 Washington Street East, Charleston, West Virginia. The hearing is open to the public. Written and oral comments by the public will be accepted during the hearing on August 13th and will be made a part of the rulemaking record. The public may also submit written comments by mail or other delivery to the Office of Air Quality through August 13th for inclusion in the rulemaking record at the following address:

G. Dale Farley, Chief
Office of Air Quality
1558 Washington Street East
Charleston, WV 25311-2599

Copies of the proposed legislative rules will be available for public review on or before July 12, 1996 at the Office of Air Quality's Charleston office. The proposed legislative rules will also be available for public review on or before July 12, 1996 at the Office of Air Quality's regional offices located at 109 Adams Street, Room M-2, Fairmont; 1911 Warwood Avenue, Wheeling; and New Creek, WV.
N.R. July 12, 1996

STATE OF WEST VIRGINIA,
COUNTY OF OHIO.

I, Bonnie Mattern for the publisher of the

~~WHEELING NEWS-REGISTER~~
~~WHEELING NEWS-REGISTER~~

newspapers published in the CITY OF

WHEELING, STATE OF WEST VIRGINIA, hereby certify that the annexed publication was inserted in said newspaper on the following dates:

July 12, 1996

commencing on the 12 day of July, 1996

Given under my hand this 19 day of July, 1996

Bonnie Mattern

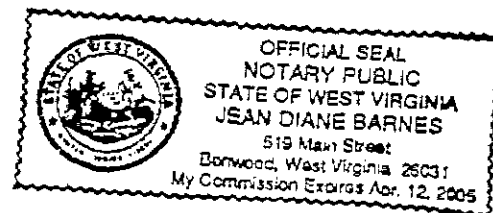
Sworn to and subscribed before me this 19th day of

July 1996 at WHEELING, OHIO COUNTY, WEST VIRGINIA

Jean Diane Barnes
Notary Public

of, in and for OHIO COUNTY, WEST VIRGINIA.

My Commission expires April 12, 2005





DIVISION OF ENVIRONMENTAL PROTECTION

1558 Washington Street East
Charleston, WV 25311-2599

GASTON CAPERTON
GOVERNOR

LAIDLEY ELI MCCOY PH.D.
DIRECTOR

July 10, 1996

Dominion Post
Classified Ad Department
Route 7 Greer Building
Morgantown, WV 26505

Dear Sir:

Please publish the attached "Notice of Public Hearing and Public Comment Period" as soon as possible as a Class I legal advertisement. The publication must occur no later than Sunday, July 14, 1996 and must not be published on Sunday as a matter of law. If you have any questions regarding this matter, please contact Tammy Mowrer at 558-2275.

You may submit your invoice and a tear sheet to the attention of Ms. Nadine Sitton, 1558 Washington Street, East, Charleston, West Virginia 25311.

Sincerely yours,

A handwritten signature in cursive script that reads "Dale Farley" followed by the initials "DFM".

Dale Farley
Chief, Office of Air Quality

DF/tlm

Enclosure

Office of Air Quality
Phone: (304) 558-4022 Fax: (304) 558-3287

FILED

NOTICE OF PUBLIC HEARING AND
PUBLIC COMMENT PERIOD

JUL 10 4 33 PM '96

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

On Tuesday, August 13, 1996 beginning at 6:00 p.m., the West Virginia Division of Environmental Protection, Office of Air Quality will hold a public hearing on proposed revisions to the following legislative rules:

- 45CSR16 "Standards of Performance for New Stationary Sources"
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- 45CSR34 "Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 63"

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G. Dale Farley, Chief
Office of Air Quality
1558 Washington Street East
Charleston, WV 25311-2599

Copies of the proposed legislative rules will be available for public review on or before July 12, 1996 at the Office of Air Quality's Charleston office. The proposed legislative rules will also be available for public review on or before July 12, 1996 at the Office of Air Quality's regional offices located at 109 Adams Street, Room M-2, Fairmont; 1911 Warwood Avenue, Wheeling; and New Creek, WV.

Mr. Ira H. Dorfman
Vice-President, Energy & Environment
Ryan-McGinn
2300 Clarendon Blvd., Suite 610
Arlington, VA 22201

Larry G. Kopelman
No. 9 Pennsylvania Avenue
Charleston, WV 25302

~~Ms. Kim Baker~~ *As Janet Fouty*
Ohio Valley Environmental Coalition
P. O. Box 970
Proctorville, OH 45669

Ms. Helen Gibbins
6128 Gideon Road
Huntington, WV 25705

~~Ms. Missy Woolverton~~
WV Citizen Action Group
1324 Virginia Street, East
Charleston, WV 25301

Ms. Rhonda Hooper
Monsanto
1 Monsanto Road
Nitro, WV 25143

Mr. Richard Poling
Office of Air Quality
Eastern Panhandle Regional Office
P. O. Box 99
New Creek, WV 267143

Ms. Claudia Banner
Appalachian Power Company
P. O. Box 2021
Roanoke, Virginia 24022-2121

Mr. Laidley Eli McCoy
Director, Division of Environmental
Protection
10 McJunkin Road
Nitro, WV 25143-2506

Act Foundation
523 Central Avenue
Charleston, WV 25302

~~Ms. Pamela Nixon~~
406 Grandview Point
Dunbar, WV 25064

*Returned
7-18-96*

Mr. Oliver A. Fick
Air Program Manager
Engineering-Science, Inc.
57 Executive Park South, N.E.
Suite 590
Atlanta, Georgia 30329-2265

Mr. Brian Farkas
Public Information Officer
WV Division of Environmental
Protection
10 McJunkin Road
Nitro, WV 25143-2506

Ms. Liz McMeekin
Aristech Chemical Company
600 Grant Street
Pittsburgh, PA 15219

Ms. Liz Schiffer
128 Woodbridge Drive
Charleston, WV 25311

Nat'l Center for Coal &
Energy
P.O. Box 6064
Morgantown, WV 26506-6064

Mr. Norman Steestra
Citizens Action Group
1324 Virginia Street, East
Charleston, WV 25301

Ms. Mary Wimmer
Water Quality Advisory
Committee
251 Laurel Street
Morgantown, WV 26505

Ms. Cindy Rank
WV Highland Conservancy
Route 1, Box 227
Rock Cave, WV 26234

Coal Outlook
1616 N. Fort Myer Drive
Suite 1000
Arlington, VA 22209

Coal Association
1301 Laidley Tower
Charleston, WV 25301

WVMRA
1624 Kanwaha Blvd.
Charleston, WV 25311

Mr. Larry George
Barth, Thompson & George
P. O. Box 129
Charleston, WV 25321

Brett Robinson
Remtech
550 Industrial Drive
Lewisberry, PA 17339-9537

Gerald P. McCarthy
VA Environmental Endowment
Three James Center
P.O. Box 790
Richmond, Va 23206

Pete Pitsenbarger
WVDEP
Abandoned Mine Lands
Nitro, WV 25143

Max Robertson
Office of Waste Management
1356 Hansford Street
Charleston, WV 25301

Office of Water Resources
1201 Greenbrier Street
Charleston, WV 25311

Dale Farley
Office of Air Quality
1558 Washington Street, E.
Charleston, WV 25311-2599

Ted Strait
WVDEP
Oil & Gas
Nitro, WV 25143

John Ailes
WVDEP
Mining & Reclamation
Nitro, WV 25143

Jerome Ashton
Stevens Publishing
1170 National Press Bldg.
Washington, D.C. 20045

WVDEP
Region 1
109 Adams Street
Fairmont, WV 26554-2300

WVDEP
Region 2
105 South Railroad Street
Philippi, WV 26416-9998

WVDEP
Region 3
116 Industrial Drive
Oak Hill, WV 25901-9714

WVDEP
Region 4
331 Court Street
Welch, WV 24801-2311

WVDEP
Region 5
525 Tiller Street
Logan, WV 25601-3438

WVDEP
District 1
1304 Goose Run Road
Fairmont, WV 26554

WVDEP
District 2
#1 Depot Street
Romney, WV 26757

WVDEP
District 3
P.O. Box 38
French Creek, WV 26218

WVDEP
District 4
General Delivery
MacArthur, WV 25873

WVDEP
District 5
694 Winfield Road
St. Albans, WV 25177

Harrison County ECO
P.O. Box 2113
Clarksburg, WV 26302

Millie Johnson
Toyota Motor Sales, USA, Inc.
1850 M Street, NW
Suite 600
Washington, DC 20036

John Wolmack
IOGA of WV
410 Washington Street, East
Charleston, WV 25301-1522

*Returned
7-17-96*

WV Press Association
3422 Pennsylvania Ave.
Charleston, WV 25302

The Logan Banner
437 Stratton Street
Logan, WV 25601

WVVA-TV
P. O. Box 1930
Bluefield, WV 24701

Charleston Gazette
1001 Virginia Street, E.
Charleston, WV 25301

Dominion Post
Rt. 7 Greer Building
Morgantown, WV 26505

WDTV-TV
5 TV Drive
Bridgeport, WV 26330

Charleston Daily Mail
1001 Virginia Street, E.
Charleston, WV 25301

Parkersburg News
519 Juliana Street
Parkersburg, WV 26101

WOWK - TV
P. O. Box 13
Huntington, WV 25706-00

The Register/Herald
301 N. Kanawha Street
Beckley, WV 25801

Parkersburg Sentinel
519 Juliana Street
Parkersburg, WV 26101

WSAZ-TV
Charleston Bureau
111 Columbia Ave.
Charleston, WV 25302

Bluefield Daily Telegraph
928 Bluefield Ave.
P. O. Box 1599
Bluefield, WV 24701

Point Pleasant Register
200 Main Street
Point Pleasant, WV 25550

WBOY-TV
P.O. Box 1590
Clarksburg, WV 26302

Morning Herald
100 Summitt Avenue
Hagerstown, MD 21740

Weirton Daily Times
114 Lee Ave.
Weirton, WV 26062

WTAP-TV
#1 Television Plaza
Parkersburg, WV 26101

Exponent
324-326 Hewes Ave.
Clarksburg, WV 26301

Wheeling Intelligencer
1500 Main Street
Wheeling, WV 26003

WTRF-TV
P.O. Box 6667
Wheeling, WV 26003

Telegram
324-326 Hewes Ave.
Clarksburg, WV 26301

Wheeling News Register
1500 Main Street
Wheeling, WV 26003

WQBE
Box 871
Charleston, WV 25323

Times - West Virginian
Quincy - Ogden Ave.
P. O. Box 2530
Fairmont, WV 26554

Williamson Daily News
100 Block E. 3rd Ave.
P. O. Box 1660
Williamson, WV 25661

WYVN-TV
P.O. Box 2089
Martinsburg, WV 25401

The Herald Dispatch
P. O. Box 2017
Huntington, WV 25720

The Morning Journal
207 W. King Street
Martinsburg, WV 25401

WEPM
1606 W. King Street
Martinsburg, WV 25401

Mineral Daily News-Tribune
P. O. Box 879
Keyser, WV 26726

The Inter-Mountain
520 Railroad Ave.
Elkins, WV 26241

The Morgan Messenger
104 Merser Street
P.O. Box 567
Berkeley Springs, WV 25411

Record-Delta
7 N. Locust Street
Buckhannon, WV 26021

The Pendleton Times
P.O. Box 906
Franklin, WV 26807

Preston County Journal
Preston County News
P.O. Box 587
Kingwood, WV 26537

Bramwell Aristocrat
Bank Building
Bramwell, WV 24715

The Gilbert Times
P.O. Box 1135
Gilbert, WV 25621

Post Report
204 C. W. Washington Street
Lewisburg, WV 24907

The Glenville Democrat
The Glenville Pathfinder
P.O. Box 458
Glenville, WV 26351-0458

The Greenbrier Valley
Ranger
P.O. Box 471
Lewisburg, WV 24901

Guyandotte Voice
P.O. Box 4308
Chapmanville, WV 25508

*Returned
7-17-96*

Coal Valley News
P.O. Box 508
Madison, WV 25130

The State Journal
P.O. Box 28
Charleston, WV 25321

The Calhoun Chronicle and
Grantsville News
P.O. Box 400
Grantsville, WV 26147

Hometown News
P.O. Box 597
Madison, WV 25130

West Virginia Beacon
P.O. Box 981
Charleston, WV 25324

The Lincoln Journal
The Weekly News Sentinel
P.O. Box 308
Hamlin, WV 25523

The Pocahontas Times
P.O. Box 117
Marlinton, WV 24954

Spirit of Jefferson
Advocate
P.O. Box 966
Charles Town, WV 25414

The Ritchie Gazette
P.O. Box 215
Marisville, WV 26362

Hinton News
P.O. Box 1000
Hinton, WV 25951

Cabell Record
911 3rd Avenue, Suite 2
Huntington, WV 25701

*Returned
7-17-96*

The Clay Herald
Route 4, Box 5
Clay, WV 25043

*Returned
7-17-96*

Hurricane Breeze
P.O. Box 336
Hurricane, WV 25526

The Montgomery Herald
P.O. Box 240
Montgomery, WV 25136

Wirt County Journal
P.O. Box 309
Elizabeth, WV 26143

Industrial News
P.O. Box 180
Jaeger, WV 24844

The Moorefield Examiner
P.O. Box 380
Moorefield, WV 26836

The Mullens Advocate
117 Moran Avenue
Mullens, WV 25882

Princeton Times
1101 Mercer Street
Princeton, WV 24740

Roane County Reporter
P.O. Box 647
Spencer, WV 25276

Hancock County Courier
P.O. Box 547
New Cumberland, WV 26047

Times Record
P.O. Box 647
Spencer, WV 25276

Wetzel Chronicle
P.O. Box 289
New Martinsville, WV 26155

The Jackson Star News
P.O. Box 10
Ravenswood, WV 26164

The Nicholas Chronicle
P.O. Box 503
Summersville, WV 26651

The Valley Press
Twin City Press
P.O. Box 8
Nitro, WV 25143

The News Leader
P.O. Box 591
Richwood, WV 26261

Braxton Citizen's News
P.O. Box 516
Sutton, WV 26601

Fayette Tribune
P.O. Box 139
Oak Hill, WV 25901

West Virginia Hillbilly
P.O. Box 430
Richwood, WV 26261

Braxton Democrat-Central
P.O. Box 427
Sutton, WV 26601-1399

Parsons Advocate
212 Main Street
Parsons, WV 26287

The Jackson Herald
P.O. Box 31
Ripley, WV 25271

The Monroe Watchman
P.O. Box 179
Union, WV 24983

Pennsboro News
P.O. Box 368
Pennsboro, WV 26415

Hampshire Review
P.O. Box 1036
Romney, WV 26757

Wayne County News
Tri-State Sunday
310 Central Avenue
Wayne, WV 25570

Grant County Press
P.O. Box 39
Petersburg, WV 26847

St. Albans Community News
P.O. Box 1000
St. Albans, WV 25177

The Webster Echo
P.O. Box 749
Webster Springs, WV 26288

Barbour Democrat
P.O. Box 459
Philippi, WV 26415

St. Marys Oracle
P.O. Box 27
St. Marys, WV 26170

The Webster Republican
P.O. Box 749
Webster Springs, WV 26288

The Piedmont Herald
P.O. Box 68
Piedmont, WV 26750

The Shinnston News
P.O. Box 7
Shinnston, WV 26431

The Brooke News
The Follansbee Reiview
P.O. Box 591
Wellsburg, WV 26070

Independent Herald
P.O. Box 100
Pineville, WV 24874

Tyler Star News/County
Journal
P.O. Box 191
Sistersville, WV 26175

Weston Democrat
P. O. Box 968
Weston, WV 26452

Weston Democrat
P.O. Box 968
Weston, WV 26452

SEP- 6-94 TUE 15:45

DEP NITRO W. VA

FAX NO. 3047590526

P. 06

The Herald Record
202 E. Main Street
West Union, WV 26456

The Catholic Spirit
P.O. Box 951
Wheeling, WV 26003

The Putnam Democrat
P.O. Box 179
Winfield, WV 25213

AGENDA

WV DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY
CONFERENCE ROOM
1558 WASHINGTON STREET, EAST
CHARLESTON, WEST VIRGINIA

AUGUST 13, 1996
6:00 P.M.

I. PUBLIC HEARING ON PROPOSED LEGISLATIVE RULES

1. 45CSR16 "Standards of Performance for New Stationary Sources"
2. 45CSR25 "To Prevent and Control Air Pollution From Hazardous Waste Treatment, Storage, or Disposal Facilities"
3. 45CSR31 "Confidential Information"
4. 45CSR34 "Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 63"

Division of Environmental Protection

Receiving Comments on: Regulations 16, 25, 31, & 34 Time/Date: Aug. 13, 1996 6:00 PM

#	NAME	ADDRESS	COMMENT	
			YES	NO
1.	Bob Foster	W.V. Mg. Assoc. - Chas	X	
2.	Steve White	ACTUP Foundation - Chas	✓	
3.	DAVID WHITE	1801 BEECHWOOD DR, S. CHAS	✓	
4.	Ken Woddy	1001 Virginia St, E Chas		✓
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				

BEFORE THE WEST VIRGINIA DIVISION OF
ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

In the matter of:

PUBLIC HEARING ON PROPOSED LEGISLATIVE RULES

- 45 CSR 16 "Standards of Performance for New
Stationary Sources"
- 45 CSR 25 "To Prevent and Control Air Pollution
From Hazardous Waste Treatment, Storage,
or Disposal Facilities"
- 45 CSR 31 "Confidential Information"
- 45 CSR 34 "Emission Standards for Hazardous Air
Pollutants Pursuant to 40 CFR Part 63"

Transcript of proceedings had at a public hearing in the above-styled matter for the West Virginia Division of Environmental Protection, Office of Air Quality at the Conference Room, 1558 Washington Street, East, Charleston, West Virginia, 25305, commencing at 6:00 p.m. on the 13th day of August 1996, pursuant to notice.

1

N. JOAN THAXTON COURT REPORTERS, INC.

7715 Sissonville Drive
Charleston, West Virginia
(304) 988-3970

P R O C E E D I N G S

1
2 MS. CHANDLER: Good evening. This public
3 hearing will now come to order on the 13th day of August,
4 1996 in the conference room of the West Virginia Division
5 of Environmental Protection in the Office of Air Quality,
6 located at 1558 Washington Street, East, Charleston, West
7 Virginia.

8 The purpose of this public hearing is to
9 hear discussions on the proposed amendments to the four
10 legislative rules filed in the Secretary of State's Office
11 on July 10, 1996, and noticed in the State Register on
12 July 12, 1996. The rules were noticed in Class I legal
13 advertisement in both the Charleston Daily Mail and the
14 Charleston Gazette. Notice was also sent to various
15 individuals and organizations. This public hearing is
16 being held pursuant to the provisions of 29A of the West
17 Virginia Code, Section 110 of the Clean Air Act.

18 By way of introduction, my name is Jeanne
19 Chandler with the West Virginia Division of Environmental
20 Protection, Public Information Officer. I will be your
21 moderator for these proceedings.

22 The hearing procedure this evening will be
23 to introduce each rule individually and allow time for

1 oral comment and then close the hearing for each
2 particular rule. Written comments for any rule may be
3 submitted at the end of the public hearing. For those of
4 you wishing to make formal comments, the sign-up sheet is
5 here and I see everyone has pretty much signed in. I
6 remind you that the comment period will end at the end of
7 the hearing tonight.

8 After review and consideration of all the
9 public comments made on these rules, the Office of Air
10 Quality will make whatever changes to the rules it deems
11 appropriate.

12 The Court Reporter is Ms. Missy L. Young.
13 She's with Thaxton Court Reporters. If anyone desires a
14 transcript of this proceeding, please contact Ms. Young.

15 The purpose of this public hearing is to
16 hear discussion on the proposed amendments through repeal
17 and replacement of 45 CSR 31, "Confidential Information."
18 45 CSR 31, "Confidential information," establishes
19 requirements for claiming information that is submitted to
20 the director as confidential, as well as the procedure for
21 requesting the disclosure of information that is claimed
22 to be confidential. The rule is not intended to replace
23 procedures under the Freedom of Information Act, but

1 rather to determine how information that is claimed as
2 confidential by regulated industry is to be handled by the
3 agency prior to any request for disclosure.

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

11 The floor is now open for public comment.
12 Mr.--White?

13 MR. WHITE: My name is Steve White. I am
14 Director of the Affiliated Construction Trades Foundation.
15 That's construction workers in the State of West Virginia,
16 about 12,000. I'm here to speak in regard to this 45 CSR
17 31 and with some problems that we have, our group, with
18 these proposed regulations, particularly with the trade
19 secret provisions.

20 We feel that this rule is adding extra
21 burdens to our organization, to the average citizen in
22 order to get information in the area of trade secrets. We
23 have been very active in a number of instances in getting

1 permit information. We have come across existing
2 provisions about trade secrets and dealt with them as they
3 are. I have problems with them as they even currently
4 stand. I think they're too broad. I think this is a
5 further strengthening of the ease of implementing the
6 trade secret veil, if you will. I think it's going to
7 really hurt in the free flow of information that's needed
8 for timely and responsible critique of permits and such.
9 So I urge you to reconsider that portion that makes the
10 extra burden on the individual person.

11 I would also note that if anyone would
12 think in reading through some of the regulations that
13 there is a crisis in West Virginia of trade secrets being
14 leaked out, that there is this big problem with trade
15 secrets, I have not seen it. I've not heard about it. In
16 fact, if anything from our group's own experience, we've
17 had a problem with getting the documents in a timely way
18 that we're after. We've been involved in court cases. In
19 one instance, in fact, we had to send and pay for out of
20 our members' hard-earned dues money a consultant to New
21 Jersey to a hotel room to review after signing off on all
22 sorts of non-disclosure statements, because a particular
23 company claimed trade secrets, which we found none. You

1 know, we weren't looking for trade secrets. It was a
2 bluff. It puts an extra burden on the individual and an
3 extra cost. This is really going to be a terrible
4 problem. So thank you very much.

5 MS. CHANDLER: Thank you, Mr. White. Any
6 other comments? There being nothing further, this public
7 hearing for 45 CSR 31 is concluded.

8 (WHEREUPON, the public hearing
9 was concluded at 6:28 p.m.)

WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

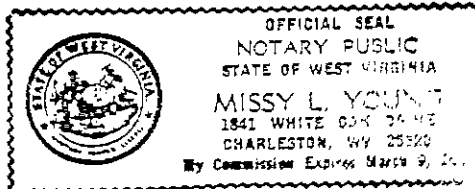
I, the undersigned, Missy L. Young, a Court Reporter and Notary Public within and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings had in the aforementioned matter.

Given under my hand and official seal this 19th day of August 1996.

Missy L. Young

Court Reporter
Notary Public

My commission expires March 9, 2004.



FORM CSR - LASER REPORTERS PAPER & MFG. CO. 800-826-6313

COMMENTS OF THE
WEST VIRGINIA MANUFACTURERS ASSOCIATION
REGARDING PROPOSED AMENDMENTS TO THE
RULE CONCERNING
CONFIDENTIAL INFORMATION

45 CSR 31

I. INTRODUCTION

On July 10, 1996, the West Virginia Division of Environmental Protection ("DEP" or "Division") filed with the Secretary of State a proposed rule which would replace existing 45 CSR Series 31 (Regulation 31), which pertains to confidential information. Accompanying the proposed rule was a notice requesting both written and oral comment. Pursuant to this notice, the West Virginia Manufacturers Association ("WVMA") has undertaken a review of the proposed rule, and files these comments.

The WVMA represents a broad cross-section of large and small industrial concerns throughout the State of West Virginia. In keeping with the WVMA's supportive position regarding the development of West Virginia's air pollution control program, the WVMA offers these comments as a means to facilitate progress toward a reasonable and protective program, consistent with the requirements of the Clean Air Act and regulations promulgated thereunder.

II. COMMENTS

The Briefing Document filed with proposed Regulation 31 states that "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 [proposed] rule." 40 CFR 2.201 through 2.215 and 2.301 establish a federal program dealing with the confidentiality of business information. Under the federal program, a number of procedures are established regarding the confidentiality of information

submitted to U.S. EPA under the Clean Air Act, 42 USC 7401 et seq. The complete program established by U.S. EPA provides a number of safeguards in dealing with the confidentiality of business information, including requirements dealing with disclosure for special circumstances, requirements prohibiting disclosure for reasons other than business confidentiality where disclosure would be prohibited by other statutes, and the establishment of penalties for wrongful disclosure of business confidential information by U.S. EPA.

The proposed Regulation 31 incorporates only portions of the federal program and the adoption of the proposal will result in both a substantial increase in the amount of effort necessary for businesses to claim confidentiality regarding information submitted to the DEP and substantially less confidentiality protection afforded to the entity claiming confidentiality of business information. For example, the federal confidentiality program at 40 CFR 2.204 regarding information previously submitted, requires U.S. EPA to determine, upon a request for disclosure of information, whether a previous confidentiality determination had been made and to review whether such prior determination of confidentiality is still valid. Proposed Regulation 31, at Section 3.2, Information Previously Submitted, allows the disclosure of information which was claimed as confidential and submitted prior to the effective date of the regulation unless the person who originally submitted the information reestablishes their claim of confidentiality. This requirement will result in a number of permittees under the DEP air program having to affirmatively refile confidentiality assertions with the Office of Air Quality ("OAQ") in order to maintain the confidentiality of information submitted which was rightfully determined to be confidential when submitted even years prior to the promulgation of the new regulation rather than dealing with issues of disclosure regarding prior information as they arise. Thus, permittees in the air program will be forced to engage in what could be massive resubmittals of information under the new rule which

should not be necessary.

Sections 3.3 and 3.4 of the proposed regulation have no federal counterpart and they impose what WVMA believes amounts to a penalty on businesses attempting to assert confidentiality with respect to information submitted to OAQ. Under the proposed rule, information for which business confidentiality is claimed will have to be prepared at least twice, including once in redacted form and once in unredacted form on colored paper which is required to be 8 ½ inches by 11 inches. WVMA submits that the permitting process under which DEP operates requires the submittal, by many complex businesses, of information such as drawings and computer printouts which, apparently, will now have to be reproduced on 8 ½ inches by 11 inches colored paper. The production of such drawings on the colored 8 ½ x 11 inch paper could, in and of itself, render the information "confidential" as a result of it being unreadable in shrunken form. WVMA believes that the process which would be established if the proposed regulation is adopted is both unnecessary and unworkable. WVMA has no problem with requiring a business attempting to assert confidentiality regarding information submitted to OAQ to identify the information; however, the assertion should be allowed to be made in a manageable form and only one time rather than multiple times.

Section 4.1 of the proposed regulation deals with requests for disclosure and, on its face, appears to apply only to requests for disclosure of information claimed to be confidential. Assuming that the proposed submittal process is revised in order to eliminate the duplicative and otherwise unworkable process established in proposed Sections 3.3 and 3.4, WVMA believes that Section 4.1 should apply to requests for any information and, further, prefers that such requests be dealt with under the aegis of the Freedom of Information Act rather than establishing a separate process in Regulation 31.

Section 4.2 of the proposed rule establishes a procedure by which the entity who submitted the confidentiality request will be advised of the determination of the Director regarding whether the information will be deemed to be confidential. The procedure provides no opportunity for informal discussion about the determination as is afforded in the federal program under 40 CFR 2.206. The proposed regulation would leave the entity who submitted the information with no choice but to initiate litigation to preserve its rights. WVMA suggests that a more reasonable approach would be the establishment of a process, such as the one afforded in 40 CFR 2.206, under which a preliminary determination could be made and under which the entity requesting confidentiality would be allowed to provide supplementary information, answer OAQ questions, or otherwise support the confidentiality claim prior to a final determination by the Director.

Finally, Section 5 of the proposed rule establishes criteria for confidentiality. However, Section 5.1 states that the Director may consider several criteria in reviewing a request for disclosure. WVMA believes both that the criteria for confidentiality should be more objective and that the Director should be required to consider objective criteria rather than merely being allowed to consider such criteria if he or she chooses to do so. In addition, WVMA believes that the criteria should include some guidance regarding the definition of confidentiality. For example, 40 CFR 2.201(e) discusses business confidentiality and defines "reasons of business confidentiality" to include

"the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information. The definition is meant to encompass any concept which authorizes a federal agency to withhold business information under 5 USC 552(b)(4), as well as any concept which requires EPA to withhold information from the public for the benefit of a business under 18 USC 1905 or any of the various statutes cited in 40 CFR 2.301 through 2.309."

While not endorsing the incorporation of this section of the federal rules in OAQ Regulation 31, WVMA does believe that there should be more objective criteria for confidentiality and that the Director must be directed to use such criteria rather than allowed discretion to use them or not in making a confidentiality determination.

WVMA appreciates the opportunity to provide comments regarding proposed 45 CSR 31 and would be pleased to provide clarifications to any of its comments if desired by the OAQ.

Respectfully submitted, this the 13th day of August, 1996,

Karen S. Price / R. L. Foster
Karen S. Price, President
West Virginia Manufacturers Association
2001 Quarrier Street
Charleston, West Virginia 25311
Telephone: 342-2123

Prepared by:

Robinson & McElwee
Post Office Box 1791
Charleston, West Virginia 25326

Contact:

Edward L. Kropp, Esq.
Telephone: 347-8342

BASF Corporation

Original - Tammy
J. Dale
Brett

Tammy
BASF

8/13/96 August 12, 1996
SKA

CERTIFIED MAIL #P 432 621 748
RETURN RECEIPT REQUESTED

G. Dale Farley, Chief
WVDEP Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311

Re: Comments to Proposed Regulation - "*Confidential Information*"

Dear Chief Farley:

BASF Corporation submits the following comments regarding the proposed regulation *45 CSR 31 - Confidential Information*.

Firstly, BASF acknowledges that the 1990 amendments to the Clean Air Act has increased the paperwork burden exponentially for industry and Agencies alike. The increase in paperwork has left everyone trying to find ways to streamline and simplify their handling of "paper" requirements. However, the Office of Air Quality's attempt to streamline the Agency's portion through implementation of the proposed Confidential Information regulation, will affectively burden industry exponentially, contrary to the comments found under 4B. of the attached "Fiscal Notes for Proposed Rules". The proposed regulation also reflects a considerable deviation from the existing regulations.

Section 3.1 - Made When Information Submitted.

Should be amended to remove the "now or never" provisions. It is understood that the best practice is to assert claims of confidential information at the time of submission. However, for larger facilities and diverse organizations like BASF, recordkeeping, tracking, reporting, reviewing, and monitoring can be done at many operational levels. To effectuate an automatic and permanent waiver of such claims merely because one person in the chain may initially fail to claim confidentiality, seems like a very severe penalty, with no benefit to the Agency and substantial loss to the industry.

Section 3.2 - Information Previously Submitted

This section should be stricken. It is an unreasonable provision which requires anyone who ever submitted a report containing confidential information to the Agency to find each and every one of those reports and make another claim to confidentiality. This provision reflects a fundamental lack of appreciation for the importance of withholding confidential business information from public disclosure and, upon the effective date of the regulation, would immediately penalize industry for any information it has ever claimed to be confidential. The Agency has the duty to protect confidential and proprietary information no matter how old the information may be. All claims of confidentiality made prior to the effective date of the regulation should be grandfathered.

Chief, WVDEP Office of Water Resources
August 12, 1996
Page 2

Section 3.3 - Submission of Information Claimed Confidential

This section is also particularly objectionable since it requires unnecessary, detailed, "up front" justification for each segment of information within each page of each submission. To require such implicit details in a cover letter, such that the Director alone can determine what should and should not be disclosed upon request, is irrational, notably since there appears to be no other input allowed for industry to strengthen their claim of confidentiality.

Coupling this with the Agency's request to "color-code" in addition to stamping and posting of lengthy phrases such as "redacted copy - claim of confidentiality" in the public disclosure portion, is excessive and redundant. This is tremendously overburdensome for industry to establish vital rights of privacy they are by law entitled to. Again, minimal foreseeable benefit to the Agency.

The Agency's requirement to provide a date upon which each claim expires is presumptuous that confidential information will always have an expiration date. Information such as plant diagrams and process descriptions will never have an expiration date. The Agency will have to expand on what is acceptable and unacceptable under this provision.

BASF appreciates the opportunity to comment on the proposed regulations and hope that our input will be beneficial in revising this regulation so that all parties can experience a sense of security in their respective functions.

Sincerely,



Angela L. Ferneau
Environmental Coordinator

alf

Original - Tammy
Copy - Dale
Britt
8/13/96

Tammy

The West Virginia Mining and Reclamation Association

1624 Kanawha Blvd., E, Charleston, WV 25311

and the West Virginia Coal Association

1301 Laidley Tower, Charleston, WV 25301

comments in response to

The Proposed 4 Sets of Legislative Rules

45 CSR Series' 16, 25, 31 & 34

Division of Environmental Protection,

August 13, 1996

The West Virginia Mining & Reclamation Association and the West Virginia Coal Association submit the following comments, this 13th day of August, 1996, in response to the four (4) sets of Proposed Legislative Rules, 45 CSR Series' 16, 25, 31 & 34, Division of Environmental Protection, Office of Air Quality:

Page 1 of 2

I. ABOUT THE PUBLIC COMMENT OPPORTUNITY:

A. OUR REPRESENTATION:

The West Virginia Mining and Reclamation Association and the West Virginia Coal Association represent over 400 coal producing companies and associate member companies who provide products and services to the coal industry. Our comments on these proposed rules are on behalf of all of the members of the WVMRA and the WVCA.

B. OUR APPRECIATION FOR THIS OPPORTUNITY:

We are grateful for this opportunity to offer comments on these Legislative Rules.

II. BACKGROUND ON THE WEST VIRGINIA COAL INDUSTRY:

The coal mining industry in West Virginia produces hundreds of millions of tons of high quality coal for domestic and foreign use as an energy source for the production of electricity, steel and a host of other applications. Employment directly in West Virginia mines and indirectly in the mining support trades and the hundreds of millions of dollars of taxes generated by coal related sources are the **economic backbone** of the Mountain State.

A recent study found that one out of every ten payroll dollars in West Virginia comes from the coal industry. It was further revealed that one of every three business tax dollars being collected by the State comes directly from the coal industry.

Every influence which alters the production of West Virginia coal changes the fragile **competitive balance** between coal mines here and coal mines in other coal producing states and other nations. Therefore, changes in the governmental regulations affecting this industry must be made with the potential negative impacts of those changes foremost in the minds of those considering such changes.

The West Virginia Mining & Reclamation Association and the West Virginia Coal Association submit the following comments, this 13th day of August, 1996, in response to the four (4) sets of Proposed Legislative Rules, 45 CSR Series' 16, 25, 31 & 34, Division of Environmental Protection, Office of Air Quality:

Page 2 of 2

III. OUR COMMENTS ABOUT THE PROPOSED LEGISLATIVE RULE:

We have distributed copies of the proposed rule changes to members of our associations, and our respective staffs have preliminarily reviewed the proposed language. It is not yet clear how the proposed rules affect the coal mining industry, therefore we offer no specific comments during this public comment period.

We do, however, reserve the privilege to offer comments at a later date to the agency or to the legislature on this matter.

Again, we are grateful to Division of Environmental Protection for providing this opportunity for comments and amendments.

COMMENTS OF THE WEST VIRGINIA CHAPTER SOCIETY OF PROFESSIONAL JOURNALISTS ON PROPOSED LEGISLATIVE RULE OF THE WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, OFFICE OF AIR QUALITY RELATING TO CONFIDENTIAL INFORMATION

The West Virginia chapter, Society of Professional Journalists ("Society") is a component of an unincorporated national association of 13,000 journalists having a professional and personal interest in access to information in the possession of government agencies including the West Virginia Division of Environmental Protection ("DEP"). The following comments are offered to the DEP on its proposal to repeal 45 CSR section 31 and replace the repealed section with a new section 31.

The provisions of the proposed new section 31 appear to substantially track parts of the operative language of Title 40, Chapter I, Subchapter A, Part 2, Subpart A of the Code of Federal Regulations, 40 C.F.R. section 2.100 et. seq. No doubt DEP's decision to track applicable federal law is based upon DEP's awareness that in assuming the primary authority to enforce the federal Clean Air Act ("CAA") in West Virginia, DEP is required by law to maintain a regulatory program consistent with the CAA and the rules and regulations of the United States Environmental Protection Agency ("EPA") promulgated thereunder. A careful reading of the proposed section 31 reveals that DEP has limited public access to information in a manner inconsistent with applicable federal law.

I. THE PROPOSED RULE PLACES ADDITIONAL AND UNLAWFUL BURDENS UPON WVFOIA REQUESTORS

Unlike the federal scheme for reviewing claims that information contained in DEP files constitute confidential "trade secrets", DEP proposes to create a process that places the burden upon a Freedom of Information Act requestor to challenge a claim of confidentiality *prior to the DEP's review* of the confidentiality claim. Moreover, the proposed rule graft an additional unlawful step onto the process identified by both federal law and the West Virginia Freedom of Information Act.

Under the DEP proposal, upon receiving a claim of confidentiality, the state agency will not review and make a determination whether to grant or deny the claim. Rather, under the proposed section 3.4 and 3.5 the DEP simply accepts the confidentiality claim and notifies the FOIA requestor that such a claim has been made. The FOIA requestor then must make a second request for review of the claim of confidentiality to the Director *before the Director undertakes to make a decision upon the claim*. In addition, the FOIA requestor is required by the proposed rule to "include [in the request] the basis upon which the person requesting disclosure disputes the claim of confidentiality

Thus, the proposed rule places additional obstacles and burdens upon a FOIA requestor not contemplated by either federal law or the West Virginia FOIA. There is no requirement under the CAA or the WVFOIA for a citizen requesting information under the FOIA to make two (2) requests for the same information, nor for the FOIA requestor to have the burden of challenging a claim of trade secret confidentiality with legal and technical reasons prior to the regulatory agency's review and decision on that claim.

It is simply untenable to graft upon the FOIA process additional burdens upon those who request information under the WVFOIA. The WVFOIA sets forth a simple procedure. If a request falls within the statute's specific enumerated exemption for trade secrets, the DEP and any other agency must notify the requestor that the material sought falls within the trade secret exemption. The decision must be made in the first instance by the agency--here the Director of the DEP.

By placing an additional burden upon those seeking information under the WVFOIA, the proposed regulation operates to discourage WVFOIA requests and to unlawfully lengthen the time allotted by the WVFOIA for agency action upon a FOIA request. WVFOIA requestors come from all walks of life. Many citizens eligible to make FOIA requests do not have the knowledge, background or resources to make a second request including a written statement disputing a corporation's claim of confidentiality. Indeed, it is the responsibility of the DEP to protect the rights of citizens making FOIA requests to review claims of exemption under the FOIA.

DEP should have the resources and expertise to carry out its mandate under the WVFOIA and the West Virginia Air Pollution Control Act to review and make an initial determination on a company's claim of trade secret exemption without imposing an additional burden upon citizens that is not contemplated by applicable law. After the DEP makes a decision upholding a claim of confidentiality, the WVFOIA requestor has the right to immediate judicial review under the WVFOIA.

II. THE PROPOSED RULE PLACES LESS OF A BURDEN UPON BUSINESSES
MAKING A CONFIDENTIALITY CLAIM THAN REQUIRED
BY THE FEDERAL CLEAN AIR ACT

Section 3.3.b of the proposed rule sets forth the requirements for information to be submitted to DEP in support of a claim for trade secret confidentiality. The information required to be submitted by the claimant, however is significantly less specific than the information required by 40 C.F.R. section 2.204 -- the comparable federal regulation, 40 CFR section 2.204 (e)(4) which provides in relevant part for confidentiality claimants to provide the following information:

- (i) The portions of the information which are alleged to be entitled to confidential treatment;
- (ii) The period of time for which confidential treatment is desired by the

business (e.g., until a certain date, until the occurrence of a specified event, or permanently);

- (iii). The purpose for which the information was furnished to EPA and the approximate date of submission, if known;
- (iv). Whether a business confidentiality claim accompanied the information when it was received by EPA;
- (v). Measures taken by the business to guard against undesired disclosure of the information to others;
- (vi). The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
- (vii). Pertinent confidentiality determinations, if any, by EPA, or other federal agencies, and a copy of any such determination, or reference to it, if available;
- (viii). Whether the business asserts that disclosure of the information would be likely to result in substantial harmful effects on the businesses' competitive position, and if so what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects; and
- (ix). Whether the business asserts that the information is voluntarily submitted information as defined in s. 2.201(i), and if so, whether and why disclosure of the information would tend to lessen the availability to EPA of similar information in the future.

In contrast to the specific information requested of those who make trade secret confidentiality claims under the federal CAA, the DEP proposes to ask the most general of inquiries of claimants under the West Virginia Air Pollution Control Act. The DEP proposed rule requires those making claims of confidentiality to state only the following:

... 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.

There is a very good reason for requiring those who make a claim of trade secret confidentiality state with peculiarity the basis for the claim. Specific detailed justification of such claims will more clearly indicate to DEP when a claim is legitimate --- thus making resort to judicial review less likely. Specific justification will also allow WVFOIA requestors and DEP to more easily determine when a claim is not meritorious. Finally, specific justifications demanded by federal law greatly facilitate the judicial review function if a claim of confidentiality is subsequently reviewed by the

courts. The proposed regulation should be revised to include requirements that confidentiality claimants submit at least as detailed information as required by the federal rules.

III. THE PROPOSED RULE DOES NOT EXPRESSLY LIMIT THE CLAIM OF CONFIDENTIALITY TO BUSINESS TRADE SECRETS

The West Virginia Air Pollution Control Act and the WYFOIA allow DEP to withhold from WYFOIA requestors only that information which qualifies as business trade secrets. Those business trade secrets which may be withheld as confidential by DEP are limited by the West Virginia Air Pollution Control Act to those which fall within the narrow category of "methods or processes". W.V. Code section 22-10-10. There are other broader types of trade secret and other information that a business entity might consider confidential. The proposed rule does not make clear that only the narrow category of trade secrets which involve methods or processes may be withheld from the public as confidential and exempt under WYFOIA. The distinction between trade secrets generally and other confidential business information and the narrow category of trade secret methods and processes should be clearly stated in the final rule.

IV. THE PROPOSED RULE DOES NOT EXPLICITLY PLACE THE BURDEN UPON THE PARTY CLAIMING TRADE SECRET CONFIDENTIALITY TO PROVE ENTITLEMENT TO THE EXEMPTION

The WYFOIA mandates that the burden of showing entitlement to a trade secret exemption is upon those claiming the applicability of the exemption. The instant rule should make explicit that both the confidentiality claimant as well as DEP bear the burden of proving that specific information may be withheld as a confidential trade secret. Such notice in the rule will serve to educate the public as to the parameters of citizens rights to information and will clearly define where the burden of proof lies when confidentiality claims are made.

V. THE DISCRETION ALLOWED THE DIRECTOR IN MAKING A DECISION ON A CONFIDENTIALITY CLAIM UNDER THE PROPOSED RULE IS IMPERMISSIBLY BROAD

Section 45-31-5 of the proposed rule grants the director much more discretion than its federal counterpart allows. The grant of such discretion would unlawfully render the DEP's air quality program inconsistent with the federal CAA. 40 C.F.R. section 2.208 sets forth substantive criteria for confidentiality determinations. While the federal rule makes satisfaction of all the criteria in section 2.208 a necessary prerequisite to a determination of confidentiality, the proposed rule states only that "the Director may consider" the enumerated criteria. Unlike its federal counterpart, the proposed 45-31-5 does not clearly require that the Director find all of the enumerated criteria as a

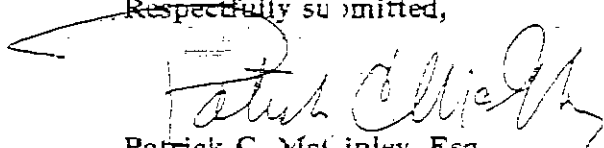
condition precedent to upholding a claim of confidentiality. Thus, the proposed rule impermissibly grants the Director broad discretion to uphold a claim of confidentiality on grounds substantially less stringent than required by the federal CAA.

VI. THE PROPOSED RULE DOES NOT SET FORTH THE TIME
IN WHICH THE DIRECTOR MUST MAKE A DETERMINATION
ON A CLAIM FOR CONFIDENTIALITY

The proposed rule fails to set forth a procedure outlining time limits within which the Director is required to make a confidentiality determination, nor does the proposal require the Director to notify FOIA requestors of the Director's decision and of the requestors' right to seek judicial review thereof. The proposed rule should be modified to insure compliance with the mandate of the WVFOIA relating to these points.

The West Virginia Chapter, Society of Professional Journalists, appreciates the opportunity to present the above comments.

Respectfully submitted,



Patrick C. McGinley, Esq.

For the West Virginia Chapter,
Society of Professional Journalists



Division of Environmental Protection
West Virginia

DATE 3/12/96

TO: DALE Farber

FROM: Wandy

- For your information.
- For your review and approval.
- To be signed.
- Please take charge of this.
- Please provide comments.
- Please note and file.
- Answer, send me copy of your letter.
- Prepare reply for my signature.
- Please see me.
- Urgent!

Remarks:

Hilda Mitros' comments on various topics include the confidentiality rule you propose.

Wandy

RECEIVED
Environmental Advocates Office

JUL 30 1996

WV Division of
Environmental Protection

Dale
Tommy
Britt

FAX
759 0526

Dear Wendy

We heard there is going to be P & P Proposals in the next legislature concerning your office as well as other items that are of great interest to us.

OWD are sending these to you because much of our correspondence to this agency doesn't get proper attention in our opinion.

We are also planning to be in Charleston this session ~~to~~ lobbying our elected officials where this agency is concerned.

1- office of Environmental ~~Advocates~~ Protection
As far as the environment goes especially the Protection part is the biggest sham the citizens of WVA has to endure. They appear to us as the most loyal employee a company could buy and

the worst part is they're paid by us citizens.

Wendy we like the Title Citizens Advocate and we would like for it to mean just that someone who represented the citizens and had the power to take care of the problem. Here is a list of the teeth needed by the Citizens advocate.

1- Every protest or complaint made by a citizen that is not properly settled by inspectors within 30 days should be turned over to the citizens advocate who had the power to make a fair and just settlement for the citizen.

2- We the people want the Citizens Advocate to have more power as far as the hearing board is concerned. We have investigated and found a citizen seldom wins his case when he appears before this board. It appears to

be stacked against us we understand they are appointed by the Gov and we believe they may be very honest people how ever we ordinary citizens are at a great disadvantage when we appear before the board we want changes we also want a fair number of impartial citizens appointed to this board creating a balance not government against the citizen We want these citizens appointed by the Citizens Advocate.

3 We want the Citizens Advocate office to have the power to provide us with copies of all the laws rules and regulations concerning our problems and how to best deal with AEP so we can adequately represent our case.

4. Since our tax dollars are paying the whole bill we want lawyers in this agency who will represent us since

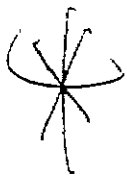
Money can't buy us one to go up against the power house and we are paying for the best money can buy to represent government bureaucrats against us. At least makes it appear we are still a democracy and that the constitution is still in effect.

5 We want the Citizens Advocate to be actively involved in the permitting process especially in the protested permits this Agency has the power to issue a permit on our land when a company does not have a right at own it. Many of these problems would not even come up if a company had to deal fairly in the beginning.

6 Every property owner should have a copy of every permit complete as it pertains to their property before a permit

is issued.

7. Apply the same power any and all areas added to an existing permit.
8. Give the Citizens Advocate the power to be involved in the release of all permits give them the power to be sure all reclamation is properly done for citizens that own property according to your own law restored as good as or better than. Also a citizens should be required showing this condition has been met before a release can be given.



We also have an interest in 45 CSR 31 Confidential Information if it concerns a citizen or their property or a community as a whole then it cannot be confidential same for this Agency dealings with these

Companies nothing should be
confidential if it directly concerns
us or our property.

As a matter of fact we think
lots of changes need to be
made in the agency they
have to much power and
to ~~not~~ little supervision it
like a biting dog without a
leash. the legislature make us responsible and
they are responsible for their agencies and need to be accountable
This agency should never be allowed
to permit a citizens mountain top
for coal removal and have the
power to let a coal company
leave ditches directed away from
natural flow of streams leave
swamps create wet lands on
a mountain top in the name
of wildlife management the
person who owns it should
have the power to use it the
way he see fit and land left
like this cannot be insured
or erosion controlled explain that
to the environment.

Woody. Call me if you cant
read this and I hope I have
not hurt your feeling in any
way I would never do that
but I believe everything I've
said and so does everybody else
down here living this right
now.

Love You
Aldo Mitros

We are going to ask the legislature
to take another look at the methane
gas bill Sen Ross told us himself
they wrote it just like Pennsylvania
and the citizens lost their case
it is our opinion that if our
legislators knew this and purposefully
write is legislation this way they
clearly intended to rob us citizens
for out of State Coal Companies
and they need to lick this
call over.

STATE OF WEST VIRGINIA
BUREAU OF THE ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY
RESPONSES TO PUBLIC COMMENTS

PROPOSED 45 CSR 31

Written and oral comments were received on Proposed 45 CSR 31 during the public comment period, which began on July 12, 1996, and ended upon the close of the public hearing which took place on August 13, 1996.

Comments of the West Virginia Chapter Society of Professional Journalists ("WVCSPJ").

The WVCSPJ comments that 45 CSR 31 is required to parallel federal regulations on this subject matter because "in assuming primary authority to enforce the federal Clean Air Act ("CAA") in West Virginia, DEP is required by law to maintain a regulatory program consistent with the CAA and the rules and regulations of the United States Environmental Protection Agency ("EPA")." The federal regulations that the WVCSPJ believes the DEP should parallel are contained in Title 40, Chapter I, Subchapter A, Part 2, Subpart A of the Code of Federal Regulations, 40 C.F.R. § 2.100 et seq.

Response: The authority for 40 C.F.R. § 2.100 is predicated in substantial part upon the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The federal FOIA applies to *federal agencies* rather than state agencies such as the Division of Environmental Protection ("DEP"). Maintenance of government records by agencies of the State of West Virginia is governed by the West Virginia Freedom of Information Act ("WVFOIA"), chapter 29B, article 1 of the West Virginia Code. Significant differences exist between the two acts. Of practical importance is the difference in the time each act allows an agency to respond to a public request for information. For example, the federal FOIA allows federal agencies ten working days, while the WVFOIA allows only five working days to respond to a request for information. In fact, the EPA regulations that this commentator desires the DEP to adopt would facially violate the WVFOIA.¹ The Clean Air Act also does not require across the board conformity of state programs with their federal counterparts. To the contrary, several provisions in the CAA clearly contemplate that each state program will differ from the federal program.²

Further, 45 CSR 31 is not required to track or parallel any federal counterpart because it is a requirement of state law. Specifically, 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, as required by this section."* Thus, not only is 45 CSR 31 required to conform with the WVFOIA, but it must also meet the requirements of W.Va. Code § 22-5-10.

¹For example, 40 C.F.R. 2.112 allows EPA ten working days to respond to a FOIA request.

²See, e.g., CAA § 119.

The WVCSPJ comments that proposed 45 CSR 31 imposes an additional step on WVFOIA requestors. Specifically, the WVCSPJ reads the proposed rule as requiring WVFOIA requestors to make two requests for confidential information.

Response: The proposed rule was drafted with the practical realities of WVFOIA requests in mind. The vast majority of FOIA requests are made for the inspection of general company files, which often span thousands of pages of information. Such requests may not be sufficiently specific under the WVFOIA, but are nonetheless accommodated by the OAQ. In such a case, section 3.4 of the proposed rule was written to provide notice to a WVFOIA requestor that information claimed to be confidential was redacted from the file and to put them on notice that they may wish to challenge such claim of confidentiality for that information under 45 CSR 31. Under the version of 45 CSR 31 currently in effect, members of the public who make non-specific WVFOIA requests may receive inadequate notice that confidential information has been redacted from the company file pursuant to a claim of confidentiality, and are required to make a specific request for the confidential information in order to trigger a confidentiality determination under that rule.

The practical reality of document handling prevents the OAQ from making a determination of confidentiality for every submission of information claimed to be confidential. To the contrary, such a regime would necessitate additional professional staff members dedicated solely to such a determination process and to accommodate company intervention as is required under the current rule. Instead, the OAQ has attempted to draft the proposed rule in order to provide the public with a higher degree of involvement in the process of confidentiality determinations. Specifically, CSR § 45-31-4.1 was drafted with the intent to provide members of the public with the opportunity to rebut the justification for a claim of confidentiality made by the submitter of information. However, because members of the public through their representatives seem to view this opportunity as a burden, the proposed rule has been amended to remove the provision complained of.

The WVCSPJ comments that a greater burden is placed upon businesses claiming confidentiality by 40 CFR section 2.204(e)(4) than by the proposed 45 CSR 31-3.3.b.

Response: Notwithstanding the response of the OAQ that the state regulation is not required to parallel any federal counterpart, a close reading of 40 CFR 2.204(e)(4) reveals that a business which has made a claim of confidentiality is afforded a significant opportunity to intervene in the determination process. Proposed rule 45 CSR 31 has been drafted to attempt to require companies claiming confidentiality of information to provide an "up front" justification for their claim to which the OAQ can turn to if an evaluation of their claim is triggered under 45 CSR 31. The "justification" envisioned in section 3.3.b was to include the criteria of section 5, which has been taken from 40 CFR 2.208, and which resides in the rule 45 CSR 31 currently in effect. Section 3.3.b of the proposed rule will be amended to make it more clear that the criteria set forth in section 5 should be addressed in the justification..

Thus, adoption of 40 CFR 2.204(e)(4) in the state regulation is undesirable because the proposed state regulation will require an up-front justification for the confidentiality claim, while

the criteria set forth in 40 CFR 2.204(e)(4) would be asserted by the company upon notice of a request for confidential information during a determination of confidentiality by the EPA. Further, contrary to the assertion by the WVCSPJ, the information enumerated in 40 C.F.R. 2.204(e)(4) is not compulsory, rather, the business asserting the claim of confidentiality is *invited to comment* on those enumerated issues. The OAQ believes that having an up-front justification by companies claiming confidentiality is absolutely necessary to the performance of any good faith effort on the part of the agency to meet the time frame requirements for disclosure of information under the WVFOIA.

The WVCSPJ comments that the proposed rule should expressly limit the claim of confidentiality to business trade secrets.

Response: Since W.Va. Code § 22-10-10, cited by the WVCSPJ is not a section of the West Virginia Air Pollution Control Act, W.Va. Code §§ 22-5-1 *et seq.*, it is assumed that the commentator intended to cite W.Va. Code § 22-5-10. W.Va. Code § 22-5-10 requires the director to promulgate a legislative rule "regarding the protection of records, reports, data or information, or trade secrets, as required by this section." The proposed rule has been drafted to comply with W.Va. Code § 22-5-10. It should also be noted that the federal regulations which are proposed by the WVCSPJ to be adopted in place of 45 CSR 31 allow a category of information broader than trade secrets to be claimed as confidential." The criteria for determining whether information may be protected as confidential has been adopted from 40 C.F.R. 2.208.

The WVCSPJ comments that the proposed rule should place the burden upon the party claiming trade secret confidentiality and the DEP to prove entitlement to the exemption.

Response: The burden to prove that a business is entitled to a trade secret exemption does not lie with the DEP. The proposed rule already places the burden upon persons making a claim of confidentiality to justify their claim at the time of submission.

The WVCSPJ comments that the Director is allowed impermissibly broad discretion in making a decision on a confidentiality claim under the proposed rule.

Response: Again, the proposed rule is not required to parallel any federal counterpart. However, 40 C.F.R. 2.208 was incorporated into the proposed rule as an established test for determining claims of confidentiality. The section has been amended to require consideration by the Director of all the enumerated criteria.

The WVCSPJ comments that the proposed rule should set forth the time in which the Director must make a determination on a claim for confidentiality.

Response: The Director is required under the WVFOIA to notify a requestor of information of the grant or denial of the request within five (5) working days. The drafters of W.Va. Code § 22-5-10 have adopted the same time constraints and written notification requirements as in the WVFOIA. Because the proposed rule cannot modify the time constraints

contained in the Code, it would be redundant to reiterate those time constraints.

COMMENTS OF THE BASF CORPORATION ("BASF")

Generally BASF objects to the proposed regulation because of the burdens placed upon industry to protect their trade secrets.

Response: It is inconceivable to the agency that industry is willing to rely solely on the expertise and diligence of agency personnel who are not trained in the handling of trade secrets to protect industry's confidential information without measures taken by industry to assist the agency. If indeed the information claimed as confidential constitutes trade secrets, it is hard to believe that industry would not be willing to shoulder an extra burden to ensure the proper handling of that confidential information. Furthermore, many companies already routinely perform some of the steps required by the proposed regulation, such as submitting information on colored paper, because they are concerned enough to take extra measures to further protect the information that they believe should remain confidential.

With regard to the comment directed toward the fiscal note, the OAQ does not expect the amendments to significantly change potential costs to industry, and may slightly decrease costs for the agency. The version of 45 CSR 31 currently in effect is a very costly rule to administer, for both industry and the agency. Under the current rule, each time a confidential document is requested within a WVFOIA request, the company is supposed to be called upon to review that confidential information and provide the agency with an explanation of why the information is entitled to confidential treatment. The proposed rule will merely shift the time frame for industry to the time of submission rather than possibly years after submission, when the person who stamped the document as confidential may no longer be employed with the company. Thus, the proposed rule should be no more costly for industry.

BASF objects to a requirement that a confidentiality claim be made at the time the information is submitted.

Response: This requirement is not new. The version of 45 CSR 31 currently in effect requires a claim of confidentiality to be made at the time of submission. Further, if the claim is not made when the information is submitted, the OAQ has no practical way of preventing the disclosure of that information that has not been claimed as confidential. Thus, the business asserting the claim must do so at the time the information is submitted or that information must be presumed to be discloseable pursuant to a FOIA request.

BASF objects to the requirement of the submitter's review of information previously submitted.

Response: The OAQ has no information to support a business's claim of confidentiality on previously submitted information. Strictly construed, the time constraints of W. Va. Code

**WRITTEN COMMENTS OF HILDA MITROS SUBMITTED TO THE OAQ BY THE
OFFICE OF THE ENVIRONMENTAL ADVOCATE**

Ms. Mitros comments that confidential information should never be withheld from the public.

Response: The West Virginia Legislature has exercised its judgment to protect certain kinds of confidential information from public disclosure in its passage of the WVFOIA and W.Va. Code § 22-5-10. Thus, the proposed rule must implement the legislative intent to ensure proper handling of certain kinds of confidential information within the agency.

§ 22-5-10 do not permit a post-hoc submission by a confidentiality claimant to support the claim. This reality renders the current rule practically unworkable and mandates the proposed rule revisions for better conformance to W.Va. Code § 22-5-10 and with the WVFOIA. Thus, it is in the business's best interest to review information that it previously claimed as confidential (the business does not have to review all of its files, just the confidential information) to ensure that the confidential information will receive proper treatment in the future.

BASF objects to the submission requirements for confidential information.

Response: The prerequisites to claims of confidentiality have become necessary because of the frequent abuse by some companies of the confidentiality claim, and because the code mandates that the Director be capable of making informed decisions on claims of confidentiality. Frequently, a company will claim an entire multi-page document as confidential if it anywhere contains a description of a process protectable as a trade secret. Thus, the OAQ will require each discrete claim of confidentiality to be justified by the company in order to eliminate spurious claims and in order to allow the OAQ to determine whether disclosure of the information should be denied upon a FOIA request. The coloring of submissions is strongly suggested in order to further *protect the company* against inadvertent disclosures of their confidential information. The redaction requirement is to provide notice to reviewers of the file that portions of the file have not been disclosed to them pursuant to a claim of confidentiality. Finally, the requirement to provide an expiration date is not presumptuous, but rather, many claims of confidentiality expire *by their own terms* and in such a case, the expiration of a claim of confidentiality requires much less burden on the agency to perform an analysis to determine whether the information should be disclosed. This section of the rule has been reworded to provide better explanation of the requirement.

WEST VIRGINIA MANUFACTURER'S ASSOCIATION ("WVMA")

The WVMA comments that the proposed regulation does not conform with federal counterpart.

Response: Please see responses to comments made by the WVCSPJ .

The WVMA comments that the proposed regulation places burdens upon industry to review their existing confidentiality claims and resubmit them.

Response: This comment is addressed above in the response to comments made by BASF.

The WVMA objects to the preparation of confidential information.

Response: This comment is addressed above in the response to comments made by

BASF.

The WVMA comments that the process for requesting information under the proposed regulation duplicates the process for requesting information under FOIA.

Response: This comment is addressed above in the response to comments made by the WVCSPJ.

The WVMA comments that no opportunity is provided for a business asserting a confidentiality claim to have informal contacts with the agency regarding a determination by the agency whether to disclose information that has been claimed as confidential.

Response: As explained above, intervention by third parties in the process of confidentiality determinations is impracticable under the five day time constraint allowed for such determinations under W.Va. Code. § 22-5-10. Furthermore, the agency cannot implement the federal regulation for confidentiality determinations because the complexity of the federal counterpart would require a significant investment of state resources to staff the agency with personnel dedicated to making these determinations. Thus, the agency has drafted the proposed regulation to allow industry to argue its justification for confidentiality while still allowing the agency to make a confidentiality determination within the time allowed by W.Va. Code § 22-5-10.

The WVMA comments that the criteria enumerated in the proposed regulation should be requisite to any determination of confidentiality by the director, and suggests additional criteria to be considered by the director in making a determination.

Response: It was the agency's intent to require consideration of the enumerated criteria but not to foreclose additional considerations should they be appropriate. The section will be amended in response to this and other comments.

COMMENTS OF STEVE WHITE OF THE AFFILIATED CONSTRUCTION TRADES FOUNDATION MADE DURING THE PUBLIC HEARING ON AUGUST 13, 1996.

Mr. White generally commented that the existence of the rule is unduly burdensome on members of the public.

Response: As mentioned above, the promulgation of 45 CSR 31 is mandated by W.Va. Code § 22-5-10. Further, in the view of the agency, the existing rule at 45 CSR 31 is more burdensome on the public than is the proposed rule. However, proposed 45 CSR 31 has been amended in order to address comments that the rule places too great a burden on members of the public to offer a basis to overturn a claim of confidentiality.

STATE OF WEST VIRGINIA
BUREAU OF THE ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

SUMMARY OF CHANGES TO 45 CSR 31

All amendments made by the Office of Air Quality ("OAQ") to the purpose rule that were made in response to comments received during the public comments period are more fully discussed in the agency's written responses to public comments and are filed with this document in the Secretary of State's office. Changes due only to renumbering are not summarized in this document.

SUMMARY OF CHANGES TO THE PROPOSED RULE:

Section 1. Subsection 1.1 of the proposed rule has been changed to more closely reflect the scope of the rule in view of public comments.

Section 2. In response to public comments, a new subsection 2.3 has been inserted so that the proposed rule includes a definition of trade secrets, adopted from the West Virginia Freedom of Information Act, § 29B-1-1 *et seq.*

The definition of designee in subsection 2.7 (formerly subsection 2.6) has been amended to require that the designee be a natural person and be located at an address within West Virginia in order to serve timely notice in accordance with the rule.

Section 3. In response to public comments, paragraph 3.3.a has been changed to encourage submission of documents of a size not greater than 8 ½" x 14" on colored paper. Formerly the paragraph required all submissions to be made on colored paper.

Paragraph 3.3.b has been changed to add punctuation and to add the in-state requirements consistent with subsection 2.7 of the proposed rule. In response to public comments, the language addressing the submission of an expiration date of the claim of confidentiality has been changed in this paragraph. The paragraph has also been changed to clearly require the company's confidentiality justification to include consideration of the criteria for determining confidentiality contained in the proposed rule.

Paragraph 3.3.c has been changed in order to conform with the deletion of former subsection 4.1.

Subsection 3.5 has been added to address the submission of electronic data in conformance with the proposed rule.

Section 4.

Although a written request is required by the rule currently in effect, in response to public comments that the requirement to make a written request for a confidentiality determination places a duplicative burden on the public, subsection 4.1 has been deleted. Thus, in order to trigger a confidentiality determination under the proposed rule, a request must be made under the West Virginia Freedom of Information Act for documents that have been claimed confidential.

Subsection 4.2 has been changed to reflect the deletion of subsection 4.1, and to remove a potential timing conflict with the West Virginia Code.