

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #4

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

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

CITE AUTHORITY Legislative - 22-5-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

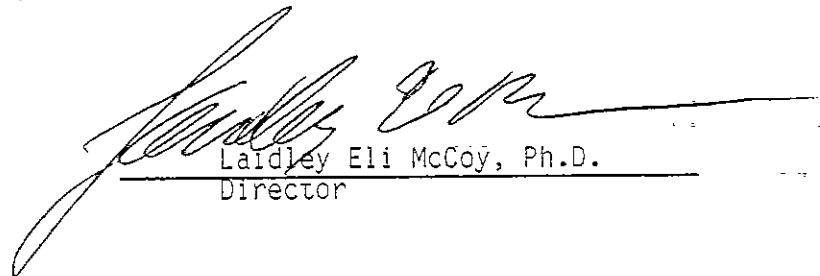
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 45CSR31

TITLE OF RULE BEING PROPOSED: "Confidential Information"

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.


Laidley Eli McCoy, Ph.D.
Director

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.

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 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 ½" 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~~ determination of whether the information claimed to be confidential is a trade secret in accordance with this rule, the Director shall consider the following criteria:

4.1.a. ~~The person asserting a claim of confidentiality 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--

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.

4.2.a. Upon a determination made pursuant to request, the Director shall provide written notice of his or her determination of confidentiality to the designee and to the person requesting the disclosure of confidential 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.

4.2.b. The Director may perform a determination of confidentiality without request, and upon such a determination, the Director shall provide written notice of his or her determination of confidentiality to the designee.

§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.~~



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

GASTON CAPERTON
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.
COMMISSIONER

November 27, 1996

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

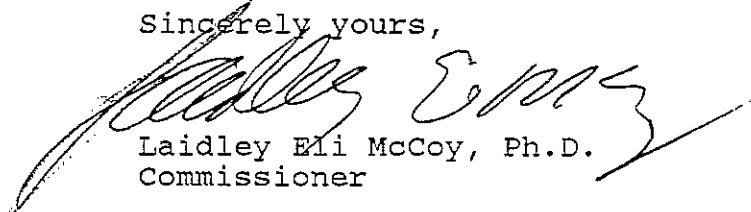
RE: 45CSR31 - "Confidential Information"

Dear Ms. Cooper:

This is to advise you that I am giving approval for filing with your office and Legislative Rule-Making a notice of rule modification on the above-referenced rule.

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

Sincerely yours,


Laidley Eli McCoy, Ph.D.
Commissioner

LEM:cc

Attachment

cc: Mark Scott
Britt Ludwig
Carrie Chambers

ANALYSIS OF PROPOSED LEGISLATIVE RULE

Agency: Division of Environmental Protection, Office of Air Quality

Subject: Confidential Information 45CSR31

PERTINENT DATES

Filed for public comment: July 10, 1996
Public comment period ended: August 29, 1996
Filed following public comment period: August 29, 1996
Filed LRMRC: August 29, 1996
Filed as emergency: n/a

Fiscal Impact: None

ABSTRACT

This rule repeals and replaces the current rule. The rule has undergone a substantial rewrite. Old references to the Air Pollution Control Commission are deleted. The Office of Air Quality contends that the refiling of the rule will aid it in providing more timely responses to information requests, and make the rule more closely reflect the intent of the authorizing statute. This abstract addresses substantial changes in the current rule.

Section 2 Several definitions have been amended to reflect changes in the agency since the rule was last amended.

Section 3 has been totally rewritten. Section 3.1 requires that documents justifying the claim of confidentiality must be filed when the information is originally submitted to the director. The current rule requires no explanation of why the person filing the protected documents believes the information is confidential.

Section 3.2 requires that any documents filed prior to the effective date of this amended rule will lose confidentiality within 180 days unless the person asserting the claim submits the necessary information meeting the new requirements of this rule.

Section 3.3 provides that any documents that a person wishes to be confidential must be submitted on both color paper and white paper with the information blacked out on the white paper version. Each document submitted as confidential must also have a cover document which will be available for public disclosure which contains contact information, a complete listing of redacted

information, reasons for confidentiality, and the time period that the information shall remain confidential. This document will be the basis of the Director's review and decision regarding whether the information is confidential.

Section 3.4 This section provides that the version of the information submitted with the redacted information blacked out must state on each page of the document "redacted copy -- claim of confidentiality."

Section 3.5 Any information submitted by electronic media shall include a cover document meeting the requirements of this section and also provide notice within the electronic information of any information contained therein for which the confidential privilege is claimed.

New Section 4 establishes guidelines for the director to follow when making a determination as whether to disclose information which is claimed confidential. Per Section 4.1 the director shall consider the following: whether the claim of confidentiality has expired, waived or withdrawn; whether the person asserting the claim has shown reasonable efforts to protect the information; if the information has not been available by reasonable means to members of the public; whether state or federal law requires its disclosure; whether the person has satisfactorily shown that disclosure will cause harm to the business's competitive position, or, if the disclosure would inhibit the state from obtaining information in the future.

Section 4.2 establishes that notification of the director's decision regarding releasing claimed confidential documents will be done in the time frame established in the WV Freedom of Information Act. This section also provides that within ten days of the directors decision regarding releasing claimed confidential documents, that the director shall notify the person making the request and the person asserting confidentiality of the directors decision and provide a location to inspect the material.

Section 6 states that figures on the discharge of air pollution cannot be claimed as confidential information.

AUTHORITY

Statutory authority: W.Va. Code, §22-5-10 provides:

The director shall promulgate legislative rules regarding the protection of records, reports, data or information, or trade secrets as required by this section.

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

No. The authorizing statute, WVC §22-5-10, requires that response to a confidential information release request be made within five days. This provision should be placed in the rule in Section 4.2 which currently requires only that the director designate a location for inspection within ten days of the decision regarding releasing the information. The reference to the Freedom of Information Act should also be deleted from Section 4.2 of the rule.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has technical modifications to suggest.



FILED

Nov 22 10 42 AM '96

West Virginia Legislature
Legislative Rule-Making Review Committee

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Room NB47-State Capitol
Charleston, West Virginia 25305
(304) 347-4840

Senator Mike Ross, Co-Chair
Delegate Vicki Douglas, Co-Chair

Debra A. Graham, Counsel
Joe Altizer, Associate Counsel
Marie Hickerson, Adm. Assistant

November 20, 1996

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register
TO: Mr. Dale Farley
Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Confidential Information

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

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

Pursuant to Code 29A-3-11(c), this notice has been filed in the State Register and with the agency proposing the rule.

3333

H. B. 2333

1 Bill-DEP, Confidential

2
3 (By Delegate(s) Douglas, Hunt, Compton,
4 Faircloth, Linch and Riggs)

5 [Introduced March 3, 1997; referred to the
6 Committee on the Judiciary.]

7
8
9
10 A BILL to amend and reenact section one, article three,
11 chapter sixty-four of the code of West Virginia, one
12 thousand nine hundred thirty-one, as amended, relating
13 to authorizing the division of environmental
14 protection to promulgate a legislative rule relating
15 to confidential information.

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

17 That section one, article three, chapter sixty-four of
18 the code of West Virginia, one thousand nine hundred
19 thirty-one, as amended, be amended and reenacted, to read
20 as follows:

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

23 §64-3-1. Division of environmental protection.

45-31

(a) The legislative ~~rules~~ rule filed in the state register on twenty-eighth day of July, one thousand nine hundred ninety-five, authorized under the authority of section four, article five, chapter twenty-two of this code, relating to the division of environmental protection (emission standards for hazardous air pollutants pursuant to 40 CFR Part 63, 45 CSR 34), ~~are~~ is authorized.

(b) The legislative ~~rules~~ rule filed in the state register on the twenty-eighth day of July, one thousand nine hundred ninety-five, authorized under the authority of section four, article five, chapter twenty-two of this code, modified by the division of environmental protection to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-seventh day of October, one thousand nine hundred ninety-five, relating to the division of environmental protection (to prevent and control air pollution from hazardous waste treatment, storage or disposal facilities, 45 CSR 25), ~~are~~ is authorized.

(c) The legislative ~~rules~~ rule filed in the state register on the twenty-eighth day of July, one thousand nine hundred ninety-five, authorized under the authority of section four, article five, chapter twenty-two of this

1 code, relating to the division of environmental protection
2 (acid rain provisions and permits, 45 CSR 33), ~~are~~ is
3 authorized.

4 (d) The legislative ~~rules~~ rule filed in the state
5 register on the thirty-first day of July, one thousand nine
6 hundred ninety-five, authorized under the authority of
7 section six, article seventeen, chapter twenty-two of this
8 code, modified by the division of environmental protection
9 to meet the objections of the legislative rule-making
10 review committee and refiled in the state register on the
11 eighteenth day of January, one thousand nine hundred
12 ninety-six, relating to the division of environmental
13 protection (underground storage tanks, 47 CSR 36), ~~are~~ is
14 authorized.

15 (e) The legislative ~~rules~~ rule filed in the state
16 register on the thirty-first day of July, one thousand nine
17 hundred ninety-five, authorized under the authority of
18 section six, article eighteen, chapter twenty-two of this
19 code, modified by the division of environmental protection
20 to meet the objections of the legislative rule-making
21 review committee and refiled in the state register on the
22 eighteenth day of January, one thousand nine hundred
23 ninety-six, relating to the division of environmental

1 protection (hazardous waste management regulations, 47 CSR
2 35), ~~are~~ is authorized.

3 (f) The legislative ~~rules~~ rule filed in the state
4 register on the thirty-first day of July, one thousand nine
5 hundred ninety-five, authorized under the authority of
6 section four, article three, chapter twenty-two of this
7 code, modified by the division of environmental protection
8 to meet the objections of the legislative rule-making
9 review committee and refiled in the state register on the
10 twenty-third day of January, one thousand nine hundred
11 ninety-six, relating to the division of environmental
12 protection (surface mining and reclamation regulations, 38
13 CSR 2), ~~are~~ is authorized with the following amendments:

14 "On page 64, section 3.27, after the word 'Director'
15 by striking out the word 'may' and inserting in lieu
16 thereof the word 'shall';

17 On page 64, section 3.27, after the word 'completed'
18 by striking out the remainder of the first paragraph and
19 inserting in lieu thereof the following words:

20 'and reclamation activities are ongoing.'

21 On page 156, section 11.6(c)(6)(A) after the word
22 'operations' by striking out the words 'within five (5)
23 years of the date of SMA approval,';

1 On page 156, section 11.6(c)(6)(B) after the word
2 '(95-87)' by striking out the words 'within five (5) years
3 of the date of SMA approval,';

4 On page 157, section 11.6(c)(6)(C) after the word
5 'State' by striking out the words 'within five (5) years of
6 the date of SMA approval,';

7 On page 163, section 11.6(d)(6)(A), after the word
8 'applicant' by striking out the words 'within five (5)
9 years of the date of SMA approval,';

10 On page 164, section 11.6(d)(6)(B), after the word
11 '95-87' by striking out the words 'within five (5) years of
12 the date of SMA approval,';

13 On page 164, section 11.6(d)(6)(C), after the word
14 'wetlands' by striking out the words 'within five (5) years
15 of the date of SMA approval,';

16 On page 169, section 11.6(e)(5)(A), after the word
17 '95-87' by striking out the words 'within five (5) years of
18 the date of SMA approval,';

19 On page 169, section 11.6(e)(5)(B), after the word
20 'wetlands' by striking out the words 'within five (5) years
21 of the date of SMA approval,';

22 On page 175, section 11.6(f)(5)(A), after the word
23 '95-87', by striking out the words 'within five (5) years

1 of the date of SMA approval, ';

2 On page 175, section 11.6(f)(5)(B), after the word
3 'enhancement' by striking out the words 'of wetlands within
4 five (5) years of the date of SMA approval, '.

5 On page 178, section 12.2 subsection (e) by striking
6 12.2.e in its entirety and inserting in lieu thereof the
7 following:

8 'Notwithstanding any other provisions of this rule, no
9 bond release or reduction will be granted if, at the time,
10 water discharged from or affected by the operation requires
11 chemical treatment in order to comply with applicable
12 effluent limitations or water quality standards: *Provided,*
13 That the Director may approve a request for Phase I but not
14 Phase II or III, release if the applicant demonstrates to
15 the satisfaction of the Director that either:

16 (A) The remaining bond is adequate to assure long term
17 treatment of the drainage; or

18 (B) The operator has irrevocably committed other
19 financial resources which are adequate to assure long term
20 treatment of the drainage: *Provided,* That the alternate
21 financial resources must be in acceptable form, and meet
22 the standards set forth in Section 11 of the Act and
23 Section 11 of this rule: *Provided, however,* That the

1 alternate financial arrangements shall provide a mechanism
2 whereby the Director can assume management of the resources
3 and treatment work in the event that the operator defaults
4 for any reason: And provided further, That default on a
5 treatment obligation under this paragraph shall be
6 considered equivalent to a bond forfeiture, and the
7 operator will be subject to penalties and sanctions,
8 including permit blocking, as if a bond forfeiture had
9 occurred.

10 In order to make such demonstration as referenced
11 above, the applicant shall address, at a minimum, the
12 current and projected quantity and quality of drainage to
13 be treated, the anticipated duration of treatment, the
14 estimated capital and operating cost of the treatment
15 facility, and the calculations which demonstrate the
16 adequacy of the remaining bond or of the alternate
17 financial resources.

18 On page sixteen, section 38-2-2.106, after the words
19 'sum of the loading' by inserting the words 'or driving';
20 and by striking out the words 'in a constructed valley
21 fill, backfill, dam, or refuse pile' and inserting in lieu
22 thereof the words 'as determined by acceptable engineering
23 practices';

1 On page twenty-eight, section 38-2-3.2(e), after the
2 words 'limited number of minor changes' by inserting the
3 words 'that do not significantly affect the health, safety
4 or welfare of the public and';

5 On page thirty-six, section 38-2-3.6(h)(5), after the
6 words 'as defined in' by striking out the words 'Article 5D
7 of Chapter 20' and inserting in lieu thereof the words
8 'Article 14 of Chapter 22';

9 On page thirty-nine, section 38-2-3.8(c), at the end
10 after the words 'reasonable time for compliance.', by
11 inserting a new sentence to read as follows: 'Provided,
12 That those structures and facilities, where it can be
13 demonstrated that reconstruction or revision would result
14 in greater environmental harm and the performance standards
15 set forth in the Act and these regulations can otherwise be
16 met, may be exempt from revision or reconstruction.';

17 On page one hundred seventy-eight, section 38-2-
18 12.2(d), after the words 'until all coal extraction
19 operations' by inserting the words 'for the permit or
20 increment thereof', and after the words 'the entire
21 disturbed area' by inserting the words 'for the permit or
22 increment thereof';

23 On page one hundred ninety-seven, section 38-2-

1 14.3(c)(2), after the words 'medium is the best' by
2 inserting the word 'reasonably';

3 And,

4 On page two hundred fifteen, section 38-2-14.14(e)(4),
5 by striking the sentence 'Runoff from areas above and
6 adjacent to the fill shall not be allowed to flow onto the
7 fill surface, and shall be diverted into stabilized
8 diversion channels, designed and constructed to safely pass
9 the peak runoff from a 100 year, 24 hour precipitation
10 event.' and inserting in lieu thereof the sentences
11 'Surface water runoff from areas above and adjacent to the
12 fill shall be diverted into properly designed and
13 constructed stabilized diversion channels which have been
14 designed using best current technology to safely pass the
15 peak runoff from a 100 year, 24 hour precipitation event.
16 The channel shall be designed and constructed to ensure
17 stability of the fill, control erosion, and minimize water
18 infiltration into the fill.'

19 (g) The legislative ~~rules~~ rule filed in the state
20 register on the twenty-sixth day of July, one thousand nine
21 hundred ninety-five, authorized under the authority of
22 section four, article twenty-one, chapter twenty-two of
23 this code, modified by the division of environmental

1 protection to meet the objections of the legislative
2 rule-making review committee and refiled in the state
3 register on the fourteenth day of December, one thousand
4 nine hundred ninety-five, relating to the division of
5 environmental protection (coalbed methane wells, 38 CSR
6 23), ~~are~~ is authorized.

7 (h) The legislative ~~rules~~ rule filed in the state
8 register on the twenty-third day of November, one thousand
9 nine hundred ninety-four, authorized under the authority of
10 section eight, article eleven, chapter twenty of this code,
11 modified by the division of environmental protection to
12 meet the objections of the legislative rule-making review
13 committee and refiled in the state register on the
14 twentieth day of December, one thousand nine hundred
15 ninety-five, relating to the division of environmental
16 protection (waste tire management, 47 CSR 38G), ~~are~~ is
17 authorized.

18 (i) The legislative ~~rules~~ rule filed in the state
19 register on the twenty-second day of June, one thousand
20 nine hundred ninety-five, authorized under the authority of
21 section twenty, article fifteen, chapter twenty-two of this
22 code, modified by the division of environmental protection
23 to meet the objections of the legislative rule-making

1 review committee and refiled in the state register on the
2 twenty-second day of December, one thousand nine hundred
3 ninety-five, relating to the division of environmental
4 protection (sewage sludge management, 47 CSR 38D), ~~are is~~
5 authorized with the amendments set forth below:

6 On page seven, section 3.2.2, by striking out the
7 words "Table 3 of this rule will automatically be repealed
8 and replaced with Table 3A of this rule on December 31,
9 1997, unless this provision is modified prior to that
10 date.";

11 And,

12 On page seven, section 3.2.2, after the word "rule."
13 by inserting the following: The director is authorized
14 until Dec. 31, 1999, to issue variances to this section to
15 allow land application to soils which exceed the maximum
16 soil concentrations of metals listed in Table 3 where soil
17 analyses demonstrate that other soil factors, including,
18 but not limited to, soil pH, cation exchange capacity,
19 organic matter content, or clay content, will limit
20 mobility and availability of the metals. No later than
21 June 30, 1999, the director shall propose revisions to
22 Table 3 to adequately protect soil quality, human health
23 and the environment,

1 And,

2 On page 20, by striking the following from Table 3:
3 "NOTE: Table 3 of this rule will automatically be repealed
4 and replaced with Table 3A of this rule on December 31,
5 1997, unless the provision of paragraph 3.2.2 of this rule
6 is modified prior to that date."

7 And,

8 On page 21, by striking out all of Table 3A.

9 (j) The legislative ~~rules~~ rule filed in the state
10 register on the thirty-first day of July, one thousand nine
11 hundred ninety-five, authorized under the authority of
12 section four, article five, chapter twenty-two of this
13 code, relating to the division of environmental protection
14 (to prevent and control of air pollution from the emission
15 of volatile organic compounds, 45 CSR 21), are authorized
16 with the following amendment:

17 "On pages 170 and 171, by striking out section 40 in
18 its entirety and inserting in lieu thereof a new section
19 40, to read as follows:

20 §45-21-40. Other Facilities that Emit Volatile Organic
21 Compound (VOC).

22 40.1. Applicability.

23 a. This section 40. applies to any facility that has

1 aggregate maximum theoretical emissions of 90.7 megagrams
2 (mg) (100 tons) or more of volatile organic compounds
3 (VOCs) per calendar year in the absence of control devices;
4 provided that this section 40. applies to any source or
5 sources within such facility other than those sources
6 subject to regulation under sections 11. through 39. VOC
7 emissions from sources regulated under sections 11. through
8 39., but which fall below the applicability thresholds of
9 these sections, and thus are not subject to the emissions
10 control standards of these sections, shall be included in
11 the determination of maximum theoretical emissions for a
12 facility but shall not be subject to the requirements of
13 this section 40. Emissions from sources listed in section
14 40.1.d. shall not be included in the determination of
15 maximum theoretical emissions for a facility.

16 b. The owner or operator of a coating line or
17 operation, whose emissions are below this applicability
18 threshold, shall comply with the certification,
19 recordkeeping, and reporting requirements of section
20 40.6.a.

21 c. The owner or operator of a non-coating source,
22 whose emissions are below this applicability threshold,
23 shall comply with the certification, recordkeeping, and

1 reporting requirements of section 40.6.b.

2 d. The requirements of this section 40. shall not
3 apply to coke ovens (including by-product recovery plants),
4 fuel combustion sources, barge loading facilities, jet
5 engine test cells, vegetable oil processing facilities,
6 wastewater treatment facilities, iron and steel production,
7 surface impoundments, pits; and boilers, industrial
8 furnaces, and incinerators having a destruction efficiency
9 of 95 percent or greater.

10 e. The requirements of this section 40. shall not
11 apply to any facility bound by an order or permit,
12 enforceable by the Director, which limits the facility's
13 emissions to less than 100 tons of VOC per calendar year
14 without the application of control devices.

15 40.2. Definitions. -- As used in this section 40., all
16 terms not defined herein shall have the meaning given them
17 in section 2.

18 a. 'Reasonably available control measures' (also
19 denoted as RACM) means an emission limit or limits that
20 reflect the application of control technology and/or
21 abatement techniques or measures that are reasonably
22 available, considering technological and economic
23 feasibility. Such emission limits may be considered on a

1 plant-wide basis to achieve emission reduction requirements
2 in the most cost effective manner.

3 b. "Fugitive emissions" means those emissions which
4 could not reasonably pass through a stack, chimney, vent,
5 or other functionally equivalent opening.

6 40.3. Standards. -- The owner or operator of a
7 facility subject to this section 40. shall:

8 a. Except as provided in section 40.3.b.,

9 1. With respect to any existing non-fugitive
10 emission source which has maximum theoretical emissions of
11 6 pounds per hour or more, comply with an emission control
12 plan established on a case-by-case basis approved by the
13 Director that meets the definition of reasonably available
14 control measures (RACM) and achieves at least a 90 percent
15 reduction in emissions below the total (aggregate) maximum
16 theoretical emissions from all such non-fugitive emission
17 sources subject to RACM requirements; and

18 2. With respect to each process unit producing a
19 product or products, intermediate or final, in excess of
20 1000 megagrams (Mg) (1,100 tons) per year, regardless of
21 whether such product or products are listed in 40 CFR
22 60.489, comply with an emission control plan for fugitive
23 sources using the methods and criteria of section 37., or

1 alternative methods and criteria approved by the Director.
2 The Director may exempt a process unit from fugitive
3 emission control requirements upon satisfactory
4 demonstration that emissions are of minor significance.

5 b. With respect to such sources as described in
6 sections 40.3.a.1. and 40.3.a.2., comply with emission
7 limits and measures based upon an alternative emissions
8 reduction plan approved by the Director considering
9 technical, economic and air quality benefit considerations
10 that, at a minimum, maintains emission control measures
11 incorporated as part of any federally approved maintenance
12 plan for the county or area in which the source is located.

13 c. With respect to any source at a facility subject to
14 this section 40., which source has maximum theoretical
15 emissions of 6 pounds per hour or more and is constructed,
16 modified or begins operating after the effective date of
17 this rule, comply with a control plan developed on a case-
18 by-case basis approved by the Director that meets the
19 definition of reasonably available control technology
20 (RACT) in section 2.60. for both fugitive and non-
21 fugitive emission sources.

22 40.4. Submissions and Approval of Control Plans

23 a. Within 90 days after the effective date of this

1 rule, the owner or operator of a facility subject to this
2 section 40. shall submit any required amendments to the
3 case-by-case RACT control plans previously submitted to the
4 Director, that revise such control plans to meet the
5 definition of reasonably available control measures (RACM).

6 b. Notwithstanding the provisions of section 9.2.,
7 the owner or operator of a facility subject to this rule
8 solely due to this section 40., that requires a major
9 process change and/or major capital investment to comply
10 with RACM requirements, may petition the Director for an
11 additional extension beyond December 31, 1996, for
12 compliance certification, and the Director may grant such
13 extension when warranted. Provided however, such
14 compliance certification date shall be no later July 31,
15 1997.

16 c. The Director shall not approve a RACM plan or an
17 alternative emissions reduction plan under this section 40.
18 unless such plan includes:

19 1. A commitment to develop and submit a
20 complete RACT plan to the Director within 180 days of a
21 finding by the Director that a violation of the National
22 Ambient Air Quality Standard for ozone has occurred within
23 the county or maintenance area in which the source is

1 located; and
2 2. A commitment to achieving full
3 implementation of RACT within 2 years of approval of the
4 RACT plan by the Director.

5 d. A finding by the Director that a violation of
6 the National Ambient Air Quality Standard for ozone has
7 occurred shall be made based upon verification of a
8 monitored ozone standard violation in the county or
9 maintenance area in which the source is located. The three
10 maintenance areas (the Huntington area, comprising Cabell
11 and Wayne counties; the Charleston area, comprising Kanawha
12 and Putnam counties; and the Parkersburg area, comprising
13 Wood county) shall be treated separately and independently
14 for any such finding(s).

15 e. All RACM control plans, RACT control plans, and
16 alternative emissions reduction plans approved by the
17 Director pursuant to this section 40, shall be embodied in
18 a consent order or permit in accordance with 45CSR13 or
19 45CSR30, as required. A facility owner or operator may at
20 any time petition the Director to approve revisions to
21 these plans. The decision concerning said petition shall
22 be issued by the Director in accordance with 45CSR13 or
23 45CSR30, as required, or a consent order. Any such

1 revisions shall be subject to the public participation
2 requirements of 45CSR13 or 45CSR30.

3 f. The owner or operator of a facility subject to
4 this section 40. may submit for approval by the Director an
5 emission control plan that meets the definition of
6 reasonably available control technology (RACT) in section
7 2.60.

8 40.5. Test methods and procedures. -- The owner or
9 operator of any source subject to this section 40. shall
10 demonstrate compliance with section 40.3. by using the
11 applicable test methods specified in sections 41. through
12 46 or by other means approved by the Director.
13 Notwithstanding the requirements of section 41.1., EPA
14 approval for alternate test methods to demonstrate
15 compliance shall not be required for sources which are
16 subject solely to emission control requirements specified
17 in section 40.3.

18 40.6. Reporting and Recordkeeping Requirements for
19 Exempt Non-Control Technique Guideline (CTG) Sources.

20 a. An owner or operator of a coating line or
21 operation that is exempt from the emission limitations in
22 section 40.3. shall comply with the certification,
23 recordkeeping, and reporting requirements in section 4.2.

1 b. An owner or operator of a non-coating source
2 that is exempt from the emission limitations in section
3 40.3. shall submit, upon request by the Director, records
4 that document that the source is exempt from these
5 requirements.

6 1. These records shall be submitted to the
7 Director within 30 days from the date of request.

8 2. If such records are not made available, the
9 source will be considered subject to the limits in section
10 40.3.

11 40.7. Reporting and Recordkeeping Requirements for
12 Subject Non-CTG Coating Sources. -- An owner or operator of
13 a coating line or operation subject to this section 40. and
14 complying with section 40.3. shall comply with the
15 certification, recordkeeping, and reporting requirements in
16 section 4.

17 40.8. Reporting and Recordkeeping Requirements for
18 Subject Non-CTG, Non-Coating Sources.

19 a. The owner or operator of the subject VOC sources
20 shall perform all testing and maintain the results of all
21 tests and calculations required under sections 40.3. and
22 40.5. to demonstrate that the subject source is in
23 compliance.

1 b. The owner or operator of the subject VOC source
2 shall maintain these records in a readily accessible
3 location for a minimum of 3 years, and shall make these
4 records available to the Director upon verbal or written
5 request.

6 c. The owner or operator of any facility containing
7 sources subject to this section 40. shall comply with the
8 requirements in section 5, except that such requirements,
9 as they apply to sources solely subject to this section
10 40., may be modified by the Director upon petition by the
11 owner or operator. Any such modified requirements shall be
12 embodied in the facility's control plan (RACM, RACT or
13 alternative plan) and reflected in the associated consent
14 order or permit issued pursuant to 45CSR13 or 45CSR30."

15 (k) The legislative ~~rules~~ rule filed in the state
16 register on the twenty-seventh day of July, one thousand
17 nine hundred ninety-five, authorized under the authority of
18 section five, article twelve, chapter twenty-two of this
19 code, modified by the division of environmental protection
20 to meet the objections of the legislative rule-making
21 review committee and refiled in the state register on the
22 seventeenth day of January, one thousand nine hundred
23 ninety-six, relating to the division of environmental

1 protection (monitoring well design standards, 47 CSR 60),
2 ~~are~~ is authorized.

3 (1) The legislative ~~rules~~ rule filed in the state
4 register on the thirty-first day of July, one thousand nine
5 hundred ninety-five, authorized under the authority of
6 section five, article fifteen, chapter twenty-two of this
7 code, modified by the division of environmental protection
8 to meet the objections of the legislative rule-making
9 review committee and refiled in the state register on the
10 twenty-fourth day of January, one thousand nine hundred
11 ninety-six, relating to the division of environmental
12 protection (solid waste management, 47 CSR 38), ~~are~~ is
13 authorized with the following amendments:

14 "On page 37, subdivision 3.8.4, after the words 'from
15 the uppermost' by striking the word 'significant.'

16 On page 142, by striking the existing subdivision
17 4.11.2.c.A and inserting in lieu thereof the following:

18 '4.11.2.c.A

19 The monitoring frequency for all constituents listed in
20 Appendix I of this rule, must be at least twice a year
21 during the active life of the facility, including closure
22 and the post-closure periods. The director may require
23 more frequent monitoring on a site-specific basis by

1 considering aquifer flow rate and existing quality of the
2 groundwater.'

3 On page 148, by striking the existing subdivision
4 4.11.3.i.A. and inserting in lieu thereof the following:

5 '4.11.3.i.A.

6 The director may consider an alternative groundwater
7 protection standard in consultation with the environmental
8 quality board pursuant to 47CSR57 for constituents for
9 which water quality standards have not been established.'

10 On page 151, subdivision 4.11.5., by following the
11 words 'any applicable groundwater quality protection
12 standards' by inserting the words 'and/or background
13 groundwater quality, pursuant to the requirements of the
14 Groundwater Protection Act, WVC §22-12-1 et seq.'

15 On page 152, subdivision 4.11.6.b.A., by following the
16 words 'Be protective of human health and the environment'
17 inserting the words 'and maintain existing groundwater
18 quality, pursuant to the requirements of the Groundwater
19 Protection Act, WVC §22-12-1 et seq.'

20 On page 154, subdivision 4.11.6.d.B. (f), by striking
21 the words 'Resource value of the aquifer' and inserting in
22 lieu thereof the words 'The hydrogeologic characteristics
23 of the facility and the surrounding land,'

1 On page 154, subdivision 4.11.6.d.B(f).(e) by striking
2 out the words "The hydrogeologic characteristics of the
3 facility and surrounding land;

4 And, by renumbering and relettering the remaining
5 subdivisions of the rule.

6 On page 156, subdivision 4.11.7.a.A., by following the
7 words 'Demonstrate compliance with' inserting the words
8 'the Groundwater Protection Act, WVC §22-12-1 et seq.,
9 and/or the'

10 And,

11 On page 173, subdivision 5.4.3, by adding the
12 following sentence to the end of the subdivision: 'A class
13 D facility other than a class D-1 solid waste facility
14 shall not exceed two (2) acres in size.'

15 (m) The legislative rule filed in the state register
16 on the twenty-ninth day of August, one thousand nine
17 hundred ninety-six, authorized under the authority of
18 section ten, article five, chapter twenty-two, of this
19 code, modified by the division of environmental protection
20 to meet the objections of the legislative rule-making
21 review committee and refiled in the state register on the
22 twenty-sixth day of November, one thousand nine hundred
23 ninety-six, relating to the division of environmental

1 protection (confidential information, 45 CSR 31), is
2 authorized.

3

4 NOTE: The purpose of this bill is to authorize the
5 Division of Environmental Protection to promulgate a
6 legislative rule relating to Confidential Information.

7

8 Strike-throughs indicate language that would be
9 stricken from the present law, and underscoring indicates
10 new language that would be added.

Senate Bill No. 167

1 (By Senator(s) Ross, Anderson, Macnaughtan,
2 Boley and Buckalew)

3 [Introduced March 3, 1997; referred to the
4 Committee on Natural Resources; and then to the
5 Committee on the Judiciary.]
6
7
8
9

10 A BILL to amend and reenact section one, article three,
11 chapter sixty-four of the code of West Virginia, one
12 thousand nine hundred thirty-one, as amended, relating
13 to authorizing the division of environmental
14 protection to promulgate a legislative rule relating
15 to confidential information.

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

17 That section one, article three, chapter sixty-four of
18 the code of West Virginia, one thousand nine hundred
19 thirty-one, as amended, be amended and reenacted, to read
20 as follows:

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

23 §64-3-1. Division of environmental protection.

1 (a) The legislative ~~rules~~ rule filed in the state
2 register on twenty-eighth day of July, one thousand nine
3 hundred ninety-five, authorized under the authority of
4 section four, article five, chapter twenty-two of this
5 code, relating to the division of environmental protection
6 (emission standards for hazardous air pollutants pursuant
7 to 40 CFR Part 63, 45 CSR 34), ~~are~~ is authorized.

8 (b) The legislative ~~rules~~ rule filed in the state
9 register on the twenty-eighth day of July, one thousand
10 nine hundred ninety-five, authorized under the authority of
11 section four, article five, chapter twenty-two of this
12 code, modified by the division of environmental protection
13 to meet the objections of the legislative rule-making
14 review committee and refiled in the state register on the
15 twenty-seventh day of October, one thousand nine hundred
16 ninety-five, relating to the division of environmental
17 protection (to prevent and control air pollution from
18 hazardous waste treatment, storage or disposal facilities,
19 45 CSR 25), ~~are~~ is authorized.

20 (c) The legislative ~~rules~~ rule filed in the state
21 register on the twenty-eighth day of July, one thousand
22 nine hundred ninety-five, authorized under the authority of
23 section four, article five, chapter twenty-two of this

1 code, relating to the division of environmental protection
2 (acid rain provisions and permits, 45 CSR 33), ~~are~~ is
3 authorized.

4 (d) The legislative ~~rules~~ rule filed in the state
5 register on the thirty-first day of July, one thousand nine
6 hundred ninety-five, authorized under the authority of
7 section six, article seventeen, chapter twenty-two of this
8 code, modified by the division of environmental protection
9 to meet the objections of the legislative rule-making
10 review committee and refiled in the state register on the
11 eighteenth day of January, one thousand nine hundred
12 ninety-six, relating to the division of environmental
13 protection (underground storage tanks, 47 CSR 36), ~~are~~ is
14 authorized.

15 (e) The legislative ~~rules~~ rule filed in the state
16 register on the thirty-first day of July, one thousand nine
17 hundred ninety-five, authorized under the authority of
18 section six, article eighteen, chapter twenty-two of this
19 code, modified by the division of environmental protection
20 to meet the objections of the legislative rule-making
21 review committee and refiled in the state register on the
22 eighteenth day of January, one thousand nine hundred
23 ninety-six, relating to the division of environmental

1 protection (hazardous waste management regulations, 47 CSR
2 35), ~~are~~ is authorized.

3 (f) The legislative ~~rules~~ rule filed in the state
4 register on the thirty-first day of July, one thousand nine
5 hundred ninety-five, authorized under the authority of
6 section four, article three, chapter twenty-two of this
7 code, modified by the division of environmental protection
8 to meet the objections of the legislative rule-making
9 review committee and refiled in the state register on the
10 twenty-third day of January, one thousand nine hundred
11 ninety-six, relating to the division of environmental
12 protection (surface mining and reclamation regulations, 38
13 CSR 2), ~~are~~ is authorized with the following amendments:

14 "On page 64, section 3.27, after the word 'Director'
15 by striking out the word 'may' and inserting in lieu
16 thereof the word 'shall';

17 On page 64, section 3.27, after the word 'completed'
18 by striking out the remainder of the first paragraph and
19 inserting in lieu thereof the following words:

20 'and reclamation activities are ongoing.'

21 On page 156, section 11.6(c)(6)(A) after the word
22 'operations' by striking out the words 'within five (5)
23 years of the date of SMA approval,';

1 On page 156, section 11.6(c)(6)(B) after the word
2 '(95-87)' by striking out the words 'within five (5) years
3 of the date of SMA approval,';

4 On page 157, section 11.6(c)(6)(C) after the word
5 'State' by striking out the words 'within five (5) years of
6 the date of SMA approval,';

7 On page 163, section 11.6(d)(6)(A), after the word
8 'applicant' by striking out the words 'within five (5)
9 years of the date of SMA approval,';

10 On page 164, section 11.6(d)(6)(B), after the word
11 '95-87' by striking out the words 'within five (5) years of'
12 the date of SMA approval,';

13 On page 164, section 11.6(d)(6)(C), after the word
14 'wetlands' by striking out the words 'within five (5) years
15 of the date of SMA approval,';

16 On page 169, section 11.6(e)(5)(A), after the word
17 '95-87' by striking out the words 'within five (5) years of
18 the date of SMA approval,';

19 On page 169, section 11.6(e)(5)(B), after the word
20 'wetlands' by striking out the words 'within five (5) years
21 of the date of SMA approval,';

22 On page 175, section 11.6(f)(5)(A), after the word
23 '95-87', by striking out the words 'within five (5) years

1 of the date of SMA approval, ';

2 On page 175, section 11.6(f)(5)(B), after the word
3 'enhancement' by striking out the words 'of wetlands within
4 five (5) years of the date of SMA approval,'.

5 On page 178, section 12.2 subsection (e) by striking
6 12.2.e in its entirety and inserting in lieu thereof the
7 following:

8 'Notwithstanding any other provisions of this rule, no
9 bond release or reduction will be granted if, at the time,
10 water discharged from or affected by the operation requires
11 chemical treatment in order to comply with applicable
12 effluent limitations or water quality standards: *Provided,*
13 That the Director may approve a request for Phase I but not
14 Phase II or III, release if the applicant demonstrates to
15 the satisfaction of the Director that either:

16 (A) The remaining bond is adequate to assure long term
17 treatment of the drainage; or

18 (B) The operator has irrevocably committed other
19 financial resources which are adequate to assure long term
20 treatment of the drainage: *Provided,* That the alternate
21 financial resources must be in acceptable form, and meet
22 the standards set forth in Section 11 of the Act and
23 Section 11 of this rule: *Provided,* however, That the

1 alternate financial arrangements shall provide a mechanism
2 whereby the Director can assume management of the resources
3 and treatment work in the event that the operator defaults
4 for any reason: *And provided further, That default on a*
5 *treatment obligation under this paragraph shall be*
6 *considered equivalent to a bond forfeiture, and the*
7 *operator will be subject to penalties and sanctions,*
8 *including permit blocking, as if a bond forfeiture had*
9 *occurred.*

10 In order to make such demonstration as referenced
11 above, the applicant shall address, at a minimum, the
12 current and projected quantity and quality of drainage to
13 be treated, the anticipated duration of treatment, the
14 estimated capital and operating cost of the treatment
15 facility, and the calculations which demonstrate the
16 adequacy of the remaining bond or of the alternate
17 financial resources.'

18 On page sixteen, section 38-2-2.106, after the words
19 'sum of the loading' by inserting the words 'or driving';
20 and by striking out the words 'in a constructed valley
21 fill, backfill, dam, or refuse pile' and inserting in lieu
22 thereof the words 'as determined by acceptable engineering
23 practices';

1 On page twenty-eight, section 38-2-3.2(e), after the
2 words 'limited number of minor changes' by inserting the
3 words 'that do not significantly affect the health, safety
4 or welfare of the public and';

5 On page thirty-six, section 38-2-3.6(h)(5), after the
6 words 'as defined in' by striking out the words 'Article 5D
7 of Chapter 20' and inserting in lieu thereof the words
8 'Article 14 of Chapter 22';

9 On page thirty-nine, section 38-2-3.8(c), at the end
10 after the words 'reasonable time for compliance.', by
11 inserting a new sentence to read as follows: 'Provided,
12 That those structures and facilities, where it can be
13 demonstrated that reconstruction or revision would result
14 in greater environmental harm and the performance standards
15 set forth in the Act and these regulations can otherwise be
16 met, may be exempt from revision or reconstruction.';

17 On page one hundred seventy-eight, section 38-2-
18 12.2(d), after the words 'until all coal extraction
19 operations' by inserting the words 'for the permit or
20 increment thereof', and after the words 'the entire
21 disturbed area' by inserting the words 'for the permit or
22 increment thereof':

23 On page one hundred ninety-seven, section 38-2-

1 14.3(c)(2), after the words 'medium is the best' by
2 inserting the word 'reasonably';

3 And,

4 On page two hundred fifteen, section 38-2-14.14(e)(4),
5 by striking the sentence 'Runoff from areas above and
6 adjacent to the fill shall not be allowed to flow onto the
7 fill surface, and shall be diverted into stabilized
8 diversion channels, designed and constructed to safely pass
9 the peak runoff from a 100 year, 24 hour precipitation
10 event.' and inserting in lieu thereof the sentences
11 'Surface water runoff from areas above and adjacent to the
12 fill shall be diverted into properly designed and
13 constructed stabilized diversion channels which have been
14 designed using best current technology to safely pass the
15 peak runoff from a 100 year, 24 hour precipitation event.
16 The channel shall be designed and constructed to ensure
17 stability of the fill, control erosion, and minimize water
18 infiltration into the fill.'

19 (g) The legislative ~~rules~~ rule filed in the state
20 register on the twenty-sixth day of July, one thousand nine
21 hundred ninety-five, authorized under the authority of
22 section four, article twenty-one, chapter twenty-two of
23 this code, modified by the division of environmental

1 protection to meet the objections of the legislative
2 rule-making review committee and refiled in the state
3 register on the fourteenth day of December, one thousand
4 nine hundred ninety-five, relating to the division of
5 environmental protection (coalbed methane wells, 38 CSR
6 23), ~~are~~ is authorized.

7 (h) The legislative ~~rules~~ rule filed in the state
8 register on the twenty-third day of November, one thousand
9 nine hundred ninety-four, authorized under the authority of
10 section eight, article eleven, chapter twenty of this code,
11 modified by the division of environmental protection to
12 meet the objections of the legislative rule-making review
13 committee and refiled in the state register on the
14 twentieth day of December, one thousand nine hundred
15 ninety-five, relating to the division of environmental
16 protection (waste tire management, 47 CSR 38G), ~~are~~ is
17 authorized.

18 (i) The legislative ~~rules~~ rule filed in the state
19 register on the twenty-second day of June, one thousand
20 nine hundred ninety-five, authorized under the authority of
21 section twenty, article fifteen, chapter twenty-two of this
22 code, modified by the division of environmental protection
23 to meet the objections of the legislative rule-making

1 review committee and refiled in the state register on the
2 twenty-second day of December, one thousand nine hundred
3 ninety-five, relating to the division of environmental
4 protection (sewage sludge management, 47 CSR 38D), ~~are is~~
5 authorized with the amendments set forth below:

6 On page seven, section 3.2.2, by striking out the
7 words "Table 3 of this rule will automatically be repealed
8 and replaced with Table 3A of this rule on December 31,
9 1997, unless this provision is modified prior to that
10 date.";

11 And,

12 On page seven, section 3.2.2, after the word "rule."
13 by inserting the following: The director is authorized
14 until Dec. 31, 1999, to issue variances to this section to
15 allow land application to soils which exceed the maximum
16 soil concentrations of metals listed in Table 3 where soil
17 analyses demonstrate that other soil factors, including,
18 but not limited to, soil pH, cation exchange capacity,
19 organic matter content, or clay content, will limit
20 mobility and availability of the metals. No later than
21 June 30, 1999, the director shall propose revisions to
22 Table 3 to adequately protect soil quality, human health
23 and the environment',

1 And,

2 On page 20, by striking the following from Table 3:
3 "NOTE: Table 3 of this rule will automatically be repealed
4 and replaced with Table 3A of this rule on December 31,
5 1997, unless the provision of paragraph 3.2.2 of this rule
6 is modified prior to that date.",

7 And,

8 On page 21, by striking out all of Table 3A.

9 (j) The legislative ~~rules~~ rule filed in the state
10 register on the thirty-first day of July, one thousand nine
11 hundred ninety-five, authorized under the authority of
12 section four, article five, chapter twenty-two of this
13 code, relating to the division of environmental protection
14 (to prevent and control of air pollution from the emission
15 of volatile organic compounds, 45 CSR 21), are authorized
16 with the following amendment:

17 "On pages 170 and 171, by striking out section 40 in
18 its entirety and inserting in lieu thereof a new section
19 40, to read as follows:

20 §45-21-40. Other Facilities that Emit Volatile Organic
21 Compound (VOC)..

22 40.1. Applicability.

23 a. This section 40. applies to any facility that has

1 aggregate maximum theoretical emissions of 90.7 megagrams
2 (mg) (100 tons) or more of volatile organic compounds
3 (VOCs) per calendar year in the absence of control devices;
4 provided that this section 40. applies to any source or
5 sources within such facility other than those sources
6 subject to regulation under sections 11. through 39. VOC
7 emissions from sources regulated under sections 11. through
8 39., but which fall below the applicability thresholds of
9 these sections, and thus are not subject to the emissions
10 control standards of these sections, shall be included in
11 the determination of maximum theoretical emissions for a
12 facility but shall not be subject to the requirements of
13 this section 40. Emissions from sources listed in section
14 40.1.d. shall not be included in the determination of
15 maximum theoretical emissions for a facility.

16 b. The owner or operator of a coating line or
17 operation, whose emissions are below this applicability
18 threshold, shall comply with the certification,
19 recordkeeping, and reporting requirements of section
20 40.6.a.

21 c. The owner or operator of a non-coating source,
22 whose emissions are below this applicability threshold,
23 shall comply with the certification, recordkeeping, and

1 reporting requirements of section 40.6.b.

2 d. The requirements of this section 40. shall not
3 apply to coke ovens (including by-product recovery plants),
4 fuel combustion sources, barge loading facilities, jet
5 engine test cells, vegetable oil processing facilities,
6 wastewater treatment facilities, iron and steel production,
7 surface impoundments, pits; and boilers, industrial
8 furnaces, and incinerators having a destruction efficiency
9 of 95 percent or greater.

10 e. The requirements of this section 40. shall not
11 apply to any facility bound by an order or permit,
12 enforceable by the Director, which limits the facility's
13 emissions to less than 100 tons of VOC per calendar year
14 without the application of control devices.

15 40.2. Definitions. -- As used in this section 40., all
16 terms not defined herein shall have the meaning given them
17 in section 2.

18 a. 'Reasonably available control measures' (also
19 denoted as RACM) means an emission limit or limits that
20 reflect the application of control technology and/or
21 abatement techniques or measures that are reasonably
22 available, considering technological and economic
23 feasibility. Such emission limits may be considered on a

1 plant-wide basis to achieve emission reduction requirements
2 in the most cost effective manner.

3 b. "Fugitive emissions" means those emissions which
4 could not reasonably pass through a stack, chimney, vent,
5 or other functionally equivalent opening.

6 40.3. Standards. -- The owner or operator of a
7 facility subject to this section 40. shall:

8 a. Except as provided in section 40.3.b.,

9 1. With respect to any existing non-fugitive
10 emission source which has maximum theoretical emissions of
11 6 pounds per hour or more, comply with an emission control
12 plan established on a case-by-case basis approved by the
13 Director that meets the definition of reasonably available
14 control measures (RACM) and achieves at least a 90 percent
15 reduction in emissions below the total (aggregate) maximum
16 theoretical emissions from all such non-fugitive emission
17 sources subject to RACM requirements; and

18 2. With respect to each process unit producing a
19 product or products, intermediate or final, in excess of
20 1000 megagrams (Mg) (1,100 tons) per year, regardless of
21 whether such product or products are listed in 40 CFR
22 60.489, comply with an emission control plan for fugitive
23 sources using the methods and criteria of section 37., or

1 alternative methods and criteria approved by the Director.
2 The Director may exempt a process unit from fugitive
3 emission control requirements upon satisfactory
4 demonstration that emissions are of minor significance.

5 b. With respect to such sources as described in
6 sections 40.3.a.1. and 40.3.a.2., comply with emission
7 limits and measures based upon an alternative emissions
8 reduction plan approved by the Director considering
9 technical, economic and air quality benefit considerations
10 that, at a minimum, maintains emission control measures
11 incorporated as part of any federally approved maintenance
12 plan for the county or area in which the source is located.

13 c. With respect to any source at a facility subject to
14 this section 40., which source has maximum theoretical
15 emissions of 6 pounds per hour or more and is constructed,
16 modified or begins operating after the effective date of
17 this rule, comply with a control plan developed on a case-
18 by-case basis approved by the Director that meets the
19 definition of reasonably available control technology
20 (RACT) in section 2.60. for both fugitive and non-
21 fugitive emission sources.

22 40.4. Submissions and Approval of Control Plans

23 a. Within 90 days after the effective date of this

1 rule, the owner or operator of a facility subject to this
2 section 40. shall submit any required amendments to the
3 case-by-case RACT control plans previously submitted to the
4 Director, that revise such control plans to meet the
5 definition of reasonably available control measures (RACM).

6 b. Notwithstanding the provisions of section 9.2.,
7 the owner or operator of a facility subject to this rule
8 solely due to this section 40., that requires a major
9 process change and/or major capital investment to comply
10 with RACM requirements, may petition the Director for an
11 additional extension beyond December 31, 1996, for
12 compliance certification, and the Director may grant such
13 extension when warranted. Provided however, such
14 compliance certification date shall be no later July 31,
15 1997.

16 c. The Director shall not approve a RACM plan or an
17 alternative emissions reduction plan under this section 40.
18 unless such plan includes:

19 1. A commitment to develop and submit a
20 complete RACT plan to the Director within 180 days of a
21 finding by the Director that a violation of the National
22 Ambient Air Quality Standard for ozone has occurred within
23 the county or maintenance area in which the source is

1 located; and

2 2. A commitment to achieving full
3 implementation of RACT within 2 years of approval of the
4 RACT plan by the Director.

5 d. A finding by the Director that a violation of
6 the National Ambient Air Quality Standard for ozone has
7 occurred shall be made based upon verification of a
8 monitored ozone standard violation in the county or
9 maintenance area in which the source is located. The three
10 maintenance areas (the Huntington area, comprising Cabell
11 and Wayne counties; the Charleston area, comprising Kanawha
12 and Putnam counties; and the Parkersburg area, comprising
13 Wood county) shall be treated separately and independently
14 for any such finding(s).

15 e. All RACM control plans, RACT control plans, and
16 alternative emissions reduction plans approved by the
17 Director pursuant to this section 40. shall be embodied in
18 a consent order or permit in accordance with 45CSR13 or
19 45CSR30, as required. A facility owner or operator may at
20 any time petition the Director to approve revisions to
21 these plans. The decision concerning said petition shall
22 be issued by the Director in accordance with 45CSR13 or
23 45CSR30, as required, or a consent order. Any such

1 revisions shall be subject to the public participation
2 requirements of 45CSR13 or 45CSR30.

3 f. The owner or operator of a facility subject to
4 this section 40. may submit for approval by the Director an
5 emission control plan that meets the definition of
6 reasonably available control technology (RACT) in section
7 2.60.

8 40.5. Test methods and procedures. -- The owner or
9 operator of any source subject to this section 40. shall
10 demonstrate compliance with section 40.3. by using the
11 applicable test methods specified in sections 41. through
12 46 or by other means approved by the Director.
13 Notwithstanding the requirements of section 41.1., EPA
14 approval for alternate test methods to demonstrate
15 compliance shall not be required for sources which are
16 subject solely to emission control requirements specified
17 in section 40.3.

18 40.6. Reporting and Recordkeeping Requirements for
19 Exempt Non-Control Technique Guideline (CTG) Sources.

20 a. An owner or operator of a coating line or
21 operation that is exempt from the emission limitations in
22 section 40.3. shall comply with the certification,
23 recordkeeping, and reporting requirements in section 4.2.

1 b. An owner or operator of a non-coating source
2 that is exempt from the emission limitations in section
3 40.3. shall submit, upon request by the Director, records
4 that document that the source is exempt from these
5 requirements.

6 1. These records shall be submitted to the
7 Director within 30 days from the date of request.

8 2. If such records are not made available, the
9 source will be considered subject to the limits in section
10 40.3.

11 40.7. Reporting and Recordkeeping Requirements for
12 Subject Non-CTG Coating Sources. -- An owner or operator of
13 a coating line or operation subject to this section 40. and
14 complying with section 40.3. shall comply with the
15 certification, recordkeeping, and reporting requirements in
16 section 4.

17 40.8. Reporting and Recordkeeping Requirements for
18 Subject Non-CTG, Non-Coating Sources.

19 a. The owner or operator of the subject VOC sources
20 shall perform all testing and maintain the results of all
21 tests and calculations required under sections 40.3. and
22 40.5. to demonstrate that the subject source is in
23 compliance.

1 b. The owner or operator of the subject VOC source
2 shall maintain these records in a readily accessible
3 location for a minimum of 3 years, and shall make these
4 records available to the Director upon verbal or written
5 request.

6 c. The owner or operator of any facility containing
7 sources subject to this section 40. shall comply with the
8 requirements in section 5. except that such requirements,
9 as they apply to sources solely subject to this section
10 40., may be modified by the Director upon petition by the
11 owner or operator. Any such modified requirements shall be
12 embodied in the facility's control plan (RACM, RACT or
13 alternative plan) and reflected in the associated consent
14 order or permit issued pursuant to 45CSR13 or 45CSR30."

15 (k) The legislative ~~rules~~ rule filed in the state
16 register on the twenty-seventh day of July, one thousand
17 nine hundred ninety-five, authorized under the authority of
18 section five, article twelve, Chapter twenty-two of this
19 code, modified by the division of environmental protection
20 to meet the objections of the legislative rule-making
21 review committee and refiled in the state register on the
22 seventeenth day of January, one thousand nine hundred
23 ninety-six, relating to the division of environmental

1 protection (monitoring well design standards, 47 CSR 60),
2 ~~are~~ is authorized.

3 (1) The legislative ~~rules~~ rule filed in the state
4 register on the thirty-first day of July, one thousand nine
5 hundred ninety-five, authorized under the authority of
6 section five, article fifteen, chapter twenty-two of this
7 code, modified by the division of environmental protection
8 to meet the objections of the legislative rule-making
9 review committee and refiled in the state register on the
10 twenty-fourth day of January, one thousand nine hundred
11 ninety-six, relating to the division of environmental
12 protection (solid waste management, 47 CSR 38), ~~are~~ is
13 authorized with the following amendments:

14 "On page 37, subdivision 3.8.4, after the words 'from
15 the uppermost' by striking the word 'significant.'

16 On page 142, by striking the existing subdivision
17 4.11.2.c.A and inserting in lieu thereof the following:

18 '4.11.2.c.A

19 The monitoring frequency for all constituents listed in
20 Appendix I of this rule, must be at least twice a year
21 during the active life of the facility, including closure
22 and the post-closure periods. The director may require
23 more frequent monitoring on a site-specific basis by

1 considering aquifer flow rate and existing quality of the
2 groundwater.'... ..

3 On page 148, by striking the existing subdivision
4 4.11.3.i.A. and inserting in lieu thereof the following:
5 '4.11.3.i.A.

6 The director may consider an alternative groundwater
7 protection standard in consultation with the environmental
8 quality board pursuant to 47CSR57 for constituents for
9 which water quality standards have not been established.'

10 On page 151, subdivision 4.11.5., by following the
11 words 'any applicable groundwater quality protection
12 standards' by inserting the words 'and/or background
13 groundwater quality, pursuant to the requirements of the
14 Groundwater Protection Act, WVC §22-12-1 et seq.'

15 On page 152, subdivision 4.11.6.b.A., by following the
16 words 'Be protective of human health and the environment'
17 inserting the words 'and maintain existing groundwater
18 quality, pursuant to the requirements of the Groundwater
19 Protection Act, WVC §22-12-1 et seq.'

20 On page 154, subdivision 4.11.6.d.B.(f), by striking
21 the words 'Resource value of the aquifer' and inserting in
22 lieu thereof the words 'The hydrogeologic characteristics
23 of the facility and the surrounding land,'

1 On page 154, subdivision 4.11.6.d.B(f).(e) by striking
2 out the words "The hydrogeologic characteristics of the
3 facility and surrounding land;

4 And, by renumbering and relettering the remaining
5 subdivisions of the rule.

6 On page 156, subdivision 4.11.7.a.A., by following the
7 words 'Demonstrate compliance with' inserting the words
8 'the Groundwater Protection Act, WVC §22-12-1 et seq.,
9 and/or the''

10 And,

11 On page 173, subdivision 5.4.3, by adding the
12 following sentence to the end of the subdivision: 'A class
13 D facility other than a class D-1 solid waste facility
14 shall not exceed two (2) acres in size.'

15 (m) The legislative rule filed in the state register
16 on the twenty-ninth day of August, one thousand nine
17 hundred ninety-six, authorized under the authority of
18 section ten, article five, chapter twenty-two, of this
19 code, modified by the division of environmental protection
20 to meet the objections of the legislative rule-making
21 review committee and refiled in the state register on the
22 twenty-sixth day of November, one thousand nine hundred
23 ninety-six, relating to the division of environmental

1 protection (confidential information, 45 CSR 31), is
2 authorized.

3

4 NOTE: The purpose of this bill is to authorize the
5 Division of Environmental Protection to promulgate a
6 legislative rule relating to Confidential Information.

7

8 Strike-throughs indicate language that would be
9 stricken from the present law, and underscoring indicates
10 new language that would be added.