

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

Form #6

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

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

AGENCY: Air Pollution Control Commission TITLE NUMBER: 45CSR31

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"

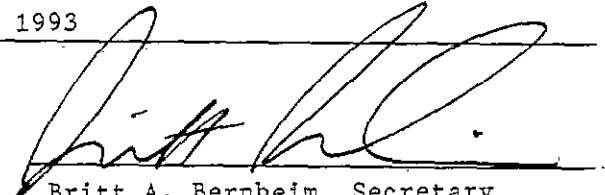
THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) H.B. 100

SECTION 64-3-1(u), PASSED ON May 26, 1993

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON

THE FOLLOWING DATE: July 7, 1993



Britt A. Bernheim, Secretary  
WV Air Pollution Control Commission

45CSR31  
TITLE 45  
LEGISLATIVE RULES  
WEST VIRGINIA AIR POLLUTION CONTROL COMMISSION  
SERIES 31  
CONFIDENTIAL INFORMATION

**§45-31-1. General.**

1.1. Scope. -- In accordance with the provisions of section twelve, article twenty, chapter sixteen of the West Virginia Code, as amended, this legislative rule is promulgated to define confidential material as related to records, reports, data or information, or trade secrets submitted to the Chief of Air Quality.

1.2. Authority. -- W. Va. Code §16-20-5.

1.3. Filing Date. --

1.4. Effective Date. --

**§45-31-2. Definitions.**

2.1. "Applicable Requirements" means all state, interstate, and federal standards and limitations for a source regulated pursuant to a legislative rule, including, but not limited to, emissions limitations, ambient air quality standards, standards of performance, control technique guidelines, preconstruction review, and any standard, term, condition, limitation or requirement contained in any order issued by the chief or the commission including consent orders and permits.

2.2. "Commission" means the West Virginia Air Pollution Control Commission.

2.3. "Chief of Air Quality" or "Chief" means the chief of the Office of Air Quality or his or her designated representative appointed by the director of the Division of Environmental Protection pursuant to the provisions of W. Va. Code §22-1-1, et seq.

2.4. "Director" means the director of the Division of Environmental Protection or his or her designated representative.

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2.5. "Division of Environmental Protection" or "DEP" means that division of the Department of Commerce, Labor, and Environmental Resources which is created by the provisions of W. Va. Code §22-1-1, et seq.

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

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

B. Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

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

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

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

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

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

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

2.9. "Standard or Limitation" means any emission standard or limitation established or publicly proposed pursuant to W. Va. Code §16-20-1, et seq., or the Clean Air Act 42 U.S. C. 7401, et seq., or pursuant to any regulation under W. Va. Code §16-20-1, et seq., or the Clean Air Act 42 U.S.C. 7401, et seq.

2.10. "Trade Secrets" includes, but is not limited to mean, 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 for 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.

**§45-31-3. Confidential Information.**

3.1. The following information furnished to the chief 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:

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- a. trade secrets,
- b. information exempt from disclosure by the WV Freedom of Information Act (W. Va. Code §29B-1-1, et seq.) and other State statutes, and
- c. information received from federal agencies exempt from disclosure by federal statutes or regulations.

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 - Statutorily Exempt."

**§45-31-4. Request for Inspection.**

4.1. Upon receipt of a written request for the inspection of information marked confidential, the chief or his or her designated representative shall review the claim of confidentiality and timely notify the person making the claim of confidentiality and the person making the request for inspection regarding the chief's determination of release of such information marked confidential and the reasons therefore. Such notification shall be made by certified mail to both the person claiming confidentiality and the person requesting to inspect information.

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

- a. The person has asserted a business confidentiality claim which has not expired by its terms, nor been waived or withdrawn.
- b. The person 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.

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

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

e. Either --

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

B. 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.

4.3. a. Any person whose interest shall have been substantially affected by any denial of information made under this rule may seek judicial review of the chief's determination as provided pursuant to section twelve, article twenty, chapter sixteen of the West Virginia Code, as amended.

b. Any person whose interest shall have been substantially affected by any determination, other than a denial of information pursuant to this subsection, may appeal such determination to the commission in the same manner as appeals of cease and desist orders under section six, article twenty, chapter sixteen of the West Virginia Code, as amended.

**§45-31-5. Designee.**

5.1. Any person submitting any information claimed to be confidential shall, at the time of submission, provide the name, address, and telephone number of the individual to be contacted if the chief receives a request for disclosure of the information claimed to be confidential.

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5.2. Notice to the company shall be deemed sufficient so long as the chief provides such notice to the designated representative.

**§45-31-6. Use of Confidential Material.**

6.1. Confidential information may be used by the chief in the prosecution of a violation of any applicable requirement so long as the chief requests that such information be sealed from public dissemination pursuant to a protective court order.

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

7.1. Types and amounts of air pollutants discharged shall not be identified as confidential.

**§45-31-8. Response to request.**

8.1. The chief shall provide, upon request, a statement regarding the quantity and type of confidential information which is not released to the requestor.

**§45-31-9. Severability.**

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

SENATE BILL NO. 170

(By **Senator Manchin**)

[Introduced March 1, 1993; referred to the  
Committee on Energy, Industry and Mining; and  
then to the Committee on the Judiciary.]

7

8

9

10 A BILL to amend and reenact section one, article three, chapter  
11 sixty-four of the code of West Virginia, one thousand nine  
12 hundred thirty-one, as amended, relating to authorizing the  
13 air pollution control commission to promulgate legislative  
14 rules relating to confidential information.

15 Be it enacted by the Legislature of West Virginia:

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

19 **ARTICLE 3. AUTHORIZATION FOR DEPARTMENT OF COMMERCE, LABOR AND**  
20 **ENVIRONMENTAL RESOURCES TO PROMULGATE LEGISLATIVE RULES.**

21 **§64-3-1. Air pollution control commission.**

22 (a) The legislative rules filed in the state register on the  
23 thirteenth day of August, one thousand nine hundred eighty-two,

1 relating to the air pollution control commission (series VII),  
2 are authorized.

3 (b) The legislative rules filed in the state register on the  
4 thirteenth day of August, one thousand nine hundred eighty-two,  
5 relating to the air pollution control commission (series XIX),  
6 are authorized.

7 (c) The legislative rules filed in the state register on the  
8 sixteenth day of November, one thousand nine hundred  
9 eighty-three, relating to the air pollution control commission  
10 (emission standards for hazardous air pollutants) (series XV),  
11 are authorized.

12 (d) The legislative rules filed in the state register on the  
13 sixteenth day of November, one thousand nine hundred  
14 eighty-three, relating to the air pollution control commission  
15 (standards of performance for new stationary sources) (series  
16 XVI), are authorized.

17 (e) The legislative rules filed in the state register on the  
18 sixth day of January, one thousand nine hundred eighty-four,  
19 relating to the air pollution control commission (to prevent and  
20 control air pollution from hazardous waste treatment, storage or  
21 disposal facilities) (series XXV), are authorized with the  
22 amendments set forth below:

23 Page 3, §1.06, change the § title from "Enforcement" to  
24 "Procedure"; place an "(a)" in front of the existing paragraph  
25 and add the following:

1       "(b) Permit applications filed pursuant to this regulation  
2 shall be processed in accordance with the permitting procedures  
3 as set forth in code §20-5E of this regulation. Permit  
4 procedures set forth in code §16-20 and any other regulation of  
5 this commission are not applicable to any permit application  
6 filed pursuant to this regulation."

7       Such rules shall also include a section which shall read as  
8 follows:

9       "The commission shall report to the legislative rule-making  
10 review committee as required by that committee, but in no event  
11 later than the first day of the regular session of the  
12 Legislature in the year one thousand nine hundred eighty-five.  
13 Such report shall include information regarding the commission's  
14 data gathering efforts, the development of compliance programs,  
15 the progress in implementation, and such other matters as the  
16 committee may require, pertaining to the regulations hereby  
17 authorized."

18       (f) The legislative rules filed in the state register on the  
19 ninth day of January, one thousand nine hundred eighty-four,  
20 relating to the air pollution control commission (permits for  
21 construction and modification of stationary sources of air  
22 pollution for the prevention of significant deterioration)  
23 (series XIV), are authorized.

24       (g) The legislative rules filed in the state register on the  
25 thirtieth day of December, one thousand nine hundred

1 eighty-eight, modified by the air pollution control commission to  
2 meet the objections of the legislative rule-making review  
3 committee and refiled in the state register on the twenty-third  
4 day of February, one thousand nine hundred eighty-nine, relating  
5 to the air pollution control commission (prevention and control  
6 of air pollution from hazardous waste treatment, storage or  
7 disposal facilities), are authorized.

8 (h) The legislative rules filed in the state register on the  
9 thirtieth day of December, one thousand nine hundred  
10 eighty-eight, modified by the air pollution control commission to  
11 meet the objections of the legislative rule-making review  
12 committee and refiled in the state register on the twenty-third  
13 day of February, one thousand nine hundred eighty-nine, relating  
14 to the air pollution control commission (good engineering  
15 practice as applicable to stack heights), are authorized.

16 (i) The legislative rules filed in the state register on the  
17 thirtieth day of December, one thousand nine hundred  
18 eighty-eight, modified by the air pollution control commission to  
19 meet the objections of the legislative rule-making review  
20 committee and refiled in the state register on the twenty-third  
21 day of February, one thousand nine hundred eighty-nine, relating  
22 to the air pollution control commission (TP-2, compliance test  
23 procedures for regulation 2 -- to prevent and control particulate  
24 air pollution from combustion of fuel in indirect heat  
25 exchangers), are authorized.

1 (j) The legislative rules filed in the state register on the  
2 sixth day of September, one thousand nine hundred eighty-nine,  
3 modified by the air pollution control commission to meet the  
4 objections of the legislative rule-making review committee and  
5 refiled in the state register on the tenth day of January, one  
6 thousand nine hundred ninety, relating to the air pollution  
7 control commission (ambient air quality standards for sulfur  
8 oxides and particulate matter), are authorized.

9 (k) The legislative rules filed in the state register on the  
10 sixth day of September, one thousand nine hundred eighty-nine,  
11 modified by the air pollution control commission to meet the  
12 objections of the legislative rule-making review committee and  
13 refiled in the state register on the tenth day of January, one  
14 thousand nine hundred ninety, relating to the air pollution  
15 control commission (prevention of air pollution emergency  
16 episodes), are authorized.

17 (l) The legislative rules filed in the state register on the  
18 sixth day of September, one thousand nine hundred eighty-nine,  
19 modified by the air pollution control commission to meet the  
20 objections of the legislative rule-making review committee and  
21 refiled in the state register on the tenth day of January, one  
22 thousand nine hundred ninety, relating to the air pollution  
23 control commission (permits for construction and major  
24 modification of major stationary sources of air pollution for the  
25 prevention of significant deterioration), are authorized.

1 (m) The legislative rules filed in the state register on the  
2 sixth day of September, one thousand nine hundred eighty-nine,  
3 relating to the air pollution control commission (standards of  
4 performance for new stationary sources), are authorized.

5 (n) The legislative rules filed in the state register on the  
6 sixth day of September, one thousand nine hundred eighty-nine,  
7 relating to the air pollution control commission (emission  
8 standards for hazardous air pollutants), are authorized.

9 (o) The legislative rules filed in the state register on the  
10 sixteenth day of October, one thousand nine hundred eighty-nine,  
11 modified by the air pollution control commission to meet the  
12 objections of the legislative rule-making review committee and  
13 refiled in the state register on the tenth day of January, one  
14 thousand nine hundred ninety, relating to the air pollution  
15 control commission (prevention and control of emissions of toxic  
16 air pollutants), are authorized.

17 (p) The legislative rules filed in the state register on the  
18 tenth day of August, one thousand nine hundred ninety, relating  
19 to the air pollution control commission (prevention and control  
20 of air pollution from the emission of volatile organic compounds  
21 from bulk gasoline terminals), are authorized.

22 (q) The legislative rules filed in the state register on the  
23 thirteenth day of August, one thousand nine hundred ninety,  
24 modified by the air pollution control commission to meet the  
25 objections of the legislative rule-making review committee and

1 refiled in the state register on the fifteenth day of November,  
2 one thousand nine hundred ninety, relating to the air pollution  
3 control commission (air quality management fee program), are  
4 authorized.

5 (r) The legislative rules filed in the state register on the  
6 tenth day of August, one thousand nine hundred ninety, relating  
7 to the air pollution control commission (prevention and control  
8 of air pollution from the emission of volatile organic compounds  
9 from the storage of petroleum liquids in fixed roof tanks), are  
10 authorized.

11 (s) The legislative rules filed in the state register on the  
12 tenth day of August, one thousand nine hundred ninety, relating  
13 to the air pollution control commission (prevention and control  
14 of air pollution from the emission of volatile organic compounds  
15 from petroleum refinery sources), are authorized.

16 (t) The legislative rules filed in the state register on the  
17 eighteenth day of September, one thousand nine hundred ninety-  
18 two, relating to the air pollution control commission  
19 (confidential information), are authorized.

20

21 NOTE: The purpose of this bill is to authorize the Air  
22 Pollution Control Commission to promulgate legislative rules  
23 relating to confidential information.

24

25 Strike-throughs indicate language that would be stricken from  
26 the present law, and underscoring indicates new language that  
27 would be added.

KEN HECHLER  
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MARY P. RATLIFF  
Deputy Secretary of State

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## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

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(Plus all the volunteer  
help we can get)

FAX: (304) 558-0900

May 28, 1993

Randy Suter  
Air Pollution Control Comm.  
1558 Washington St., E  
Charleston, WV 25305

**HB 100** authorizing, **Title 45, Series 31, Confidential Information**, passed the Legislature on **May 26, 1993**. It is now awaiting the Governor's signature.

You have sixty (60) days after the Governor signs HB 100, to final file the legislative rule with the Secretary of State's office. To final file your legislative rule, fill in the blanks on the enclosed form #6, the "Final Filing" form and file the form with our office. Authorization for your legislative rule is cited in **HB 100** section **64-3-1(u)**. The agency may set the effective date of the legislative rule up to ninety (90) days from the date the legislative rule is final filed with the Secretary of State's office. Please have an authorized signature on the bottom line.

**\*\*\*IMPORTANT: IF YOUR AGENCY HAS COMPLETED THE LEGISLATIVE RULE ON A COMPUTER SYSTEM THAT USES A 3 1/2" OR 5 1/4" DISK, PLEASE SUBMIT A CLEAN COPY, WITH ALL UNDERLINING AND STRIKE-THROUGHS TAKEN OUT, TO OUR OFFICE WHEN FINAL FILING THE RULE. STATE ON THE DISK THE FORMAT THE RULE IS IN AND THE TITLE IT IS FILED UNDER. THIS WILL MAKE IT QUICKER FOR US TO ENTER YOUR RULES ON THE LEGISLATIVE DATA BASE. REMEMBER THE TEXT OF THE COMPUTER FILED RULE MUST BE IDENTICAL - WORD FOR WORD, COMMA FOR COMMA, WITH ALL UNDERLINING AND STRIKE-THROUGHS TAKEN OUT, AS THE HARD COPY AUTHORIZED BY THE LEGISLATURE.**

After the final rule is entered into the legislative data base, the rule will be sent to the agency for review and proofing. Following confirmation or corrections, as the case may be, the Secretary of State shall submit to the agency a final version of the rule for their records.

If you have any questions or need any assistance, please do not hesitate to call our office.

Thank You  
Administrative Law Division