

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In this Box

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE 1992 Sept 18  
ADMINISTRATIVE LAW DIVISION

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

AGENCY: WV Air Pollution Control Commission TITLE NUMBER: 45CSR31

CITE AUTHORITY WV Code §16-20-5

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

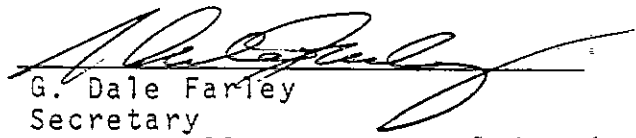
IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

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 HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

  
G. Dale Farley  
Secretary

WV Air Pollution Control Commission

APPENDIX B  
FISCAL NOTE FOR PROPOSED RULES

RECEIVED  
1992 SEP 18 AM 9:33  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Rule Title: 45CSR31 - "Confidential Information"

Type of Rule:   X   Legislative            Interpretive            Procedural

Agency: West Virginia Air Pollution Control Commission

Address: 1558 Washington Street, East

Charleston, WV 25311-2599

| 1. Effect of Proposed Rule | Annual    |          | Fiscal Year |                 |           |
|----------------------------|-----------|----------|-------------|-----------------|-----------|
|                            | Increase  | Decrease | Current     | Next<br>1993-94 | 1994-95   |
| Estimated Total Cost       | \$ 32,250 | \$ -0-   | \$ -0-      | \$ 32,250       | \$ 32,250 |
| Personal Services          | 32,250    |          | -0-         | 32,250          | 32,250    |
| Current Expense            |           |          |             |                 |           |
| Repairs and Alterations    |           |          |             |                 |           |
| Equipment                  |           |          |             |                 |           |
| Other                      |           |          |             |                 |           |

2. Explanation of above estimates:

Freedom of information requests regarding file information, confidential and non-confidential, are currently made to this agency. This legislative rule clarifies the definition of confidential information. One additional employee is necessary to assist the chief in making objective determinations regarding confidential information.

3. Objectives of these rules:

This legislative rule is proposed to clarify the definition of confidential materials in accordance with the mandate of WV Code §16-20-12.

4. Explanation of overall economic impact of proposed rule.

A. Economic impact on state government.

There should be a slight economic impact on state government as one additional employee is necessary to implement this rule.

B. Economic impact on political subdivisions; specific industries; specific groups of citizens.

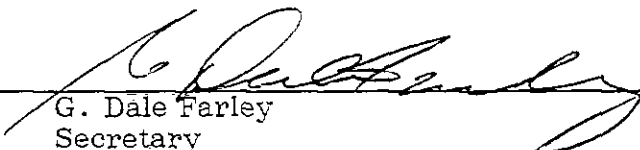
There should be no additional economic impact on specific industries and specific groups of citizens that use confidentiality standards.

C. Economic impact on citizens/public at large.

No additional impact above current levels.

Date: September 18, 1992

Signature of agency head or authorized representative:

  
G. Dale Farley  
Secretary  
West Virginia Air Pollution Control Commission

RECEIVED

DATE: September 18, 1992

1992 SEP 18 AM 9:33

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

FROM: G. DALE FARLEY  
CHIEF, OFFICE OF AIR QUALITY

LEGISLATIVE RULE TITLE: 45CSR31 - "Confidential Information"

1. Authorizing statute(s) citation WV Code §16-20-5
2.
  - a. Date filed in State Register with Notice of Hearing:  
July 22, 1992
  - b. What other notice, including advertising, did you give of the hearing?  
Class II legal advertisement filed in a newspaper published in each of  
the ten (10) Air Quality Control Regions of West Virginia.
  - c. Date of hearing(s): August 5, 1992
  - d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.  
Attached X No comments received
  - e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)  
September 18, 1992
  - f. Name and phone number of agency person to contact for additional information:  
G. Dale Farley, Chief  
Office of Air Quality (Phone: 558-2275)

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

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

\_\_\_\_\_ N/A \_\_\_\_\_

b. Date of hearing: \_\_\_\_\_ N/A \_\_\_\_\_

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

\_\_\_\_\_ N/A \_\_\_\_\_

d. Attach findings and determinations and reasons:

Attached \_\_\_\_\_ N/A \_\_\_\_\_



West Virginia Department of  
Commerce, Labor & Environmental Resources  
Air Pollution Control Commission

1558 Washington Street, East  
Charleston, West Virginia 25311

Telephone: (304)348-4022  
or (304)348-3286  
Fax: (304)348-3287

SUMMARY

45CSR32 - "Serious and Minor Violations of Applicable Rules" - is a new legislative rule proposed by the Air Pollution Control Commission in response to the newly enacted provisions of WV Code §16-20-8 (Effective March 7, 1992). The aforementioned Code provision provides, "The commission shall, by rule and regulation subject to the provisions of chapter twenty-nine-a of this Code, determine the definitions of serious and minor violations". The proposed legislative rule defines and clarifies serious violations and minor violations.

RECEIVED  
1992 SEP 18 AM 9:34  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE



RECEIVED

92 JUN -8 AM 10:43

WEST VIRGINIA  
AIR POLLUTION  
CONTROL COMMISSION  
GASTON CAPERTON  
Governor

DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES  
OFFICE OF THE SECRETARY  
State Capitol, Room R-151  
Charleston, West Virginia 25305-0310  
Telephone: (304) 558-3255  
Fax No.: (304) 558-4983

JOHN M. RANSON  
Cabinet Secretary

June 5, 1992

G. Dale Farley, Director  
Air Pollution Control Commission  
1558 Washington Street, East  
Charleston, West Virginia 25311

RECEIVED  
1992 SEP 18 AM 9:34  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

RE: Proposed Rules - Title 45, Series 31 (Confidential  
Information)

Dear Dale:

Pursuant to West Virginia Code §5F-2-2(a)(12), I hereby  
consent to the proposal of the rules specified above.

You may attach a copy of this letter to your filing with the  
Secretary of State as evidence of my consent.

Sincerely yours,

*John M. Ranson*  
John M. Ranson  
Cabinet Secretary

JMR:cjb

B:RUL-APCC.CJB



Ken Hechler  
Secretary of State

# WEST VIRGINIA REGISTER

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Volume IX

Issue 25

June 18, 1992

Pages 1175-1207

A Weekly Publication

Administrative Law Division

Judy Cooper  
Director

Missy Phalen  
Administrative Assistant

Pam Gibson  
Data Entry Clerk

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

(304) 558-6000

- I. Chronological Index
- II. Open Government Meetings Listing
- III. Price List
- IV. Rule Monitor
- V. Notices
  - a. Legislative Rules
  - b. Interpretive Rules
  - c. Procedural Rules
  - d. Emergency Rules
  - e. Legislative Rule-Making Review Committee
- VI. Legislative Interims
- VII. Orders
- IX. Ethics Commission Opinions
- X. Attorney General Opinions
- XI. Other Documents or Information Filed
- XII. Publication Deadlines and Publication Dates

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In this Box

August 5, 1992 9:00 a.m.

## NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Air Pollution Control Commission TITLE NUMBER: 45CSR31

RULE TYPE: Legislative CITE AUTHORITY: WV Code §16-20-5

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

DATE OF PUBLIC HEARING: August 5, 1992 TIME: 9:00 a.m.

LOCATION OF PUBLIC HEARING: Conference Room

WV Air Pollution Control Commission

1558 Washington Street, East

Charleston, WV 25311

COMMENTS LIMITED TO: ORAL, WRITTEN, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Same as above.

The Department requests that persons wishing to make comments at the hearing make an effort to submit written

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In this Box

August 5, 1992 9:00 a.m.

## NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Air Pollution Control Commission TITLE NUMBER: 45CSR32

RULE TYPE: Legislative CITE AUTHORITY: WV Code §16-20-5

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: 45CSR32

TITLE OF RULE BEING PROPOSED: Civil Penalties

DATE OF PUBLIC HEARING: August 5, 1992 TIME: 9:00 a.m.

LOCATION OF PUBLIC HEARING: Conference Room

WV Air Pollution Control Commission

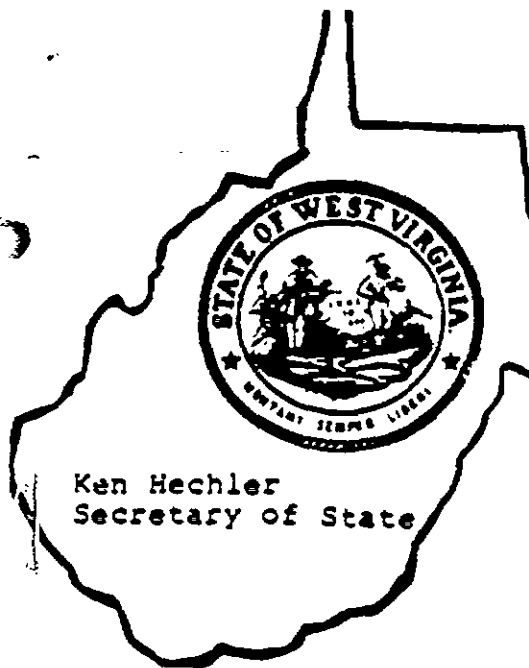
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Charleston, WV 25311

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Ken Hechler  
Secretary of State

# WEST VIRGINIA REGISTER

Volume IX

Issue 30

July 24, 1992

Pages 1374-1412

A Weekly Publication

Administrative Law Division

Judy Cooper  
Director

Missy Phalen  
Administrative Assistant

Pam Gibson  
Data Entry Clerk

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

(304)558-6000

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- XII. Publication Deadlines and Publication Dates

## OTHER

Commission Meeting Agenda  
August 5, 1992  
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8. Such other business as the Commission deems timely and appropriate.  
\*The following is quoted from the West Virginia Air Pollution Control Law of West Virginia, 16-20-4:

At its first meeting the Commission shall elect from its membership a chairman, and at the first meeting in each fiscal year thereafter the Commission shall elect from its membership a chairman to act during each fiscal year. At similar times the Commission shall elect from its membership a vice-chairman and appoint a secretary. The secretary need not be a member of the Commission.



West Virginia Department of  
Commerce, Labor & Environmental Resources  
Air Pollution Control Commission

1558 Washington Street, East  
Charleston, West Virginia 25311

Telephone: (904) 408 4022  
or (904) 408 1266  
Fax: (904) 408 1267

## AGENDA

WEST VIRGINIA AIR POLLUTION CONTROL COMMISSION  
Conference Room  
1558 Washington Street, East  
Charleston, West Virginia 25311

August 5, 1992  
9:00 a.m.

I. HEARINGS ON PROPOSED RULES

1. Hearing on Proposed Rule 31 (45CSR31) - Confidential Information.
2. Hearing on Proposed Rule 32 (45CSR32) - Civil Penalties.

II. COMMISSION MEETING

1. Further Consideration of Amendments to Regulation 5 (45CSR5) - "To Prevent and Control Air Pollution from the Operation of Coal Preparation Plants and Coal Handling Operations".
2. Further Consideration of Amendments to Regulation 14 (45CSR14) - "Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution For the Prevention of Significant Deterioration".
3. Further Consideration of Amendments to Regulation 19 (45CSR19) - "Requirements for Pre-construction Review, Determination of Emission Offsets for Proposed New or Modified Stationary Sources of Air Pollutants and Emission Trading for Intrasource Pollutants".
4. Further Consideration of Proposed to Regulation 29 (45CSR29) - "Regulation Requiring the Submission of Emission Statements for Volatile Organic Compound Emissions and Oxides of Nitrogen Emissions".
5. Election of Chairman.\*
6. Election of Vice-Chairman.\*
7. Appointment of Secretary.\*



West Virginia Department of  
Commerce, Labor & Environmental Resources  
Air Pollution Control Commission

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Fax: (304)348-3287

AGENDA

WEST VIRGINIA AIR POLLUTION CONTROL COMMISSION  
Conference Room  
1558 Washington Street, East  
Charleston, West Virginia 25311

August 5, 1992  
9:00 a.m.

FILED  
AUG 22 AM 11:18

I. HEARINGS ON PROPOSED RULES

1. Hearing on Proposed Rule 31 (45CSR31) - Confidential Information.
2. Hearing on Proposed Rule 32 (45CSR32) - Civil Penalties.

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3. Further Consideration of Amendments to Regulation 19 (45CSR19) - "Requirements for Pre-construction Review, Determination of Emission Offsets for Proposed New or Modified Stationary Sources of Air Pollutants and Emission Trading for Intrastate Pollutants".
4. Further Consideration of Proposed to Regulation 29 (45CSR29) - "Regulation Requiring the Submission of Emission Statements for Volatile Organic Compound Emissions and Oxides of Nitrogen Emissions".
5. Election of Chairman.\*
6. Election of Vice-Chairman.\*
7. Appointment of Secretary.\*

Commission Meeting Agenda  
August 5, 1992  
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**AFFIDAVIT OF PUBLICATION**  
**BECKLEY NEWSPAPERS INC.**  
**BECKLEY, WEST VIRGINIA 25801**

June 25, 19 92

STATE OF WEST VIRGINIA  
COUNTY OF RALEIGH, to wit:

I, Robert E. Zutaut being first duly sworn upon my oath, do depose and say that I am Advertising Manager of Beckley Newspapers Inc., a corporation, publisher of the newspaper entitled The Register-Herald, an Independent newspaper; that I have been duly authorized by the board of directors of such corporation to execute this affidavit of publication; that such newspaper has been published for more than one year prior to publication of the annexed notice described below; that such newspaper is regularly published daily, for at least fifty weeks during the calendar year, in the municipality of Beckley, Raleigh County, West Virginia; that such newspaper is a newspaper of "general circulation," as that term is defined in article three, chapter fifty-nine of the Code of West Virginia, 1931, as amended, within the publication area or areas of the aforesaid municipality and county; that such newspaper averages in length four or more pages, exclusive of any cover, per issue; that such newspaper is circulated to the general public at a definite price of consideration; that such newspaper is a newspaper to which the general public resorts for passing events of a political, religious, commercial and social nature, and for current happenings, announcements, miscellaneous reading matters, advertisements and other notices; that the annexed notice

of Public Hearing  
(Description of notice)

was duly published in said newspaper once a week for two  
successive weeks (Class II), commencing with the issue of the  
18th day of June, 1992, and ending with the issue  
of the 25th day of June, 1992, (and was posted at the

on the \_\_\_\_\_ day of \_\_\_\_\_); that said annexed  
notice was published on the following dates: 6/18, 6/25/92

\_\_\_\_\_ and that the  
cost of publishing said annexed notice as aforesaid was \$18.95

Signed Robert E. Zutaut  
Robert E. Zutaut, Advertising Manager  
Beckley Newspapers

Taken, subscribed and sworn to before me in my said county this

25th day of June 19 92

My commission expires March 27, 2001

Notary Public of Raleigh County,  
West Virginia

**COPY OF PUBLICATION**

**NOTICE OF PUBLIC HEARING**  
On Wednesday, August 6, 1992, beginning at 9:00 a.m., the West Virginia Air Pollution Control Commission will hold a public hearing on proposed legislative rules 45CSR31 - "Confidential Information" and 45CSR32 - "Civil Penalties". The hearing will be held in the Commission's Conference Room located at 1558 Washington Street, East, Charleston, West Virginia. The hearing is open to the public. Written and oral testimony by all interested parties will be accepted and made part of the record. Copies of the proposed legislative rules may be obtained through the Office of Secretary of State and are available for public review in the Raleigh County Public Library, P.O. Box 1876, Beckley, WV. G. Dale Farley, Secretary, West Virginia Air Pollution Control Commission, 1558 Washington Street, East Charleston, West Virginia 25311 6-25-Thu-2-RH

RECEIVED

92 JUN 26 AM 11:14

WEST VIRGINIA  
AIR POLLUTION  
CONTROL COMMISSION

PUBLISHER'S CERTIFICATE

VS.

STATE OF WEST VIRGINIA,  
COUNTY OF HARRISON

I, Deborah S. Veltri

Classified Office Manager of THE CLARKSBURG EXPONENT, a  
newspaper of general circulation published in the City of Clarksburg, Coun-  
ty and State aforesaid, do hereby certify that the annexed

Notice of Public Hearing

NOTICE OF PUBLIC HEARING  
On Wednesday, August 5, 1992,  
beginning at 9:00 a.m., the West Vir-  
ginia Air Pollution Control Commission  
will hold a public hearing on proposed  
legislative rules 45CSR31 - "Confiden-  
tial Information" and 45CSR32 - "Civil  
Penalties".

The hearing will be held in the Com-  
mission's Conference Room located at  
1558 Washington Street, East, Charle-  
ston, West Virginia. The hearing is open  
to the public. Written and oral testimony  
by all interested parties will be accepted  
and made part of the record.

Copies of the proposed legislative  
rules may be obtained through the Office  
of Secretary of State and are available  
for public review in the office of the West  
Virginia Air Pollution Control Commis-  
sion, North Central Regional Office,  
517 1/2 East Park Avenue, Fairmont, WV.

G. Dale Farley

Secretary

West Virginia Air

Pollution Control Commission

1558 Washington Street, East  
Charleston, West Virginia 25311

was published in said THE CLARKSBURG EXPONENT once a  
week for 2 successive weeks,

commencing on the 17 day of June 19 92

and ending on the 24 day of June 19 92

The publisher's fee for said publication is \$ 12.25

Given under my hand this 24 day of June 19 92

Deborah S. Veltri  
Classified Office Mgr. of The Clarksburg Exponent

SEAL

Subscribed and sworn to before me this 24 day

of June 19 92

[Signature]  
Notary Public in and for Harrison County, WV.

My commission expires on the 24th day of October 1993.

# State of West Virginia, County of Randolph, ss.

## NOTICE OF PUBLIC HEARING

On Wednesday, August 5, 1992, beginning at 9:00 a.m., the West Virginia Air Pollution Control Commission will hold a public hearing on proposed legislative rules 45CSR31 — "Confidential Information" and 45CSR32 — "Civil Penalties."

The hearing will be held in the Commission's Conference Room located at 1558 Washington Street East, Charleston, West Virginia. The hearing is open to the public. Written and oral testimony by all interested parties will be accepted and made part of the record.

Copies of the proposed legislative rules may be obtained through the Office of Secretary of State and are available for public review in the Elkins-Randolph County Public Library, 416 Davis Avenue, Elkins, WV.

G. Dale Farley

Secretary

West Virginia Air Pollution  
Control Commission

1558 Washington Street, East  
Charleston, West Virginia 25311

6-17, 24



Notary Public, State of West Virginia

SHIRLEY A. MENEAR

P. O. BOX 1251

ELKINS, WV 26241

My Commission Expires April 15, 2002

I, James Hoffman, Publisher of THE INTER-MOUNTAIN, a news paper published at Elkins, in said county, do hereby certify that the annexed advertisement was published on the following dates:

June 17 June 24 \_\_\_\_\_

1992 as required by law.

Given under my hand this 24 day of June, 1992

James Hoffman  
Publisher

Printer's Fee: \$ 22.66

Subscribed and sworn to before me this 24 day of June, 1992

Shirley A. Menear  
Notary Public

My Commission Expires the 15 day of April, 2002

# NOTICE OF PUBLIC HEARING

On Wednesday August 5, 1992, beginning at 9:00 a.m., the West Virginia Air Pollution Control Commission will hold a public hearing on proposed legislative rules 45CSR31-"Confidential Information" and 45CSR32-"Civil Penalties".

The hearing will be held in the Commission's Conference Room located at 1558 Washington Street East, Charleston, West Virginia. The hearing is open to the public. Written and oral testimony by all interested parties will be accepted and made part of the record.

Copies of the proposed legislative rules may be obtained through the Office of Secretary of State and are available for public review in the Martinsburg-Berkeley County Public Library, 101 King Street, Martinsburg, WV.

G.Dale Farley

Secretary

West Virginia Air Pollution

Control Commission

1558 Washington St. East

Charleston, West Virginia 25311

6:18,25(2)

92 JUL 6 PM 1:27

## Certificate of Publication

This is to certify the annexed advertisement

WV DEPT.COMM.LABOR & ENV.RES.  
AIR POLLUTION CONTROL COMM

### PUBLIC HEARING

appeared for 2 consecutive <sup>days</sup> weeks  
in The Journal Publishing Company a  
newspaper published in the City of  
Martinsburg, W. Va., in its issue  
beginning

6/18.....

and ending

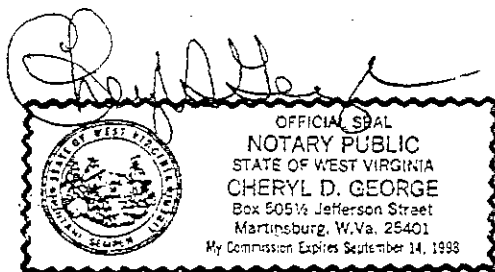
6/25.....

The Journal

*Pamela L. McCauley*

21.81

Fee \$ .....



I, as an officer of the News-Tribune, a daily newspaper published at Keyser, Mineral County, West Virginia, hereby certify that the Notice of Public Hearing

in the case of WV Dept. of  
Air Pollution Control Comm.

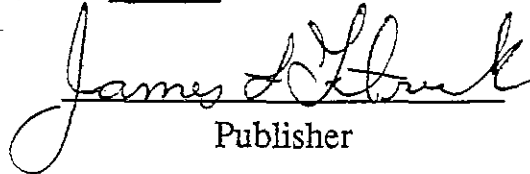
Confidential info  
vs. and civil penalties

a copy whereof is hereto annexed has been published for 2 consecutive weeks

in said NEWS-TRIBUNE, the first publication being on the 17th day of, June

19 92.

Given under my hand at Keyser this 24th day of June, 19 92.

  
Publisher

Publisher's Fee

\$ 16.53

RECEIVED

92 JUN 26 AM 11:08

WEST VIRGINIA  
AIR POLLUTION  
CONTROL COMMISSION

**NOTICE OF  
PUBLIC HEARING**

On Wednesday, August 5, 1992, beginning at 9 a.m., the West Virginia Air Pollution Control Commission will hold a public hearing on proposed legislative rules 45CSR31 - "Confidential Information" and 45CSR31 - "Civil Penalties".

The hearing will be held in the Commission's Conference Room located at 1558 Washington Street East, Charleston, West Virginia. The hearing is open to the public. Written and oral testimony by all interested parties will be accepted and made part of the record.

Copies of the proposed legislative rules may be obtained through the Office of Secretary of State and are available for public review in the Keyser-Mineral County Public Library, 105 North Main Street, Keyser, WV.

G. Dale Farley, Secretary  
West Virginia Air  
Pollution Control  
Commission

1558 Washington Street, East  
Charleston, WV 25311

6:17, 24

NOTICE OF PUBLIC HEARING

On Wednesday August 5, 1992, beginning at 9:00 a.m., the West Virginia Air Pollution Control Commission will hold a public hearing on proposed legislative rules 45CSR31 - "Confidential Information" and 45CSR32 - "Civil Penalties".

The hearing will be held in the Commission's Conference Room located at 1558 Washington Street East, Charleston, West Virginia. The hearing is open to the public. Written and oral testimony by all interested parties will be accepted and made part of the record.

Copies of the proposed legislative rules may be obtained through the Office of Secretary of State and are available for public review in the Parkersburg/Wood County Public Library, 3100 Emerson Avenue, Parkersburg, West Virginia.

G. Dale Farley

Secretary

West Virginia Air Pollution Control Commission  
1558 Washington Street, East  
Charleston, West Virginia 25311

June 18, 25

N

MARCIA MOORE

being first duly sworn, says that the

notice of public hearing -- AUGUST 5th

RECEIVED

92 JUN 30 AM 11:03

WEST VIRGINIA  
AIR POLLUTION  
CONTROL COMMISSION

hereto attached was printed in the Parkersburg News

a daily newspaper published in the City of Parkersburg, Wood County, West Virginia, and posted at the front door of the Court House for two

successive weeks, the first publication ~~and posting~~ thereon being on

the 18th day of JUNE 19 92, and subse-

quent publication on the 25th day of JUNE 19 92,

the        day of        19, the        day of

19, the        day of       

19, and the        day of        19.

Printer's Fee \$ 21.12

1 7/8 "x 103 = 193.13 words @ 10.9375 marcia Moore

Subscribed and sworn to before me this 25th day of

JUNE 19 92

Kolena C. Covey  
Notary Public for Wood County, West Virginia

My commission expires July 23, 1994

OFFICIAL SEAL

NOTARY PUBLIC, STATE OF WEST VIRGINIA

ROBIN C. COVEY

P. O. BOX 1787 PARKERSBURG, WV 26102

MY COMMISSION EXPIRES JULY 23, 1994

Parkersburg Printing Co. - 5/71

# State of West Virginia, County of Upshur, ss:

Mark Davis

.....Advertising Manager  
Record Delta, a newspaper published at Buckhannon in the said county, do hereby  
certify that the annexed .....

## ..... Notice Of Public Hearing .....

.....  
was published once a week for ..(2) ..two ..... successive weeks in  
said Record Delta newspaper published as aforesaid, commencing on the .....  
17th and 24th days of June ..... days of 19..92 .....

Given under my hand this .. 29th .. day of June .. day of 19..92 .....

.....Advertising Manager

Printers fee \$ 8.40 .....

### WEST VIRGINIA, UPSHUR COUNTY, TO-WIT:

Subscribed and sworn to before me this 29th day of June .. day of 19..92 .....

OFFICIAL SEAL  
NOTARY PUBLIC

.....Notary Public.

My Commission Expires .. 29..1999 .....

STATE OF WEST VIRGINIA  
LINDA SNYDER  
P. O. Box 1103  
Buckhannon, WV 26201  
My Commission Expires March 29, 1999

**NOTICE OF PUBLIC HEARING**  
On Wednesday August 5, 1992,  
beginning at 9 a.m., the West Virginia Air  
Pollution Control Commission will hold a  
public hearing on proposed legislative  
rules 45CSR31 - "Confidential Informa-  
tion" and 45CSR32 - "Civil Penalties".  
The hearing will be held in the Com-  
mission's Conference Room located at

1658 Washington Street East,  
Charleston, West Virginia. The hearing  
is open to the public. Written and oral tes-  
timony by all interested parties will be  
accepted and made part of the record.  
Copies of the proposed legislative  
rules may be obtained through the Office  
of Secretary of State and are available  
for public review in the Gassaway Pub-

lic Library, 100 Birch Street, Gassaway,  
WV.  
G. Dale Farley  
Secretary  
West Virginia Air Pollution Control  
Commission  
1658 Washington Street, East  
Charleston, West Virginia 25311  
(6-17,24)

NOTICE OF PUBLIC HEARING  
On Wednesday August 5, 1992, beginning at 9:00 a.m., the West Virginia Air Pollution Control Commission will hold a public hearing on proposed legislative rules 45CSR31, "Confidential Information" and 45CSR32, "Civil Penalties".  
The hearing will be held in the Commission's Conference Room located at 1558 Washington Street East, Charleston, West Virginia. The hearing is open to the public. Written and oral testimony by all interested parties will be accepted and made part of the record.  
Copies of the proposed legislative rules may be obtained through the Office of Secretary of State and are available for public review in the office of the WV Air Pollution Control Commission, Northern Panhandle Regional Office, 1911 Warwood Avenue, Wheeling, WV.

G. Dale Farley, Secretary  
West Virginia Air Pollution Control Commission  
1558 Washington Street, East  
Charleston, West Virginia 25311

Intel. June 19, 26  
N.R. June 19, 26

RECEIVED  
92 JUL -1 AM 11:52  
WEST VIRGINIA  
AIR POLLUTION  
COMMISSION

STATE OF WEST VIRGINIA,  
COUNTY OF OHIO.

I, Bonnie Mattern for the publisher of the

~~WHEELING NEWS-REGISTER~~  
WHEELING INTELLIGENCER

newspapers published in the CITY OF

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

June 19, 26, 1992

commencing on the 19 day of June, 19 92

Given under my hand this 29 day of June, 19 92

Bonnie Mattern

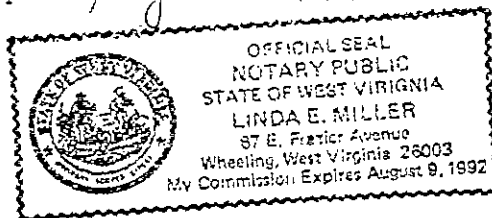
Sworn to and subscribed before me this 29th day of June, 19 92, at WHEELING, OHIO COUNTY, WEST VIRGINIA

Linda E. Miller

Notary Public

of, in and for OHIO COUNTY, WEST VIRGINIA.

My Commission expires August 9, 1992



AFFIDAVIT OF PUBLICATION

STATE OF WEST VIRGINIA,

KANAWHA COUNTY, TO-WIT:

I, Debra A. Caldwell OF

THE DAILY MAIL, A DAILY REPUBLICAN NEWSPAPER,

PUBLISHED IN THE CITY OF CHARLESTON, KANAWHA COUNTY,

WEST VIRGINIA, DO SOLEMNLY SWEAR THAT THE ANNEXED

NOTICE OF: 45CSR31

WAS DULY PUBLISHED IN SAID PAPER(S) ON THE DATES

LISTED BELOW, AND WAS POSTED AT THE FRONT DOOR OF THE

COURT HOUSE OF SAID KANAWHA COUNTY, WEST VIRGINIA,

ON THE

18TH DAY OF JUNE , 1992 .

DATES PUBLISHED:

06/17/92 DAILY MAIL 06/24/92 DAILY MAIL

SUBSCRIBED AND SWORN TO BEFORE ME THIS

26TH DAY OF JUNE , 1992 .

Maureen A. Hartman  
NOTARY PUBLIC OF KANAWHA COUNTY, WEST VIRGINIA

NOTICE OF  
PUBLIC HEARING

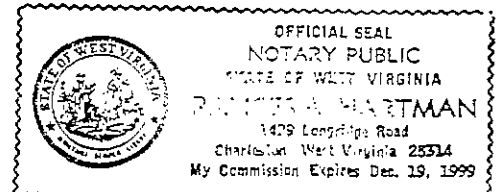
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Copies of the proposed legislative rules may be obtained through the Office of the Secretary of State and are available for public review in the Library of the West Virginia Air Pollution Control Commission located at the address below.

G. Dale Farley  
Secretary  
West Virginia  
Air Pollution  
Control Commission  
1558 Washington Street, East  
Charleston,  
West Virginia 25311  
(901134)

PRINTERS FEE \$ 30.84



AFFIDAVIT OF PUBLICATION

STATE OF WEST VIRGINIA,

KANAWHA COUNTY, TO-WIT:

I, Debra A. Caldwell OF

THE DAILY MAIL, A DAILY REPUBLICAN NEWSPAPER,  
PUBLISHED IN THE CITY OF CHARLESTON, KANAWHA COUNTY,  
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PUBLIC HEARING

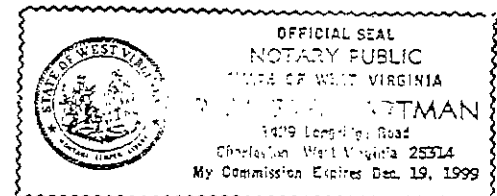
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G. Dale Farley  
Secretary  
West Virginia  
Air Pollution  
Control Commission  
1558 Washington Street, East  
Charleston,  
West Virginia 25311  
(901134)

PRINTERS FEE \$ 30.84





West Virginia Department of  
Commerce, Labor & Environmental Resources  
Air Pollution Control Commission

---

1558 Washington Street, East  
Charleston, West Virginia 25311

Telephone: (304)348-4022  
or (304)348-3286  
Fax: (304)348-3287

NOTICE OF PUBLIC HEARING

On Wednesday August 5, 1992, beginning at 9:00 a.m., the West Virginia Air Pollution Control Commission will hold a public hearing on proposed legislative rules 45CSR31 - "Confidential Information" and 45CSR32 - "Civil Penalties".

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G. Dale Farley  
Secretary  
West Virginia Air Pollution Control Commission  
1558 Washington Street, East  
Charleston, West Virginia 25311

# COMMISSION MEETING

AUGUST 5, 1992

| NAME                            | ADDRESS                                                      | COMPANY AFFILIATION             |
|---------------------------------|--------------------------------------------------------------|---------------------------------|
| Gary A. Jack                    | Manayakala Pkwy <del>1300</del> 1300 Fairmount Ave Fairmount |                                 |
| Robert L. Foster                | Chas Ryan Assoc                                              | Chas, WV                        |
| Kaym M. Schmidt                 | 600 United Cntr                                              | Robinson; McElwee               |
| Roland Henson                   | 600 United Center                                            | Robinson & McElwee              |
| Maury Wertheimer                | 1324 Virginia St. E.                                         | WV - CAC                        |
| J. Hallman                      | Calwell Mc Cormick                                           | 405 Capital St<br>Fairmont, WV  |
| John Cumming                    | Robinson & McElwee                                           | 600 United Center               |
| Karen Price                     | UNMA                                                         | <del>WVMA</del> 401 Capital St. |
| <del>Fredrick H. Sizemore</del> |                                                              |                                 |
| <del>Robert D. Johnson</del>    | <del>Chas Ryan Assoc</del>                                   |                                 |
|                                 |                                                              |                                 |
|                                 |                                                              |                                 |
|                                 |                                                              |                                 |
|                                 |                                                              |                                 |
|                                 |                                                              |                                 |



**WEST VIRGINIA  
MANUFACTURERS ASSOCIATION**

SUITE 503  
405 CAPITOL STREET  
CHARLESTON, WV 25301  
TELEPHONE (304) 342-2123

August 4, 1992

The Honorable L. Newton Thomas, Jr., Chairman Director  
West Virginia Air Pollution Control Commission  
1558 Washington Street, East  
Charleston, West Virginia 25311

Re: Comments on Proposed Series 31,  
Confidential Information Regulations

Dear Chairman Thomas:

Attached, please find for purposes of filing the comments of the West Virginia Manufacturers Association ("WVMA") regarding proposed Series 31, "Confidential Information Regulations."

The WVMA commends the Commission for taking the initiative to develop a comprehensive regulatory scheme regarding the protection of confidential information. It is in the spirit of cooperation that the WVMA files these comments. If you wish to discuss any of these comments in further detail, please do not hesitate to contact me at 342-0161.

Very truly yours,

R. L. Foster, Chairman  
Environmental, Safety and  
Health Committee

RLF/blc  
enc.

cc: G. Dale Farley, Chief  
The Honorable Cleve Benedict, Commissioner  
The Honorable Samuel Kusic, Commissioner  
The Honorable Jean C. Neely, Commissioner  
The Honorable William T. Wallace, M.D., M.P.H., Commissioner

August 4, 1992  
Page 2

bcc: Karen T. Price, President WVMA  
M. Ann Bradley, Esq.  
Kim Brown Poland, Esq.  
John C. Cummings, Esq.  
David L. Yaussy, Esq.  
E. L. Kropp, Esq.



**WEST VIRGINIA  
MANUFACTURERS ASSOCIATION**

SUITE 503  
405 CAPITOL STREET  
CHARLESTON, WV 25301  
TELEPHONE (304) 342-2123

COMMENTS OF THE  
WEST VIRGINIA MANUFACTURERS ASSOCIATION  
ON PROPOSED AMENDMENTS TO THE  
CONFIDENTIAL INFORMATION REGULATIONS  
45 C.S.R. SERIES 31

---

Prepared By:

Environmental, Safety & Health Committee  
West Virginia Manufacturers Association

and

Robinson & McElwee  
600 United Center  
Post Office Box 1791  
Charleston, West Virginia 25326  
(304) 344-5800

Counsel for  
West Virginia Manufacturers Association

August 4, 1992

**COMMENTS OF THE  
WEST VIRGINIA MANUFACTURERS ASSOCIATION  
REGARDING PROPOSED SERIES 31  
"CONFIDENTIAL INFORMATION REGULATIONS"**

**August 4, 1992**

The West Virginia Air Pollution Control Commission has proposed regulations concerning procedures applicable to confidential information filed with the Director.

These comments on those proposed regulations are filed on behalf of the West Virginia Manufacturers Association, a non-profit state trade organization headquartered in Charleston which represents over 250 companies in West Virginia, including manufacturers of chemicals, metal, glass and other wholesale and consumer products. Its membership ranges from small family-owned businesses to large multi-national corporations.

The Manufacturers Association comments as follows:

**The proposed regulations conflict with the West Virginia  
Freedom of Information Act.**

Subsections 3.1.b. and 3.1.c. of the proposed regulations provide that trade secrets, unreleased financial data and classified information pertaining to national security may be given protection as confidential information. However, although both the Air Pollution Control Act, W.Va. Code §16-20-12, and the Freedom of Information Act, W.Va. Code §29B-1-4, provide an exemption from disclosure for trade secrets, neither provides for exempting "unreleased financial data" or "classified information pertaining to national security."

The Freedom of Information Act does, however, contain a catch-all exemption for "information specifically exempted from disclosure by statute," which arguably could be used to support exemption of the classified information pertaining to national security based on federal

law. But, unless "unreleased financial data" is specifically exempted under some state or federal statute, the regulations may be limited by the Freedom of Information Act, although they imply broader protection which could prove to be misplaced and invalid.

We note that the definition of trade secrets, as used in the exemption to the Public Records Act (§29B-1-4), 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." And, the Air Pollution Control Act provides at §16-20-12 that "records, reports, data or information or any particular part thereof, to which the director has access ... [which] if made public, would divulge methods or processes entitled to protection as trade secrets ...the director shall consider such records, reports, data or information or such particular portion thereof confidential."

We further note that the EPA regulations (40 CFR 2.201(e)) provide that "[r]easons for business confidentiality include the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information...." Business information is defined as "any information which pertains to the interests of any business, which was developed or acquired by that business..."

Finally, we note that W.Va. Code §29B-1-1 provides that the Freedom of Information Act should be liberally construed toward providing information to the public and, therefore, courts have held the exemptions are to be strictly construed. We therefore urge greater specificity in the rules.

Because neither of the West Virginia statutes discussed above restricts the meaning of trade secrets, we recommend expanding the proposed regulations' definition of "trade secrets" in a general manner similar to the federal language and specifically including financial data and other specific types of information which may require protection.

**Unauthorized Use or Disclosure of Confidential Information By A Public Employee  
Should Be Grounds for Dismissal**

Pursuant to §16-20-8(2), which provides that any person who knowingly violates any provision of any rule issued pursuant to Article 20 is guilty of a misdemeanor and subject to a fine and/or imprisonment, and pursuant to the commissions statutory authority to "promulgate legislative rules regarding the protection of records, reports, data or information, or trade secrets, as required by this section," we recommend addition of an additional section, either as 6.2 or 7.1, which would provide:

Knowing misuse or unauthorized disclosure of confidential information shall be a misdemeanor as provided in §16-20-8 and, further, shall be grounds for termination of employment of any public employee who knowingly misuses or discloses any confidential information.

Respectfully submitted this \_\_\_\_ day of \_\_\_\_\_, 1992.

RECEIVED

92 JUL -6 PM12:47

WEST VIRGINIA  
AIR POLLUTION  
CONTROL COMMISSION

# WEST VIRGINIA PRESS ASSOCIATION

3422 Pennsylvania Avenue  
Charleston, West Virginia 25302  
Voice: (304) 342-1011 • FAX: (304) 343-5879

July 2, 1992

Mr. G. Dale Farley, Director  
West Virginia Air Pollution Control Commission  
1558 Washington Street, East  
Charleston, WV 25311

Dear Mr. Farley:

**RE: Proposed Rule on "Confidential Information"**

As proposed, this regulation would render confidential – exempt from public disclosure requirements of the State Freedom of Information Act – reports, documents and other material relating to air pollution control which contain specified types of information.

Included in the specified types of information are "trade secrets" and "unreleased financial data."

The major thrust of the proposed rule is toward reports, documents and other material compiled by private industries, businesses or others who may be required to file information with the commission.

The West Virginia Press Association, which represents the daily and weekly newspapers of West Virginia, strongly recommends that the proposed rule be amended to provide: (1) That "confidential" information should not be included in any report or other filing unless inclusion of that information is clearly necessary for proper completion of the document, and (2) That documents containing "confidential" information shall be released with the confidential portions obscured or deleted.

In a number of local situations across the state, the public clearly has demonstrated a need for full information on the nature of air emissions.

The regulations as proposed invite abuse by those filing information before the commission. Any party desiring to do so could render confidential any document merely by inserting unnecessary information on production processes or "unreleased" financial data, including financial data which ordinarily would never be subject to public announcement.

Sincerely,



William F. Childress

William F. Childress, Executive Director

LAW OFFICES

# CALWELL & McCORMICK

405 Capitol Street  
Suite 908

P. O. Box 113

Charleston, West Virginia 25321

Telephone: (304) 343-4323

FAX: (304) 344-3684

Toll Free: 1-800-876-5529

92 AUG 18 AM 10 34  
STUART CALWELL  
JEREMIAH F. MCCORMICK  
JOHN SKAGGS  
MARY MCQUAIN  
ANDREW B. CHATTIN  
JACQUELINE A. HALLINAN

August 18, 1992

2602 First Avenue  
P.O. Box 715  
Nitro, West Virginia 25143  
Telephone: (304) 755-8161  
FAX: (304) 755-8739

Dale Farley  
Chief  
Office of Air Quality  
1558 Washington Street East  
Charleston, West Virginia 25301

Dear Dale:

Enclosed is a written version of the amendment suggested to the Commission at the public hearing for the confidentiality regulations on August 5, 1992. We believe that the public interest would be served and that the decisionmaker would be guided by being given some substantive criteria to consider when making a decision whether to release information. As the regulations now stand, they are vague and imprecise. The addition of a substantive standard is within the scope of authority granted by the statute.

I hope that you will recommend that the commission adopt such a standard.

Very truly yours,

*Jacqueline A. Hallinan*

JACQUELINE A. HALLINAN

COMMENTS OF AFFILIATED CONSTRUCTION TRADES FOUNDATION ON PROPOSED  
RULES TITLE 45, SERIES 31 (CONFIDENTIAL INFORMATION).

The Affiliated Construction Trades Foundation suggests that the proposed confidentiality regulations be amended by adding the underscored section. This proposed section was adapted from federal regulations now in effect at 40 CFR 1, Section 2.208.

Section 45-31-3                      Confidential Information

3.1 The following information furnished to the director from persons subject to section twelve, article twenty, chapter sixteen of the West Virginia Code is confidential if specifically marked as confidential at the time such information is submitted, and shall not be made a part of any public record unless the person expressly agrees to its publication:

- a. trade secrets,
- b. unreleased financial data, and
- c. classified information.

3.2. All information marked as confidential shall also be marked by the person who furnishes the information. The person shall state under which of the above categories confidentiality is claimed, for example "Confidential - Trade Secret" or "Confidential - Unreleased Financial Data."

We proposed amending section 45-31-3 of the proposed regulations to include the following section:

3.3 Determinations issued under this section shall hold that business information is entitled to confidential treatment for the benefit of a particular business if--

(a) The business has asserted a business confidentiality claim which has not expired by its terms, or been waived nor withdrawn;

(b) The business 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;

(c) The information is not, and has not been, reasonably obtainable without the business'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);

(d) No statute specifically requires disclosure of the information; and

(e) Either--

92 APR 19 AM 10 35

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

(2) The information is voluntarily submitted information and its disclosure would be likely to impair the chief's ability to obtain necessary information in the future.

(b) A class determination shall clearly identify the class of information to which it pertains.

(c) A class determination may state that all of the information in the class—

(1) Is, or is not, voluntarily submitted information under § 2.201(i);

(2) Is, or is not, governed by a particular section of this subpart, or by a particular set of substantive criteria under this subpart;

(3) Fails to satisfy one or more of the applicable substantive criteria, and is therefore ineligible for confidential treatment;

(4) Satisfies one or more of the applicable substantive criteria; or

(5) Satisfies one or more of the applicable substantive criteria during a certain period, but will be ineligible for confidential treatment thereafter.

(d) The purpose of a class determination is simply to make known the Agency's position regarding the manner in which information within the class will be treated under one or more of the provisions of this subpart. Accordingly, the notice of opportunity to submit comments referred to in § 2.204(d)(1)(ii) and § 2.205(b), and the list of materials required to be furnished to the EPA legal office under § 2.204(d)(1)(iii), may be modified to reflect the fact that the class determination has made unnecessary the submission of materials pertinent to one or more issues. Moreover, in appropriate cases, action based on the class determination may be taken under § 2.204(b)(1), § 2.204(d), § 2.205(d), or § 2.206. However, the existence of a class determination shall not, of itself, affect any right a business may have to receive any notice under § 2.204(d)(2) or § 2.205(f).

**§ 2.208 Substantive criteria for use in confidentiality determinations.**

Determinations issued under §§ 2.204 through 2.207 shall hold that business information is entitled to confidential treatment for the benefit of a particular business if—

(a) The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;

(b) The business 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;

(c) The information is not, and has not been, reasonably obtainable without the business'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);

(d) No statute specifically requires disclosure of the information; and

(e) Either—

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

(2) The information is voluntarily submitted information (see § 2.201(i)), and its disclosure would be likely to impair the Government's ability to obtain necessary information in the future.

**§ 2.209 Disclosure in special circumstances.**

(a) *General.* Information which, under this subpart, is not available to the public may nonetheless be disclosed to the persons, and in the circumstances, described by paragraphs (b) through (g) of this section. (This section shall not be construed to restrict the disclosure of information which has been determined to be available to the public. However, business information for which a claim of confidentiality has been asserted shall be treated as being entitled to confidential treatment until there has been a determination in accordance with the procedures of this subpart that the information is not entitled to confidential treatment.)

(b) *Disclosure to Congress or the Comptroller General.* (1) Upon receipt of a written request by the Speaker of the House, President of the Senate, chairman of a committee or subcommittee, or the Comptroller General, as appropriate, EPA will disclose business information to either House of Congress, to a committee or subcommittee

STAFF RESPONSES  
TO COMMENTS OF  
THE WEST VIRGINIA MANUFACTURERS ASSOCIATION  
REGARDING PROPOSED 45CSR31  
"CONFIDENTIAL INFORMATION"

**COMMENT 1.** The proposed regulations conflict with the West Virginia Freedom of Information Act.

The WVMA notes that neither the Air Pollution Control Act, W. Va. Code §16-20-12, nor the Freedom of Information Act, W. Va. Code §29B-1-4, provides an exemption from disclosure of "unreleased financial data" or "classified information pertaining to national security." However, the WVMA does note that the WV Freedom of Information Act does exempt "information specifically exempted from disclosure by statute."

The WVMA recommends expanding the proposed regulation's definition of "trade secrets" in a general manner to specifically include "financial data" and other specific types of information which may require protection.

In light of the fact that Freedom of Information Act requests must be liberally construed toward providing information to the public, this agency does not believe that it would be pertinent to expand upon the legislature's definition of trade secret.

However, as the WVMA correctly indicates that other material, specifically exempt by statute, might fall into a confidential class, the provisions of subsection 3.1 relating to unreleased "financial data" and "classified information" have been deleted (along with their definitions) in favor of language which indicates that "information exempt from disclosure by the WV Freedom of Information Act and other State Statutes, and "information received from federal agencies exempt from disclosure by federal statutes or regulations."

**COMMENT 2.** Unauthorized use or disclosure of confidential information by a public employee should be grounds for dismissal.

The WVMA recommends the provision of a section which would provide as follows:

"Knowing misuse or unauthorized disclosure of confidential information shall be a misdemeanor as provided in §16-20-8 and, further, shall be grounds for termination of employment of any public employee who knowingly misuses or discloses any confidential information."

This agency believes that such provisions may be outside the scope of the Commission's purview. If the provision of such information is a misdemeanor under §16-20-8, the inclusion of the suggested provision is redundant.

The inclusion of such additional language may prove "chilling" to the provision of information to the public which is favored by the Freedom of Information Act. The chief currently has the authority to dismiss an employee for such misconduct. However, removing the chief's discretion in such matters would unreasonably and unnecessarily hamstring the chief's ability to deal with employees.

In addition, it appears that such a provision would be better placed in the Air Pollution Control Act. (Note: the legislature has previously put such provisions in the W. Va. Code. See W. Va. Code §11-10-5d "Confidentiality and disclosure of (tax) returns and (tax) return information.")

STAFF RESPONSES  
TO COMMENTS OF JACQUELINE A HALLINAN, ESQ.  
REPRESENTING THE AFFILIATED CONSTRUCTION TRADES FOUNDATION  
REGARDING PROPOSED 45CSR31  
"CONFIDENTIAL INFORMATION"

COMMENT 1. The commentor states that the chief needs substantive criteria when making a decision on whether to release information.

The commentor provided substantive criteria as used by the U.S. EPA in determining the confidential nature of submitted information. (40CFR2.208)

Such comments are considered by this agency to be in line with the substantive determination of "confidential information".

In addition, the Code of Federal Regulations 40CFR2.301 provides valuable definitions for "emission data" and "standard or limitation" to further define what is not to be considered as "confidential". The term "emission data" has been deleted in favor of the term "types and amounts of air pollutants discharged" so as to better comport with the WV Code.

STAFF RESPONSES  
TO COMMENTS OF  
THE WEST VIRGINIA PRESS ASSOCIATION  
REGARDING PROPOSED 45CSR31  
"CONFIDENTIAL INFORMATION"

COMMENT 1. That "confidential" information should not be included in any report or other filing unless inclusion of that information is clearly necessary for proper completion of the document.

Companies subject to regulations do not routinely submit confidential information unnecessary to a report or application. Subsection 8.1 was added to this rule so that the chief shall provide, upon request, a statement regarding the quantity and type of confidential information being withheld.

COMMENT 2. That documents containing "confidential" information shall be released with the confidential portions obscured or deleted.

See Comment 1. Subsection 8.2 has been added to the rule to address this concern.



West Virginia Department of  
Commerce, Labor & Environmental Resources  
Air Pollution Control Commission

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1558 Washington Street, East  
Charleston, West Virginia 25311

Telephone: (304)348-4022  
or (304)348-3286  
Fax: (304)348-3287

WVAPCC Staff Response to the Governor's  
Executive Order 8-92  
(Effective July 1, 1992)

As a result of the Governor's Executive Order 8-92, questions have arisen as to the proper nomenclature for administrative functions. As of the effective date of the Executive Order (July 1, 1992):

"the name of the Division or the Director (of DEP), as may be appropriate, shall be deemed substituted for the name of the predecessor office or official in the Code; in any legal instrument or proceeding, including but not limited to existing agency rules, regulations or guidelines . . ." (Executive Order 8-92, Section 7(b)).

Revisions to rules and rules not in existence which are promulgated after the effective date of the Executive Order need to use current terminology.

Therefore, definitions of "Chief of Air Quality", "Division of Environmental Protection", and "Director" have been added or changed to reflect the status of operations since the implementation of the Executive Order.

In addition, in all areas where the term "Director" was previously used the term "Chief" or "Chief of Air Quality" is currently used. The term "Chief" or "Chief of Air Quality" has also been substituted for the term "Commission" in those areas which are not part of the Commission's appellate or rule-making authority.

SIGNIFICANT CHANGES MADE TO  
PROPOSED "CONFIDENTIAL INFORMATION" REGULATION  
AS A RESULT OF COMMENTS OR COMMISSION ACTION

- ONE. See Response to Governor's Executive Order 8-92 regarding changes in nomenclature (e.g. from "director" to "chief"). See new definitions 2.3, 2.4, 2.5.
- TWO. Proposed 2.2 "Classified Information" and 2.8 "Unreleased Financial Data" have been deleted from definitions and subsection 3.1. Subsection 3.1 was changed to specify certain other types of confidential information as contained in the WV Freedom of Information Act or other State or federal statutes or regulations.
- THREE. "Types and amounts of air pollutants discharged" was defined to show the types of emissions data not to be held confidential and provide substantive criteria for the chief to consider in making such determinations.
- FOUR. "Standard or Limitation" was defined as necessary for the definition outlined in number three.
- FIVE. The definition of "trade secret" was modified to be consistent with W. Va. Code §29B-1-1, et seq., regarding exemptions from Freedom of Information Act requests.
- SIX. Subsection 3.1 and 3.2 were modified as per number two.
- SEVEN. Subsection 4.2 was added in response to comments. This section provides substantive criteria for the chief to use in determining whether submitted material is confidential.
- EIGHT. Subsection 4.3 was modified to provide for judicial review of denials of information and commission review of any other determination.
- NINE. Section 7 was modified from "Emissions Data" to "Types and Amounts of Air Pollutants Discharged" to be consistent with the applicable definition under number three.
- TEN. Section 8 "Response to Request" was added in response to comments. (See Staff Response to W. Va. Press Association.)

WEST VIRGINIA DEPARTMENT OF  
COMMERCE, LABOR & ENVIRONMENTAL RESOURCES  
AIR POLLUTION CONTROL COMMISSION

IN RE:           Public Hearing on Proposed Rule 31  
                  (45CSR31) and Proposed Rule 32 (45CSR32).

TRANSCRIPT OF PROCEEDINGS had and/or testimony  
adduced in the hearing held before the West Virginia Air  
Pollution Control Commission in the Conference Room at 1558  
Washington Street, East, Charleston, Kanawha County, West  
Virginia, on the 5th day of August, 1992, commencing at  
11:25 a.m.

Before:   L. NEWTON THOMAS, Chairman  
          SAMUEL KUSIC  
          G. DALE FRALEY, Director  
          LARRY KOPELMAN, Special Assistant A.G.  
          WILLIAM T. WALLACE, M.D., MPH. Commissioner  
          RANDALL SUITOR,  
          CLEVE BENEDICT

**Action Court Reporting**

*V. Ann Woofert  
Post Office Box 4449  
Charleston, WV 25364  
340-1020 / 1-800-752-7064*

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| <u>Witnesses:</u>      | <u>Direct</u> |
|------------------------|---------------|
| Robert L. Foster       | 11            |
| Jacqueline A. Hallinan | 14            |
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## P R O C E E D I N G S

(11:25 A.M.)

CHAIRMAN THOMAS: Convene the hearing West Virginia Air Pollution Control Commission. Let the record indicate that we have commissioners in attendance with the presence of Commissioner Cleve Benedict, Sam Kusic and Dr. William Wallace and L. Newton Thomas, Jr. The record would also state that the court reporter is Tracy Dunlap for Action Court Reporting, Inc., and any of those requesting or wanting a transcript of the hearing will contact the court reporter directly and make those arrangements. The first item on the agenda for this hearing is the hearing on proposed rule 31 related to confidential information and the treatment thereof. I will defer to our director or chief of air quality for comment.

MR. FARLEY: In the last legislative session some changes were made to the code and there were changes made in reference to data reports and files and so forth, files with the agency. And pursuant to that the commission was put in position of needing to develop a rule that would describe how confidential information would be shared particularly with employees of the--this is what brought this about anyway, but particularly with the employees of the Federal Environmental Protection Agency. And with that

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1 having been said, since the person who did the drafting on  
2 this, Attorney Larry Kopelman, I'll ask that he make some  
3 introductory comments that he think appropriate.

4 MR. KOPELMAN: Thank you Dale. Mr. Chairman one  
5 thing I'd like to do just before I get to this reg just in  
6 general is a procedural matter. As you know for a number of  
7 years, as long as I've been here the commission chose to  
8 swear witnesses before they spoke at hearings like this or  
9 taking of information. And the question's come up a couple  
10 of times is it require. And I find no requirement for that  
11 in any state law nor is it required, to my knowledge, in the  
12 miscellaneous rules. It's just been done over the years and  
13 Dale and I talked about it earlier this morning and he  
14 doesn't particularly like it and I don't think that it's  
15 necessary so I would recommend to the commission to dispense  
16 with swearing witnesses for purposes of taking information  
17 and data as it relates to regulations.

18 CHAIRMAN THOMAS: That suits me. Of course you're  
19 in the best position to advise us relative to any additional  
20 standing in court situation that we would have by virtue of  
21 having sworn witnesses you think that's not--

22 MR. KOPELMAN: I don't think that it's necessary  
23 because here we're not necessarily debating fact.

24 CHAIRMAN THOMAS: Um-hum. That's fine. No  
25 objection.

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1 MR. BENEDICT: No problem.

2 MR. KOPELMAN: Reg 31 is a very brief regulation  
3 dealing with how the new chief will handle requests for  
4 inspection of information marked confidential. I'll  
5 be glad to take any questions that you may have on this  
6 reg. It just simply does that function.

7 DR. WALLACE: Where it says director or, well it  
8 will now say chief and whereas--wherever it says--

9 MR. KOPELMAN: Apparently this reg has not been  
10 worked over. Yes of course this is the hearing stage and  
11 the record would stay open for 30 days, then you would come  
12 back so we could do that in 30 days. So yes that would be  
13 the recommendation, I'm sure, from Dale.

14 MR. FARLEY: Just to interject. This would be  
15 filed before the change. We would not propose to change  
16 them until after the hearing.

17 CHAIRMAN THOMAS: Is anyone going to speak to the  
18 West Virginia Press Association comment?

19 MR. KOPELMAN: I read it and I'll be glad to.

20 CHAIRMAN THOMAS: All right.

21 MR. KOPELMAN: Primarily down in paragraph four is  
22 where they start getting into the meat of their comments.  
23 They strongly recommend that the proposed rule be amended to  
24 provide 1: confidential information should not be included  
25 in any report or other filing unless inclusion of that

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1 information is clearly necessary for proper completion of  
2 the document. That goes beyond the scope of suggesting how  
3 confidential information would be handled in terms of  
4 viewing it. That goes to a policy issue, so I don't think  
5 there's a legal opinion. In other words, I think that the  
6 commission could, if they want to make a policy  
7 determination that confidential information should not be  
8 included in a report or filing. You could add that if you  
9 wanted to. If that became a policy issue.

10 MR. BENEDICT: Well I assume that the concern is  
11 that wouldn't confidential information put in that report  
12 that would then exclude the reports probably from here. If  
13 they don't want a classification of confidential information  
14 would a very small part of a report being used to keep the  
15 whole report from public review.

16 MR. KOPELMAN: That's correct. And that's sort of  
17 a method in which the chief would then determine whether or  
18 not confidential information that's marked confidential  
19 would reshape confidential. In other words you're sort of  
20 giving guidance up front to people who are marking things  
21 confidential where that guidance isn't necessarily there,  
22 no. It could be a good thing. It's entirely up to  
23 you. Then this also gives guidance to the chief to make it  
24 clear that certain parts of a report could be  
25 confidential and therefore the whole report is not

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1 confidential. So I don't have any problem with it either.  
2 It's a policy decision. It's your call.

3 And then number 2: the documents containing  
4 confidential information be replaced with the confidential  
5 portions. I don't think you need that because there's the  
6 whole idea of confidential information. That and freedom of  
7 information. If it is confidential then it's not released.  
8 If it's not then it is released under freedom of the  
9 information. So I don't think number two needs to be  
10 stated that's inherent with the definition of confidentiality  
11 and the previous information.

12 DR. WALLACE: Do you think perhaps the reason it's  
13 there is if there's a 50 page document and 40 pages  
14 considered confidential and then I guess it concerns  
15 the public wants to know or needs to know or whoever, how  
16 much is confidential that is not part of the report is if  
17 you give a 50 page report with 40 pages blacked, you know,  
18 it's a 50 page report? I don't know if that was the nature  
19 of number two or it was only a few paragraphs or sentences.  
20 In other words--

21 MR. KOPELMAN: Yeah, you could put in a policy  
22 statement that the director shall divulge or the chief shall  
23 divulge the----

24 DR. WALLACE: How much confidential information?

25 MR. KOPELMAN: The quantity and the type of

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1 confidential information that is not being allowed  
2 dissemination. Yeah, you could add that.

3 DR. WALLACE: Yeah.

4 MR. KOPELMAN: That would be a requirement. I  
5 don't have any problem with that.

6 CHAIRMAN THOMAS: Say that again.

7 MR. KOPELMAN: That the chief--Upon request the  
8 chief shall state the quantity and type of confidential  
9 information not being released. In other words, attached  
10 to this report are four pages of confidential information  
11 showing a proprietary chemical process.

12 CHAIRMAN THOMAS: Yeah, that may be an issue of  
13 form and how the application's submitted--the information's  
14 submitted where you request the applicant to isolate all of  
15 the confidential information in one section so that the body  
16 of the application, the other information included could be  
17 released. If it's scattered through, like Dr. Wallace has  
18 said, a 50 page application you might have the equivalent of  
19 about three paragraphs that are confidential then.

20 MR. KOPELMAN: What we could do is then to  
21 follow up what you're saying the documents containing--  
22 shall be released, you could say shall be released with  
23 the confidential portions obscured or if deleted the  
24 chief shall state the amount of confidential information  
25 deleted and the type. Something like that.

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1 DR. WALLACE: Yeah.

2 MR. KOPELMAN: That way you're making the  
3 statement to the public that there is more pages--

4 DR. WALLACE: If dealing in the quantity and  
5 nature of the deleted material something like that.

6 MR. BENEDICT: Mr. Chairman, as I read their  
7 letter, their concerns apparently are addressed to  
8 information by the nature of air emissions. The public code  
9 has definite need for air emissions and we have in 31-7  
10 emission data including time effecting the--shall not be  
11 identified as confidential. So if that's what they're  
12 concerned about the rules take care of their issue.

13 MR. KOPELMAN: That's in the statute, too. The  
14 statute makes it clear the confidential--The air emission  
15 data is not confidential under any circumstances.

16 MR. BENEDICT: But that seems to be the focus of  
17 their concern in their letter.

18 DR. WALLACE: Anybody from the press association  
19 here? Anyone here to speak?

20 CHAIRMAN THOMAS: Well we will get to that. I  
21 just want to ask Larry all the questions procedurally  
22 here. Does that--Did you have anything else Larry you  
23 wanted to--

24 MR. KOPELMAN: No.

25 CHAIRMAN THOMAS: Dale did you have any other

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1 comment?

2 MR. FARLEY: Just one or two things to point out,  
3 and I think maybe that will be expanded on a little bit  
4 more. We've just had, I think, what was probably someone  
5 here's who's just wanted to comment on us. More likely  
6 we'll have a lot of discussions about with the release of  
7 company process information. One of the things that as I  
8 had discussions with Randy, and Randy more recently than  
9 Larry, is that apparently in the state code there's a term  
10 "trade secrets", is that what it is? Trade secrets is used  
11 and that's extremely broad.

12 MR. KOPELMAN: Ours?

13 MR. FARLEY: Yeah.

14 MR. KOPELMAN: Or in the code?

15 MR. FARLEY: In the code it's extremely broad.

16 MR. SUITOR: There's ours and then there's the  
17 definition of trade secrets under the Freedom of Information  
18 Act.

19 MR. FARLEY: The only thing I'd like to know here.  
20 I don't know whether it's a remedy or not, but just in  
21 thinking through this or reconsidering the rule one of the  
22 things we were trying to accomplish and I realize that the  
23 state law one of the things we were trying to accomplish is  
24 put something in place that would give us the ability to  
25 exchange data with USEPA in a much more constructive way

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1 than we are now. And that's kind of worked to our detriment  
2 to the fact we've got contractors the EPA LOE contractors  
3 that we call 'em. We've had this glitch for two or three  
4 years now where a lot of information comes in with  
5 confidentiality claims and there's no mechanism that seems  
6 to work out whether everybody can get into agreement how the  
7 information is to be shared. What I gather, and I'm just  
8 saying this. We really haven't figured this out yet  
9 probably with the term trade secrets in here that I'm not  
10 sure as I would understand if how broad that is in the state  
11 code. I don't know that even passing this rule will get us  
12 in sync enough with the way in federal law in handling of  
13 confidential data that we're going to accomplish that  
14 mission. Just note that. But I just don't know. I'm just  
15 bringing that up because I don't know whether it's a  
16 solution or not but that's really the only thing I have to  
17 say about it.

18 CHAIRMAN THOMAS: We know what we have to do here.  
19 We need something to give us guidance. Okay. Let me ask  
20 for anyone from the audience. You don't have to be sworn  
21 in we'll take your word.

22 MR. FOSTER: That's a change. I'm distributing  
23 copies of our written comments to you. Members of the  
24 commission and director Farley I am Robert L. Foster. I'm  
25 chairman of the West Virginia Manufacturers Association

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1 Environmental Safety and Health Committee. I'm speaking  
2 here today on behalf of the association regarding the  
3 proposed regulation 31 which concern is protection of  
4 confidential information and as I say, I'm handing out our  
5 written comments to you. But I would like to make a couple  
6 of points here verbally to you which are--we feel is  
7 important.

8 Our first point concerns the--concerns proposed  
9 regulation provisions that trade secrets unrelated financial  
10 data and classified information pertaining to national  
11 security may be given protection as confidential  
12 information. Although both the West Virginia Air Pollution  
13 Control Act and the Freedom of Information Act provide an  
14 exception from disclosure of trade secrets, neither provides  
15 for exempting unreleased financial data or classified  
16 information pertaining to national security. We do note,  
17 however, that the definition of trade secrets as used in the  
18 exception to the public records act is not exclusive and  
19 that the Air Pollution Control Act provides that records  
20 reports, data or information or any particular part thereof  
21 to which the director has access if made public would  
22 divulge methods or processes entitled to protection of trade  
23 secrets and they should be considered shall be considered as  
24 confidential. Because neither of the statutes restricts the  
25 meaning of trade secrets we recommend expanding the proposed

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1 regulation's definition of trade secrets to specifically  
2 include financial data and other types of information which  
3 may require protection.

4 Finally we note that the Freedom of the  
5 Information Act mandates it to be liberally construed toward  
6 providing information to the public and therefore courts  
7 have held that exemptions are to be strictly construed. We  
8 therefore urge the rules be more specific.

9 Our second point concerns violation of  
10 confidentiality provision of the regulations. Pursuant to  
11 16-20-82 which provides that any person who knowingly  
12 violates any provision of any rule issued pursuant to  
13 article 20 is guilty of a misdemeanor and subject to a fine  
14 and or imprisonment and pursuant to the commission's  
15 statutory authority to promogate legislative rules regarding  
16 the protecting their records, reports, data, information on  
17 trade secrets, etc. We recommend that the addition on the  
18 additional section designating either 6.2 or 7.1 which would  
19 provide that knowingly misuse or unauthorized disclosure of  
20 confidential information shall be a misdemeanor and further  
21 shall be grounds for termination of employment of any public  
22 employee who knowingly misuses or discloses such  
23 confidential.

24 That's the conclusion of our--Those are all  
25 contained by the way in the written comments. Thank you for

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1 the opportunity to present these compliments.

2 CHAIRMAN THOMAS: Thank you Bob. Any questions of  
3 Mr. Foster?

4 DR. WALLACE: You're not recommending any  
5 particular language change for the first concern to that.  
6 You had only for the second?

7 MR. FOSTER: Yeah.

8 CHAIRMAN THOMAS: Well I misunderstood. I thought  
9 in the first incident you were suggesting that we include  
10 trade secrets financial--

11 DR. WALLACE: With federal and--But you didn't  
12 suggest new language

13 MR. FOSTER: No, I did not.

14 CHAIRMAN THOMAS: Any questions of--by counsel or  
15 director chief? No questions. Thank you Mr. Foster. Any  
16 other persons wanting to comment on the regulation?

17 MS. HALLINAN: I wanted to thank the commission  
18 for allowing me the address them here today and I can't  
19 refrain from observing that Mr. Foster points out this is  
20 the Freedom of Information Act and the statute favoring  
21 releasing information. Then he goes on to suggest a more  
22 specific restriction of trade secrets.

23 CHAIRMAN THOMAS: Would you mind identifying  
24 yourself?

25 MS. HALLINAN: Yes, sir. My name is Jackie

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1 Hallinan and I'm an attorney with Calwell and McCormick and  
2 I represent Affiliated Construction Trades here today. And  
3 we intend to submit specific written revisions to the code  
4 but I don't have them with me today. So in lieu of that,  
5 I'm distributing a section from the EPA regulations in the  
6 United States Code that would I think give us--I wanted to  
7 bring to your attention that the statute that's being  
8 interpreted says all data or emissions permit applications  
9 should be considered available to the public except that  
10 upon a showing satisfactory to the director they may be  
11 considered confidential. Now with the present draft of the  
12 rules the present draft of the rule, you know, doesn't seem  
13 to go a little bit different way from this.

14 On page two, 3.1 says if the following  
15 information is confidential if strictly and specifically  
16 marked as confidential at the time such information is  
17 submitted and shall not be made a part of any public record.  
18 What I would suggest to the commission that they might do  
19 for the commission's protection and as guidance for the  
20 director or the chief of this section is to provide some  
21 standard for indicating when the information should be  
22 released. And in this regard I looked at the EPA's  
23 regulations and the EPA regulation which I brought to your  
24 attention sets out substantive criteria for use in  
25 confidentiality determinations. And this criteria says that

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1 determinations issued under 2.204 which is the control and  
2 regulation shall hold that a business information is  
3 entitled to confidential treatment for the benefit of a  
4 particular business if business has asserted a business  
5 confidentiality claim which is not expired by his it terms  
6 nor been waived or withdrawn or B: The business's  
7 satisfactory has shown that it's taken reasonable measures  
8 to protect the confidentiality of the information. In other  
9 words, that it really is confidential information to them  
10 and that it tends to intend to continue to take the measures  
11 and see that the information is not and has not been  
12 reasonably obtainable without the business's consent by  
13 other persons other than governmental bodies by use of a  
14 legitimate means other than discovery based on the slowing  
15 of special need and a judicial equate by a judicial  
16 proceeding.

17 In other words, that it hasn't been obtained in  
18 some court case and may or may not be subject to a  
19 protective order and D: No statute specifically required  
20 disclosure of the information. In other words, emissions  
21 data wouldn't fall under this particular provision because  
22 emissions data is required by the statute to be revealed and  
23 then either the business has satisfactorily shown that  
24 disclosure of the information is likely to cause substantial  
25 harm to the business's competitive position or to the

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1 information voluntarily submitted information. In other  
2 words, that the business doesn't have to give it to the  
3 commission. They're giving it to the commission and the  
4 commission feels that it would be an abuse of trust or  
5 contrary to a positive course of dealing with the business  
6 and that the disclosure will be likely to impair the  
7 government's ability to obtain necessary information in the  
8 future.

9         Gentlemen, I think this is the kind of standard  
10 that the commission I think would do well to consider adding  
11 into--amending into the rules, because then it would give  
12 the chief something to go by. Currently we've been walking  
13 through the procedure. We've requested a copy of a permit  
14 and what seems to be the current practice is that industry  
15 has been submitting their permits and marking as  
16 confidential just about everything that is in emissions  
17 data, which under current practice they, you know,  
18 apparently are within their rights to do. And in order to  
19 get anything other than emissions data one must appeal to  
20 the director, to the chief, which we have done, and the  
21 chief has to make a determination as to whether it is  
22 confidential or not. And there really isn't anything for  
23 him to go by. There's a broad definition of trade secrets  
24 in the Freedom of the Information Act, but considering that  
25 your particular statute favors disclosing information, it

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1 says that all information shall be public except on a  
2 determination by the director and the Freedom of Information  
3 Act, you know, favors discussed disclosure of information.  
4 I don't think he has much direction and he's behaving very  
5 conservatively which, you know, a reasonable person would do  
6 in his position. But the result has been to really restrict  
7 a flow of information and making it, you know, pretty  
8 difficult to review permits or to review information from  
9 the commission. So this is an opportunity for the  
10 commission to provide guidance and to provide procedure and  
11 to provide a method, you know, for industry to be protected  
12 and for people to actually provide some kind of public  
13 comment or input into the commission process. And I would  
14 suggest that or I would hope that, you know, when our  
15 written submission comes in that it would be viewed and  
16 considered by the commission. Thank you.

17 CHAIRMAN THOMAS: Thank you. Any questions?

18 DR. WALLACE: Mr. Chairman. So you're suggesting  
19 that basically 3.1 be replaced by or at least somewhere in  
20 there a reference be made to the EPA's section relative to  
21 criteria that you used.

22 MS. HALLINAN: I would suggest that it be worded a  
23 little bit, you know, differently, but a reference to this  
24 additional section because it says it is confidential if  
25 specifically marked confidential at some time the

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1 information is submitted, you know, unless determined as not  
2 being confidential by the chief pursuant to section 3, you  
3 know, whatever and to adopt the EPA regulation as an  
4 interpretation of your statute.

5 CHAIRMAN THOMAS: You want proof of  
6 confidentiality  
7 why it should be treated confidential.

8 MS. HALLINAN: Yes, sir.

9 DR. WALLACE: And include criteria for determining  
10 confidentiality set in our rule.

11 MS. HALLINAN: Yes, that's very important.

12 DR. WALLACE: Rewriting it or whatever.

13 MS. HALLINAN: Or adopting something like it yes,  
14 sir.

15 DR. WALLACE: Thank you.

16 CHAIRMAN THOMAS: Any other questions? Thank you  
17 very much. Are there other persons that would like to  
18 comment? Are there any further comments or questions of the  
19 commission? If not let me state that the record will be  
20 open for additional comment for a 30 day period after which  
21 we will be back on this particular regulation in a future  
22 meeting. Let us move now to the consideration of hearing on  
23 the proposed rule 32 relative to civil penalties. Again,  
24 let me defer to the chief of air quality for comment.

25 MR. FARLEY: Again this was a regulation along

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1 these lines civil penalties at least from the standpoint  
2 of the finding was serious or minor violations for purpose  
3 of civil penalties is now required by changes to the air  
4 pollution control law made in the last legislative session,  
5 and as the commission's aware from a lot of discussion  
6 relative to consent orders and various things that have been  
7 done over the last two years since this changed last.  
8 There's been a lot of discussion about some kind of criteria  
9 for assessment of penalties as well or policy statement  
10 about that in regard to anything similar, and I think this  
11 rule goes, and Larry can comment on that. I'll turn this  
12 over to him to introduce it, but this rule goes a bit beyond  
13 the pure definition of serious and minor, and it sort of  
14 lays out some criteria to establish appropriate penalty  
15 levels and consent order settlements. So that said I ask  
16 for Larry's comments.

17 CHAIRMAN THOMAS: Mr. Kopelman.

18 MR. KOPELMAN: Yes. The reg comes to you as an--  
19 It has attempted to satisfy two issues. The first one deals  
20 with the provision in the penalties section of imposing a  
21 monetary penalty on serious versus non-serious minor  
22 violations. That, I think, is required by the statute to  
23 define those--those things. It also serves to satisfy a  
24 second issue and that is to explain to those people who deal  
25 with the DEP what the thought process is on assessing a

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1 civil penalty that may go into a consent order. As you know  
2 we did an--I did a one or one and a half page document some  
3 time back just outlining 10 or 12 things that the office of  
4 the attorney general and later the AG along with the  
5 director used in recommending a penalty to you in a consent  
6 order. The reg goes on to expand on that and to try to give  
7 some subjective definition to what may otherwise be a very  
8 objective or discretionary area. This is--The idea of this  
9 reg is just that idea. I'm sure that if you put 10 people  
10 in a room and ask for how a penalty, a civil penalty should  
11 be reviewed and determined or approached you'd have 10  
12 different opinions. So this is just one idea of how it  
13 should be, how it should be handled, and with that said I'll  
14 be glad to answer any questions on this idea.

15 CHAIRMAN THOMAS: I have several minor things and  
16 I'm speaking from an earlier draft I'm--Has there been any  
17 change from this--These drafts are not dated but the one we  
18 received at an earlier meeting? This reg 32? Is this a  
19 recent revision?

20 MR. FARLEY: I think the first thing you received  
21 some time ago was just a rough draft which wasn't even in  
22 regulatory--regulation form. I think--

23 CHAIRMAN THOMAS: This wasn't in regulatory form  
24 after--

25 MR. FARLEY: I think it's been changed at all

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1 since it was put in the form of regulation.

2 CHAIRMAN THOMAS: Then on page three subsection  
3 was at the bottom of the page was actually under 2.7d  
4 subparagraph B Capitol B the second paragraph from the  
5 bottom whether any violations caused actual harm to humans  
6 or animals or the environment. I guess that just about any  
7 violation would be perhaps detrimental to the environment is  
8 that going a little bit further than we need to go in that  
9 instance by including the--I'm sure that's our focus is  
10 environmental protection but, you know, you could not harm  
11 humans or animals and still be considered to harm the  
12 environment in the eyes of the beholder whoever wants to  
13 make that determination. I wonder about that determination.  
14 I think anything that happens could be considered to be  
15 adverse to the environment. Simple human activity. But I  
16 just wonder if that needs the environment's language needs  
17 to be something to think about.

18 MR. KOPELMAN: Yeah. Would--Just as we're  
19 thinking about it.

20 CHAIRMAN THOMAS: I don't need a response right  
21 now but--

22 MR. KOPELMAN: Okay.

23 CHAIRMAN THOMAS: I just think for future  
24 consideration. Over on page four in the civil penalties  
25 section paragraph 3.1 we refer the last line there minor

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1 first violation isn't that somewhat of a redundancy? Isn't  
2 a minor violation in first violation? I realize there's  
3 other--there's one other cause that would come under minor  
4 violation, but I just wondered if you need a whole line of  
5 minor violations I assume are first violations.

6 MR. KOPELMAN: That's probably right.

7 CHAIRMAN THOMAS: And that's in paragraph 3.4  
8 also.

9 MR. KOPELMAN: Okay.

10 CHAIRMAN THOMAS: And number 3.5 under paragraph  
11 small "a" I assume that all of those three conditions must  
12 exist although the word or is used anyone of those three  
13 exist will trigger that.

14 MR. KOPELMAN: That's right.

15 CHAIRMAN THOMAS: Any one of those. Okay.

16 MR. KOPELMAN: Well I think the intent there is if  
17 it is reckless grossly negligent or an intentional act that  
18 it's not a class one violation.

19 CHAIRMAN THOMAS: Um-hum. But if one of the  
20 other--Okay. Yeah, there's the that's the umbrella line  
21 reached for those three.

22 MR. KOPELMAN: Yeah that's the intent. I'll take  
23 a look at it and see.

24 CHAIRMAN THOMAS: Now if any one of those  
25 conditions exists or--No that's one determined factor and--

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MR. KOPELMAN: And--

CHAIRMAN THOMAS: One of the other three.

MR. KOPELMAN: Right. Then it would have to be one of the other three.

CHAIRMAN THOMAS: Okay. And the same is true of subparagraph B under class 2 violation. Any one of those three or--Excuse me under subparagraph C class 3 violation. Any one of those three conditions would trigger a class 3 violation.

MR. KOPELMAN: Right.

CHAIRMAN THOMAS: Okay. And over on page six paragraph 3.8 subparagraph D the last sentence in that paragraph in determining economic revenue if the director should include interest at a minimum of 10 percent per animal the question I raise is what's the rationale for that? I mean why 10 percent that's certainly above going rates today and it could be below going rates in the future.

DR. WALLACE: Yeah.

CHAIRMAN THOMAS: Shouldn't it be some--

MR. KOPELMAN: Yeah. You could link it to the I.R.S.'s determination of generally prevailing rate.

CHAIRMAN THOMAS: Ours has fixed penalty rates, too.

MR. KOPELMAN: Don't they float their interest? I think it does.

1 MR. BENEDICT: I thought the penalty rate changed.

2 MR. KOPELMAN: I think it does. I think their  
3 interest changes not necessarily, but interest--

4 MR. BENEDICT: Interest.

5 MR. KOPELMAN: Not on penalties but the interest  
6 if you owe the I.R.S money their interest rate, I think,  
7 fluctuates. According to some formula.

8 DR. WALLACE: According to--

9 MR. SUITOR: In the alternative.

10 MR. KOPELMAN: Let's hope we never--

11 MR. SUITOR: In the alternatives there state  
12 statutes regarding the tax commissioner and his ability to,  
13 I believe, on a yearly basis determine what the rate of  
14 interest is for tax penalties.

15 CHAIRMAN THOMAS: I think it ought to have some  
16 relationship to what's going on in the economic environment,  
17 that's all.

18 MR. KOPELMAN: Yeah it could be the reason for 10  
19 percent and I may be wrong because I haven't researched  
20 this, but the legislature adopts from time to time pre and  
21 post-judgment interest when you're involved in a litigation  
22 and if you're entitled to interest it's set and I think it's  
23 10 percent.

24 CHAIRMAN THOMAS: Well this has to do with the  
25 economic analysis of the economic benefit of the project and

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1 I think those interest rates ought to bear some realism  
2 to what the economic benefit is, because that's certainly in  
3 that determination the benefit that they may receive--have  
4 received for not doing something would have a relationship  
5 to the money they could earn on their lack of investment on  
6 what they would have invested, and so I think it has to have  
7 some bearing on that the economic environment.

8 MR. KOPELMAN: Yeah. I mean there's of course two  
9 ways to look at it. It's what they could earn had they had  
10 the money and invested it, or on the other hand, what it  
11 would cost them to borrow the money in the market.

12 CHAIRMAN THOMAS: Well that again has to do with  
13 it--

14 MR. KOPELMAN: Yeah it fluctuates the market.

15 CHAIRMAN THOMAS: --in both cases.

16 MR. KOPELMAN: I agree with you. Would you like  
17 to tie it to the state tax department's determination?

18 DR. WALLACE: Some kind of current economic  
19 standard that constantly relies--

20 CHAIRMAN THOMAS: Not something that's readily  
21 accessible to the people that are implementing this, the air  
22 quality something that's readily available to them.

23 MR. KOPELMAN: Randy does the tax commissioner  
24 establish interest rates with a formula? Does he--

25 MR. SUITOR: I believe there's some criteria in

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1 the code for that, however, you do run into the same  
2 arguments from time to time that you run into here. For  
3 example in some of our discussions regarding the title five  
4 program and linking it to the consumer price index you do  
5 see from time to time when the commissioner wants to re-  
6 establish an interest rate saying that that has pre-empted  
7 legislative authority.

8 MR. KOPELMAN: But if you tie it to something--If  
9 it's tied to something that is a formula you can do that.

10 DR. WALLACE: I agree.

11 MR. KOPELMAN: So what formula would you want to  
12 tie it to?

13 CHAIRMAN THOMAS: I don't know. Maybe Randy could  
14 do a little research.

15 MR. KOPELMAN: We'll find something to tie it to.

16 DR. WALLACE: I just really wanted to make sure  
17 that the company, by not paying, doesn't accrue a whole lot  
18 of economic advantage by postponing or by going through a  
19 process that postpones any kind of penalties.

20 MR. BENEDICT: Mr. Chairman, if I could comment on  
21 this section, too. I'm inclined to the view that this whole  
22 calculation of economic benefit is at best a tenuous one and  
23 we run a serious risk of killing a goose that lays payroll  
24 eggs, and in that sort of calculation a marginal business.  
25 I can think, for example, a saw mill at Macker Vallent. It

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1 wouldn't be here today if this sort of proposal and the  
2 benefit of that situation were not the owner of the mill but  
3 the families that depended on that mill without whom there  
4 would be no--And I really am concerned that we're riding off  
5 into the sunset on something that sounds good--And Chairman  
6 this are other things here.

7 MR. KOPELMAN: If I could--If I could--Yeah,  
8 provision 1.

9 MR. BENEDICT: These calculations are real  
10 troublesome. There are other provisions in here  
11 that would moderate that.

12 MR. KOPELMAN: On the next page hopefully would  
13 take care of that.

14 CHAIRMAN THOMAS: If that bothers you then  
15 paragraph E ought to bother you more. Paragraph E following  
16 that D that we just spoke to that to me is unrealistic and  
17 to expect anyone kind of a determination of that I--

18 MR. KOPELMAN: What we have here, just so you'll  
19 understand.

20 CHAIRMAN THOMAS: How can you tell what our will  
21 cause somebody not to do something.

22 MR. KOPELMAN: Just so you'll understand where  
23 these came from the majority of them are from the list that  
24 we did a year and a half ago but they're also--

25 CHAIRMAN THOMAS: I didn't look at it as closely.

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1 MR. KOPELMAN: No. That wasn't in there. Maybe  
2 deterrence was, but it also came from a reading of the  
3 federal penalty policy which is very extensive and they rely  
4 heavily on deterrence. So the reason that's in there that  
5 was just simply taken from that.

6 MR. BENEDICT: I prefer that concept quite frankly  
7 to D.

8 MR. KOPELMAN: No, but I will say--

9 MR. FARLEY: They rely on that, too.

10 MR. KOPELMAN: The feds rely foremost on taking  
11 away economic benefits that is their--

12 MR. BENEDICT: Yeah.

13 MR. KOPELMAN: --holder stock and then they come  
14 down to some other things.

15 CHAIRMAN THOMAS: Yeah, that has some basis. You  
16 can get some numbers but this other is simply a guess,  
17 subject judgment as to how much do I have to hurt that  
18 individual to keep 'em--to make 'em aware.

19 MR. BENEDICT: Yeah. Yes.

20 CHAIRMAN THOMAS: What he has to do and not cause  
21 him to go out of business.

22 MR. BENEDICT: That's right, and it depends on the  
23 size of the mule and the nature of the do before this--So  
24 that calculation is appropriate to make.

25 CHAIRMAN THOMAS: I just think it's unrealistic to

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1 expect an agency to make that determination.

2 DR. WALLACE: Very subjective.

3 CHAIRMAN THOMAS: With any degree of competency.  
4 That's all I have. Are there any questions for the  
5 commissioners?

6 MR. KOPELMAN: Well you got to understand that  
7 this is a caldron and all the little alchemy that's poured  
8 in and stirred up and something comes out.

9 CHAIRMAN THOMAS: I agree. No doubt all of these  
10 factors have informally entered into the decision making  
11 process and establishing penalties and consent orders before  
12 the board. When we get 'em on paper then we'll take a more  
13 critical look at it. Is there anyone in the audience that  
14 would like to comment?

15 MR. FOSTER: I can't pass up the opportunity  
16 confidential and regulations especially penalty regs.

17 CHAIRMAN THOMAS: Right.

18 MR. FOSTER: There again are our written comments.  
19 Again, my name is Robert L. Foster, I'm the chairman of the  
20 West Virginia Manufacturers Association of Environmental  
21 Safety and Health Committee, and again speaking today on  
22 behalf of the association regarding proposed series 32  
23 regulations. The West Virginia Air Pollution Control Act  
24 mandates that the options and regulations defining serious  
25 and minor violation by the Air Pollution Control Commission.

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1 However, the act authorizes only the Kanawha County Circuit  
2 Court fix the penalties. Consequently, there's no statutory  
3 authority for determination in position for of such  
4 administrative penalties by the commissioner or the director  
5 as embodied in the draft regulations.

6 Accordingly, these rules cannot be legally pursued  
7 as drafted. The commission should revise their rules simply  
8 to define serious or minor violations by the courts of law  
9 in imposing civil not administrative penalties. Although  
10 the association objects totally to the rules as-proposed, we  
11 none the less have submitted some written comments to you on  
12 substantive provision as if the authority did exist.  
13 However, such comments are not an endorsement of the  
14 regulations which exceed the statutory authority. The main  
15 points in our written comments are 1: The arbitrary  
16 classification of serious as serious for any second or  
17 subsequent violation on the specific provision is  
18 unreasonable, unjustified and unsupported by the act. Such  
19 arbitrariness is unnecessary since the factors proposed or  
20 determine the amount of any penalty include consideration of  
21 past claims history. Similarly subsection 2.7d list two  
22 factors which result in serious violations regarding other  
23 circumstances. We submit that it is unnecessary and unwise  
24 to restrict the process of effective endorsement by  
25 mandating a finding of seriousness on the basis of any

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1 single factor. Furthermore, to effectively lump all  
2 violations into the serious category does not accomplish  
3 what the legislature has directed.

4 Second, the proposed regulation that would impose  
5 a minimum of \$1,500 fine for each day of any violation  
6 other than some minor first violation. These are not  
7 required by statute and should be deleted. Particularly  
8 with reference to minor technical paper work violations and  
9 other violations which pose little or no risk of harm. Such  
10 automatic minimum penalties are unjustified to restrict.  
11 Over all consideration of the specific facts of each  
12 incident will provide a more rational approach and  
13 sufficient basis for determination of fair effective  
14 penalties.

15 Number 3: The regulations should provide for an  
16 object independent preview of the department's information  
17 and the inspectors findings before issuance of any noted--of  
18 violation or any penalties documents. This would reduce the  
19 burden on both the regulators and the regulated by lessening  
20 the likelihood of initiation of unjustified endorsement  
21 actions.

22 Fourth issue concern is the number of factors  
23 which the directors required to address under section 3.8  
24 are so numerous as to be unworkable and meanings.  
25 Furthermore, the mandate to address so many factors many of

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1 which may be inappropriate in a given situation will tend to  
2 create unnecessary controversy.

3 Finally, we object to the consideration of cost of  
4 enforcement as a factor in mitigation and aggravation,  
5 especially since that cost would include costs incurred  
6 after the person has been notified of the violation and may  
7 include sampling and analysis evaluation of a person's  
8 property or facility preparation of and similar costs.

9 The association objects to this concept as patently unfair  
10 because it kills and fuels party right to contest an  
11 alleged violation by placing on that party not only the cost  
12 of its own good faith defense but also the cost of the state  
13 relating to any or negotiation or prosecution. Again, we  
14 present these comments. Thank you.

15 MR. KOPELMAN: If I could ask you just two  
16 questions. I get an opportunity just once in a great blue  
17 moon. Do you think that the commission should adopt a  
18 regulation dealing with how consent order penalties are  
19 negotiated?

20 MR. FOSTER: Yeah. We have that in other sections  
21 of regulatory actions.

22 MR. KOPELMAN: You're not objecting to the penalty  
23 reg. It's just the way it goes about and the specifics.

24 MR. FOSTER: It's done that way in hazardous waste  
25 as well as water.

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1 MR. KOPELMAN: Yeah. Just on the penalties issue.  
2 Your statement says that only the Kanawha County Circuit  
3 Court fixes penalties, but that's true once it gets to the  
4 circuit court level. But, you know, in the last legislature  
5 the legislature added this language. It's new paragraph 19  
6 receipt of any money by the commission, which is now the  
7 DEP, as a result of the entry of any consent order shall be  
8 deposited in the state treasury to the credit of the  
9 environment fund. And do you understand that that's what  
10 this reg is intended to do is to not have any effect on the  
11 circuit court in setting penalties but simply just to  
12 outline how the chief director--

13 MR. FOSTER: I understand what you're trying to do  
14 it's just that I don't think you have authority to do it  
15 the way that this is written. If I understand it right.

16 MR. KOPELMAN: Okay.

17 CHAIRMAN THOMAS: Was that question referring to  
18 what we've already done in establishing penalties for  
19 consent orders?

20 MR. KOPELMAN: That's a good question. Do you  
21 think that the commission has the authority to enter into a  
22 consent order penalty your not challenging that are you.

23 MR. FOSTER: Let me ask my legal beagle over here.

24 MR. KOPELMAN: All right.

25 MR. HOUSTON: My name's Roland Houston. I'm

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1 with Robinson and McElwee. Granted there is a new provision  
2 in here dealing with the receipt of monies by the commission  
3 as a result of any consent order; however, that strictly  
4 speaks of the money and what's to be done with it. It does  
5 not provide any mechanism for the commission. In going back  
6 to the conversation you were having earlier about the  
7 commission versus the director and who owns the regulations.  
8 It has no authority here where the commission to bind the  
9 director in how the director will determine what goes into  
10 that consent order.

11 MR. KOPELMAN: Well let me go back to the question  
12 here then. If--I think I understand what you're saying. Do  
13 you object to the regulation in concept? In other words,  
14 you believe that the penalty negotiated by the director  
15 should be the way it used to be with no direction from a  
16 regulation. Is that what you're saying?

17 MR. HOUSTON: I'm not familiar with the way it  
18 used to be.

19 MR. KOPELMAN: Well this is a new regulation and  
20 it's giving some outline and some skeleton for thought  
21 process in how a consent order penalties arrived. Are you  
22 objecting to that in concept?

23 MR. HOUSTON: I'm objecting to any regulation that  
24 has no basis in statute. And this regulation has no basis  
25 in statute.

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1 MR. KOPELMAN: Let me back up then.

2 MR. HOUSTON: So to that point, yes, I'm objecting  
3 to it in concept.

4 MR. KOPELMAN: Well, let's back up and see where  
5 the basis is if there is a basis, okay?

6 MR. HOUSTON: Okay.

7 MR. KOPELMAN: Do you believe that the old  
8 commission and the new DEP may resolve a dispute in an  
9 enforcement matter through a consent order? That's clear to  
10 statute I'm sort of setting you up the answer's yes.

11 MR. HOUSTON: That's why you're getting a slow  
12 answer.

13 MR. KOPELMAN: Then let me ask you, do you think  
14 in a consent order that there is the ability to put in an  
15 agreed penalty to avoid going to the circuit court to avoid  
16 a penalty?

17 MR. HOUSTON: Consent order is between the--

18 MR. KOPELMAN: The company and the new director of  
19 DEP used to be the commission.

20 MR. HOUSTON: Correct.

21 MR. KOPELMAN: Right. Do you believe those two  
22 parties can come together and agree on penalties?

23 MR. HOUSTON: Those two parties can come together and  
24 agree on a compromise.

25 MR. KOPELMAN: Okay. My question to you is do you

1 think that the method in which that agreement--the structure  
2 in which those two parties can come together on a compromise  
3 do you think that should be in writing or it should be  
4 negotiated with without any structure.

5 MR. HOUSTON: No, you you're skipping a step.

6 MR. KOPELMAN: All right.

7 MR. HOUSTON: That step is, should that writing be  
8 a regulation and if it is going to be a regulation by which  
9 this commission intends to bind the director or chief which  
10 ever the case may be then there's got to be some legislative  
11 authority for this commission to do that and there is none.

12 MR. KOPELMAN: You're sort of saying this  
13 commission's binding the director. My question then, is  
14 suppose the director proposes the regulation then is it  
15 appropriate for this commission to issue a regulation if  
16 it's proposed by the commission director?

17 MR. HOUSTON: Not--The director does not have  
18 statutory authority to adopt that regulation and there is no  
19 statutory authority that we have found to adopt this  
20 regulation.

21 MR. KOPELMAN: Okay. All right. Then backing  
22 down one notch. This is being proposed as a legislative  
23 rule okay?

24 MR. HOUSTON: Okay.

25 MR. KOPELMAN: Do you believe the director of DEP

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1 would have the right to request this commission to adopt it  
2 as a procedural rule?

3 MR. HOUSTON: I have not looked at that, so I  
4 don't know what my answer would be to that.

5 MR. KOPELMAN: What's your recommendation? Do you  
6 think this commission should say no Mr. Director you've  
7 proposed this regulation but we feel you don't have the  
8 statutory basis consequently we don't want to consider this  
9 regulation. Is that what you're suggesting this commission  
10 do?

11 MR. HOUSTON: Yes. I think that the thing this  
12 commission is charged to do, the thing it needs to do and  
13 the thing that it has not done is distinguish in a  
14 meaningful way serious from minor violations.

15 MR. KOPELMAN: Okay. But that clearly is called  
16 for in the code--

17 MR. HOUSTON: That's right.

18 MR. KOPELMAN: --in terms of the regulation to  
19 distinguish that.

20 MR. HOUSTON: That's all it's called for.

21 MR. KOPELMAN: But the--Go on and put some thought  
22 process--mandatory thought process into how a civil penalty  
23 would be compromised you feel the commission--It's not an  
24 appropriate legislative rule.

25 MR. HOUSTON: Correct.

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1 MR. KOPELMAN: And it might be an appropriate  
2 procedural rule or interpretive rule and it might be an  
3 appropriate procedural rule.

4 MR. HOUSTON: I have some difficulty with that in  
5 that "interpretative rules" then become in many cases rules  
6 that are binding on the public but are not necessarily  
7 binding on the agency, and so I'm not ready to sign on to  
8 yes, it would be make a great interpretive reason.

9 DR. WALLACE: I'm not sure I understand the  
10 difference between the legislative rule and the procedural  
11 rule if the rule is promogated, but by whoever, whatever  
12 under authority arranged to the statute by an agency that  
13 impacts the general public. Does it not then--I mean I'm--  
14 What are two levels there?

15 MR. KOPELMAN: Well there's some statutory  
16 definition, but to try to answer you. If the agency would  
17 have the right to adopt a procedural rule to say things like  
18 we will not meet on the second Tuesday of every month that  
19 becomes a procedural rule, and unless it violates some  
20 standard that would be challenged or declared for a judgment  
21 or something like that then it holds up as how we're going  
22 to conduct ourselves.

23 An interpretive rule gets a little grayer. The  
24 code says that you don't have to go through the rule making  
25 the strict legislative rule making provisions going to the

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1 legislature for an interpretive rule, but then you're still  
2 subject to your interpretation being correct and subject to  
3 judicial challenge on your interpretive rule. The former  
4 director and this director have chosen never to issue an  
5 interpretive rule because the question becomes if an  
6 interpretive rule has an impact upon a regulated community  
7 it should be a legislative rule.

8 DR. WALLACE: Sure. Right.

9 MR. KOPELMAN: So that's why I'm asking this  
10 question of counsel here, whether or not he believes that  
11 this that this should either be done away with. Any  
12 schematic or penalty assessment should not be in writing  
13 which is the way it's been for years or should be an  
14 interpretive rule or should be a legislative rule. And I  
15 think what we're getting here is what it shouldn't be a  
16 legislative rule that it might be an interpretive rule.  
17 I'll let him speak.

18 DR. WALLACE: If it's fines then it's binding upon  
19 the penalties.

20 MR. KOPELMAN: Well we've--It's sort of a catch-  
21 22, you know, Bob Parsons stood up here and I can see his  
22 face pounding the desk and saying, you guys can't do this  
23 it needs to be in writing. You need to set it out as to  
24 how you're going to assess these penalties. You're  
25 arbitrary and capricious. You need a regulation. So we've

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1 got one counsel that's been up here advising this commission  
2 put it in writing to develop a regulation that tells the  
3 regulated community how a penalty would be assessed, and now  
4 we've got another counsel that's saying that we don't have a  
5 statutory basis and we recommend that you not put it in  
6 writing.

7 MR. HOUSTON: Without the statutory basis.

8 MR. KOPELMAN: Right.

9 MR. HOUSTON: I would recommend that the statutory  
10 basis be obtained if it's to be moved--issued to move  
11 forward on.

12 CHAIRMAN THOMAS: What action did the legislature  
13 recently take relative to the authority of the commission  
14 dealing with--

15 MR. KOPELMAN: They did two things. They adjusted  
16 the amended--the penalty section and put in a minor and  
17 serious violation step that if it's a first violation that's  
18 minor there's no penalty. So counsel has agreed that we  
19 need that reg.

20 CHAIRMAN THOMAS: Okay.

21 MR. KOPELMAN: Not necessary in the way we've  
22 done it, but it is agreed that we need a reg to distinguish  
23 the difference between serious and minor. Now prior to this  
24 legislative change there was no mention of consent order  
25 penalties. And the commission has gone forward to

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1       compromise a contested case with an administrative penalty.  
2       I think there's basis for that and I stand clear on my  
3       opinion to you that you have performed that function  
4       legally. Even though there's no statute that  
5       says that you can or cannot collect an administrative  
6       penalty in 16.20.

7               CHAIRMAN THOMAS: I'm talking about civil  
8       penalties in the code.

9               MR. KOPELMAN: Yeah. An administrative penalty--

10              CHAIRMAN THOMAS: What authority if any is given  
11       to the commission?

12              MR. KOPELMAN: To collect it?

13              CHAIRMAN THOMAS: Yes.

14              MR. KOPELMAN: You have the general authority to  
15       compromise an enforcement claim or case without going to  
16       the circuit court.

17              DR. WALLACE: Including the assessment of monetary  
18       agreement upon monetary penalties.

19              MR. KOPELMAN: Sure. Sure.

20              CHAIRMAN THOMAS: That's in effect assessing a  
21       penalty? That's in effect giving the commission the  
22       authority to assess a penalty?

23              MR. KOPELMAN: The commission has--

24              CHAIRMAN THOMAS: Does that not speak to the  
25       statutory authority then that he's speaking of?

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1 MR. KOPELMAN: No. What he's talking of there's  
2 no specific statutory authority.

3 MR. BENEDICT: Both sides agree to it's okay.

4 MR. KOPELMAN: Yeah, when both sides agree to it  
5 you don't have to have it.

6 MR. BENEDICT: It's been one of my frustrations  
7 have been--

8 CHAIRMAN THOMAS: Authorize the commission to  
9 impose penalty.

10 MR. KOPELMAN: The most recent change says receipt  
11 of any money by the commission as a result of the entry of  
12 any consent order.

13 CHAIRMAN THOMAS: Well that--

14 MR. KOPELMAN: It makes it pretty clear.

15 DR. WALLACE: It implies that the authority is  
16 there already.

17 MR. KOPELMAN: Correct. Shall be deposited in the  
18 state treasury to the credit of the environment. So that's  
19 made it clear that if you receive money as the result of the  
20 entry of a consent order you put it somewhere.

21 CHAIRMAN THOMAS: This turns out to be a legal  
22 question not a question for this commission. It has to be  
23 resolved.

24 DR. WALLACE: If it was in my agency, the first  
25 thing identify themselves wanted do is you get, you know, a

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1 clear understanding and a legal opinion usually from--We  
2 usually go to the attorney general's office as to whether or  
3 not we have the authority to promogate a rule like this in  
4 code.

5 CHAIRMAN THOMAS: The penalties part of this.

6 DR. WALLACE: Yes. The penalty, and I want to be  
7 sure of that before because potentially effects of the  
8 actions that are taken.

9 MR. KOPELMAN: Well your general authority to  
10 promogate regulations, of course it comes back to the--to  
11 ask you all to promogate legislative rules the revision of  
12 29a with this code not inconsistent with this the provision  
13 of this article goes on to say relating to the control of  
14 air pollution. Of course you can read that narrowly or  
15 broadly, you know, broadly read a penalty is necessary if  
16 there was no penalty there'd be no ability to enforce.

17 So personally, I think that's broad enough to  
18 include this. You can promogate a legislative rule in the  
19 provisions of 29a that just tells the procedural  
20 requirements not inconsistent with the provision of this  
21 argument. I think that establishing a penalty policy is  
22 consistent with the provisions of this article. So--

23 MR. HOUSTON: Well we would beg to differ and  
24 that's such a broad reading of such general language  
25 certainly you could then say that this commission has the

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1 authority to do anything and everything it so desires to do  
2 so long as it may have some impact on air pollution. And we  
3 read the statute as a whole and we read other statutes. The  
4 legislature grants specific authority for an awful lot of  
5 things that this commission can do and that other bodies can  
6 do. And if they intended for this commission to establish  
7 penalties then it's our belief they would have so stated.

8 MR. KOPELMAN: But going back to--Just to beat the  
9 dead horse one more time. You don't have a problem with  
10 compromising a penalty in a consent order.

11 MR. HOUSTON: I do not have a problem with an  
12 amount--an agreed amount being included in a consent order  
13 and agreed amount between two equals who are dealing with  
14 an issue. That is significantly different from a mandated  
15 penalty that someone has to face.

16 MR. KOPELMAN: Well just in all fairness to this  
17 statement. That was Carl Beard's position for 28 years. He  
18 didn't want it in writing. So the question here is this  
19 comes to you in this transition. This commission chose two  
20 or three years ago, and this director wanted it in writing  
21 there was a complete 180 degree phase shift between the old  
22 director and the new director Dale wanted it in writing  
23 because he wanted an outline so people could have an idea  
24 and more of a something that's--

25 MR. BENEDICT: The difficulty is this goes beyond

1 being an outline and takes on its own life is the problem we  
2 as far as right now.

3 MR. KOPELMAN: And that was when Dale--And now  
4 Dave Callahan's the one who brings regulations to you,  
5 technically. But before Dave Callahan, Dale wanted civil  
6 penalties to be in writing and fairly concrete as to how you  
7 remember some of the things we've gone through with consent  
8 orders in the justifying penalties. I know you've asked  
9 more questions than anyone else. How do you justify this  
10 penalty? And when you have something in writing it's self-  
11 justification. You can go back to it and say, I give this  
12 weight to this weight to this and this is how I came up with  
13 it. The industry's now objecting to having it in writing  
14 and are ready to go back to the caldron approach it's a  
15 policy issue.

16 CHAIRMAN THOMAS: I go back to legal. I think we  
17 need at least I personally would need an AG opinion that we  
18 can do that we can define penalties.

19 MR. KOPELMAN: I think it really goes back a step  
20 beyond that and the question is to Dave Callahan. Does Dave  
21 Callahan want this?

22 CHAIRMAN THOMAS: If he wanted to do it then for  
23 this commission to act on it I think we need an AG's  
24 opinion.

25 MR. KOPELMAN: I think now that this has been

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1 raised that you would be well served to report back to Dave  
2 Callahan. There's been substantial question on the  
3 authority of the commission to promogate the penalty issue  
4 not the serious versus--Right?

5 MR. HOUSTON: Right.

6 MR. KOPELMAN: Serious versus minor is, okay.  
7 It's the penalty side of it to see if one if he wants it in  
8 writing me want the regulation and two whether or not he--  
9 his staff feel that the law 16.20 gives the supporting basis  
10 for this regulations.

11 MR. HOUSTON: If I may make one more comment. The  
12 Manufacture's Association and the comments that we've made  
13 do not say that there should be no written guidelines for  
14 penalties. They say that there should that these are not  
15 the guidelines to be had at this time on this lack of  
16 authority in so far as the caldrón approach. These  
17 guidelines give you the caldrón approach, which counsel  
18 himself used that term earlier in saying you put in these  
19 various factors. If the commission gets the authority, we  
20 still think these are not the proper regulations and we  
21 would look forward to visiting with you on that.

22 CHAIRMAN THOMAS: That covers your objection.

23 MR. HOUSTON: Yes, sir.

24 CHAIRMAN THOMAS: Thank you.

25 MR. KOPELMAN: Yeah. As I stated earlier though

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1 and I'd like to point out to the manufacturers that this is  
2 just an idea of how these penalties could be addressed. I'm  
3 sure that if the commission does come back to the decision  
4 to put it in writing that if you all can come forward with  
5 not simply objections but suggestions, I'm sure they would  
6 be welcome by the commission.

7 MR. FOSTER: Okay, sure.

8 CHAIRMAN THOMAS: Please feel free to submit that  
9 determination for subject or legal position. We don't have  
10 the authority to do that you'll help us do it. -Additional  
11 comments? Yes.

12 MR. JACK: I'll be very brief. My name is Gary  
13 Jack. I'm in-house counsel for Monongahela Power Company  
14 in Fairmont, West Virginia. I'm also speaking on behalf  
15 of our sister operating company the Potomac Edison Company  
16 due to this ensuing debate my comments have changed  
17 drastically, so let me just say that our companies likewise  
18 have serious doubt and question as to whether there is ample  
19 statutory authority for these rules. And we certainly  
20 concur with further review of this and an attorney general's  
21 opinion.

22 And secondly, let me just say that we as companies  
23 I think would prefer an approach not in writing an  
24 evaluation of the totality of the circumstances this rule  
25 did--was good in that it did look at the totality of the

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1 circumstances. But then it kind of deviated from that and  
2 said well, if certain items do occur then it's automatically  
3 a serious violation.

4 We do have objection to that there are times  
5 where, you know, certain for instance a reckless conduct  
6 automatically made it a serious violation a violation over  
7 30 percent of the standard automatically threw it into a  
8 serious violations, you know, for instance you could have an  
9 opacity problem. You know, you might not spike up 30  
10 percent and all we're saying is, you know, continue to look  
11 at the totality of the circumstances don't automatically  
12 throw it into that. So I had further comments, but I don't  
13 think they're appropriate due to what is going to occur.  
14 But I did want the commission to know that we support the  
15 comments made earlier.

16 CHAIRMAN THOMAS: Thank you. Any questions?

17 MR. KOPELMAN: Yeah. The only thing I would  
18 recommend to both of the counsel that have spoken is on the  
19 serious and minor violations issues is give us your  
20 suggestions. Put them in writing how would you define  
21 serious and minor and let's all take a look at it.

22 CHAIRMAN THOMAS: I was going to speak to that.  
23 Certainly we want comments in writing until we have  
24 something definitive that we can address using this as a  
25 draft, but how it should be changed. Please submit your

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1 comments in writing to us in the next 30 day period.

2 MR. JACK: Be glad to. And if I could speak on  
3 just very quickly on one comment you made. Certainly we  
4 feel that the commission and the commission staff has the  
5 power to compromise potential suits and I realize now that  
6 that is the purpose. When I first--When our company first  
7 read this, we got the impression that this was the  
8 imposition of administrative penalties. In other words,  
9 that the commission staff could unilaterally go out and  
10 impose a penalty without due process without hearings and a  
11 lot of our comments addressed that. And so I think it's  
12 cleared that up and I do want you to realize that that's in  
13 there. But certainly we have no problems with compromising  
14 potential suits.

15 CHAIRMAN THOMAS: What cleared it up? Was it  
16 interpretation of what it says? I guess what I'm hearing  
17 you say it ought to be clearer in the regulation that they  
18 haven't avoided the due process. If that's not clear it  
19 needs to be.

20 MR. KOPELMAN: Well I think we can make it  
21 clearer.

22 CHAIRMAN THOMAS: Okay.

23 MR. KOPELMAN: You read 3.1 through 3.4 and it  
24 deals with it. It comes off hitting you between the eyes  
25 with a 2x4, so to speak. The person violating applicable

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1 requirements are liable for so forth and so on, then it goes  
2 on to say but you're not really if it's a minor violation.  
3 Then 3.5 makes it fairly clear for purposes of determining  
4 the appropriate administrative penalty to be included in the  
5 consent orders to compromise of potential civil penalties.  
6 Then it goes on. I think perhaps that should be placed up  
7 in the 3.1 to make it clear the the entire--

8 CHAIRMAN THOMAS: Section is covered by that.

9 MR. KOPELMAN: --section is covered by that. So  
10 it's a point well taken we can restructure that to try the  
11 add some clarity to that.

12 MR. JACK: Thank you.

13 MR. KOPELMAN: The person reading it cold isn't  
14 first thinking that it's a new regulation for administration  
15 penalties. The purpose of it is to compromise a consent  
16 order--in a consent order.

17 MR. JACK: Okay.

18 CHAIRMAN THOMAS: Any other questions? If not--

19 MR. JACK: Thank you very much.

20 CHAIRMAN THOMAS: Any other persons to comment?  
21 Apparently there are none. Any further comment from any  
22 of the directors or the commissioners? Hearing none  
23 then we will adjourn this hearing on proposal Rule 32 and I  
24 will remind everybody that the record will stay open for 30  
25 days for additional comment.

ACR

## REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA;

COUNTY OF KANAWHA, to-wit:

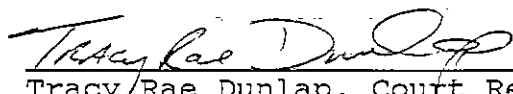
I Tracy Rae Dunlap, a Notary Public within and for the State and County aforesaid, duly qualified, do hereby certify that the foregoing transcript of the proceedings had were duly taken by me at the time and place and for the purpose specified in the caption thereof, said witness having been duly sworn by me to testify the whole truth and nothing but the truth concerning the matter in controversy.

I do further certify that the said deposition was taken by means of the Stenograph machine and transcribed on a computer by me.

I further certify that I am not connected by blood or marriage to any of the parties to this action, am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, or financially interested in the action, or interested directly or indirectly in the matter in controversy.

A.C.R.

Given under my hand this 11th day of September, 1992.

  
Tracy Rae Dunlap, Court Reporter  
and Notary Public

My commission expires January 27, 2002.

A.C.R.