

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE.**

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

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

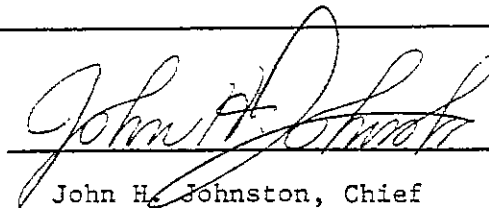
TITLE OF RULE BEING PROPOSED: "Confidential Information"

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) H.B. 2333

SECTION 64-3-1(g), PASSED ON April 12, 1997

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON
THE FOLLOWING DATE: September 25, 1997


John H. Johnston, Chief



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

CECIL H. UNDERWOOD
GOVERNOR

JOHN E. CAFFREY
COMMISSIONER

June 27, 1997

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

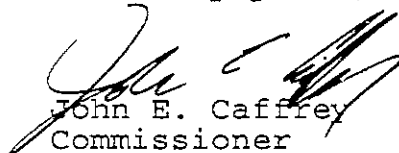
RE: 45CSR31 - "Confidential Information"

Dear Ms. Cooper:

This is to advise you that I am giving approval for final filing of 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 Carrie Chambers at 759-0515.

Sincerely yours,


John E. Caffrey
Commissioner

JEC:cc

Attachment

LEGISLATIVE HISTORY ABSTRACT 45CSR31

CONFIDENTIAL INFORMATION

Bureau of Environment
Division of Environmental Protection
Office of Air Quality
House Bill 2333 Section 64-3-1(g)

07/10/96	Filed Notice of Public Hearing with Secretary of State.
07/10/96	Initial Filing with Legislative Rule-Making Review Committee.
08/13/96	Held Public Hearing.
08/13/96	End of Public Comment Period.
08/29/96	Agency Approved Rule Filed with Secretary of State and Legislative Rule-Making Review Committee.
11/26/96	Modified Rule Filed with Secretary of State.
04/12/97	Passed the West Virginia Legislature.
05/02/97	Approved by the Governor.
06/27/97	Rule Final Filed with Secretary of State.
09/25/97	Effective Date of Rule.

**BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION**

BRIEFING DOCUMENT

Rule Title: 45CSR31 - "Confidential Information"

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

B. SUMMARY OF RULE:

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

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

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

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

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

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

This rule was presented to the DEP Advisory Council in their July 17, 1996 meeting. The rule was discussed by the Council members, but no changes were made to the rule as a result of those discussions

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

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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. -- June 27, 1997

1.4. Effective Date. -- September 25, 1997

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 --

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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.

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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 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).

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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 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 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

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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. 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.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

JAN CASTO
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000
FAX: (304) 558-0900



STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

PENNEY BARKER
Supervisor, Corporations

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

(Plus all the volunteer help we can get)

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TO: CARRIE CHAMBERS

AGENCY: DEP - OFFICE OF AIR QUALITY

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: July 14, 1997

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 31 TITLE: 45 DEP - OFFICE OF AIR QUALITY

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: Karen G. Watson

TITLE OF PERSON SIGNING: Attorney, OAQ

DATE: 7/25/97

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.