WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #5 ☐

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2003 SEP 10 P 1:41

OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: WVDEP - Division of Air Quality TITLE NUMBER: 45

CITE AUTHORITY: WV §§ 22-5-4; 22-5-10; 29A-1-2(c);45CSR31

RULE TYPE: PROCEDURAL _____ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

_____

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 RULE BEING PROPOSED: 31B

TITLE OF RULE BEING PROPOSED: "Confidential Business Information and Emission Data"

_____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS November 10, 2003

Stephanie R Timmermeyer
Authorized Signature

$6.60

TITLE 45
INTERPRETIVE RULE
BUREAU OF ENVIRONMENT
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

SERIES 31B
CONFIDENTIAL BUSINESS INFORMATION AND EMISSION DATA

§45-31B-1. General.

1.1. Scope. -- Series 31B provides guidance and clarification concerning the term "types and amounts of pollutants discharged" defined under 45CSR§31-2.4, the Department's legislative rule entitled "Confidential Information," and thus what information may not be claimed confidential in accordance with 45CSR§31-6.

1.2. Authority. -- W. Va. Code §§22-5-4; 22-5-10; 29A-1-2(c); and WV45CSR31.

1.3. Filing Date. -- September 10, 2003.

1.4. Effective Date. – November 10, 2003.

§45-31B-2. Definitions.

2.1. "Aggregation" means the combining of individual elements, such as equipment, units, throughputs or capacities, into one total.

2.2. "Categorization" means the combining of individual elements, such as materials or chemicals, into one category.

2.3. "Emission data," or "types and amounts of air pollutants discharged" means, with reference to any source of emission of any substance into the air --

2.3.a.

2.3.a.1. Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

2.3.a.2. Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

2.3.a.3. A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

2.3.b. Notwithstanding subdivision 2.3.a of this subsection, the following information shall be considered to be emission data only to the extent necessary to allow the Secretary to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow the Secretary to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

2.3.b.1. Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

2.3.b.2. Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

2.4. "Emissions monitoring and sampling" means real-time monitoring, such as continuous emissions monitors, or statistically valid periodic sampling and monitoring that provides reliable and accurate data on emissions.

2.5. "Parametric monitoring" means combining the use of surrogate parameters and monitoring or sampling.

2.6. "Surrogate parameter" means a value that stands in place of throughput, production or some other variable claimed confidential. The term may include an alternative measure of production or throughput or some other production unit that correlates with production or throughput and with emissions. A surrogate parameter must have a simple direct relationship to the value it replaces.

§45-31B-3. Applicability.

3.1. This rule applies to all information submitted to the Secretary, regardless of the regulatory context, and includes, but is not limited to, information submitted in the permitting, enforcement and emission inventory contexts.

§45-31B-4. What Information Constitutes Emission Data.

4.1. Information or data that is indispensable or essential to determining emissions or location in accordance with subsection 2.3 will be considered emission data and thus non-confidential, unless there is a readily available non-confidential alternative for determining emissions or location. Where there is no readily available non-confidential alternative, the Secretary may approve non - confidential alternatives through the use of aggregation, categorization, surrogate parameters, emissions monitoring or sampling, or parametric monitoring; provided that such use is consistent with applicable rules and standards and results in a practically enforceable method of determining emissions.

4.2. The data elements and types of information listed in Tables 2A through 2D of Appendix A to Subpart A of 40 C.F.R. Part 51, as further defined in the Glossary in such Appendix, will be considered emission data if the information is found to be necessary to determine emissions or location in accordance with subsection 4.1.

4.3. Information in addition to that listed in the Tables referenced in subsection 4.2 will also be deemed emission data if the information is found to be necessary to determine emissions or location in accordance with subsection 4.1.

4.4. The determination as to what information constitutes emission data will be made by the Secretary on a case-by-case basis upon application of the provisions stated in this rule.

§45-31B-5. Contents of Permit.

5.1. The contents of any permit issued by the Secretary pursuant to 45CSR13, 45CSR14, 45CSR19 or 45CSR30 may not be claimed as confidential. This does not, however, preclude a permit application from containing confidential information.

§45-31B-6. Information Determined Emission Data by EPA.

6.1. Notwithstanding the provisions of this rule, information and data determined to be emission data by EPA in accordance with 40 C.F.R. §2.301 will be deemed emission data by the Secretary; provided that the mere inclusion of information or data in Tables 2A through 2D of Appendix A to Subpart A of 40 C.F.R. Part 51 shall not be considered a determination for purposes of this section where EPA has not made a case-specific determination of confidentiality.

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March 21, 2003

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John A. Benedict, Deputy Director
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Department of Environmental Protection
7012 MacCorkle Avenue, S.E.
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RE: 45 CSR 31B – Confidential Business Information.

Dear Deputy Director Benedict:

The following comments are filed on behalf of the West Virginia Chamber of Commerce ("the Chamber") to the proposed 45 CSR 31B. As the voice of business in West Virginia, the Chamber has been actively involved with the Division of Air Quality ("DAQ") in pursuing clarification of the scope of the confidential business information provisions of the air program, since these provisions have a direct impact upon the ability of businesses to maintain their market competitiveness. It is important for the state of West Virginia to ensure that its business residents are afforded appropriate protection for business confidential information while at the same time assuring a successful air quality program. The Chamber appreciates the efforts on the part of the DAQ to work to address these matters of concern to the regulated community and the general public developing both legislative and administrative law on this issue. As a followup to the legislative negotiations with the DAQ, set forth below is the Chamber's recommended interpretation of "types and amounts of air pollutants discharged" that focuses upon types and amounts of air pollutants or emissions actually discharged.

1. "Types and amounts of air pollutants discharged" or "emission data." It is recommended that, consistent with the State Air Pollution Control Act, the language of Section 2.1 be revised to provide that only actual emissions discharged shall be the subject of the release of information pursuant to this interpretive rule or the legislative rule.

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

2.1.a.

2.1.a.1.Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any actual emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

~~2.1.a.2. Emission data necessary to determine the identity, amount frequency, concentration, or other characteristics (to the extend related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source);~~ and

2.1.a.~~3~~.2. A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

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

2.1.b.1. Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

2.1.b.2. Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

2. Definition of Necessary. The DAQ has correctly focused this interpretive rule upon the definition of that data which is "necessary" to determine types and amounts of air pollution *actually* discharged for disclosure to the public upon request. Consistent with the comment set forth above, the definition of "necessary" should be limited to "data or information indispensable or essential to determine types and amounts of air pollutants actually discharged for which there is no readily available non-confidential alternative."

The recent legislative amendment to W.Va. Code §22-5-10. "Records, reports, data or information; confidentiality; proceedings upon request to inspect or copy" which sets forth procedural limitations on the request for and release of trade secrets and confidential information creates legislative precedent for the development of procedures when managing requests for such information. The suggestions for expansion of Section 2.2 of the interpretive rule to include such procedures is explained in detail by the West

Virginia Manufacturers Association ("WVMA") in its comments and should be adopted by the DAQ in the final version of 45 CSR 31B.

3. What Constitutes Emission Data. The WVMA has offered clarification to its suggestion that the agency look to 40 CFR Part 51 as guidance, rather than wholesale adoption. The Chamber supports the WVMA comment and believes that the DAQ is best served by reserving its ability to look beyond the CFR if necessary to meet unique circumstances not otherwise identified by the referenced lists of data elements and to remain consistent with West Virginia law.

4. Contents of Permit. It is recommended that the DAQ eliminate entirely or revise the language of Section 4.1 to more consistently reflect W.Va. Code 22-5-10 as follows:

> "The contents of any permit that does not include trade secrets or confidential information issued by the Secretary pursuant to 45 CSR 13, 45 CSR 14, 45 CSR 19, or 45 CSR 30 may not be claimed as confidential, provided that information contained in an application for such permit may be claimed confidential."

5. Information Determined Emission Data by EPA. The WVMA has provided further input on its initial suggestion that DAQ look to 40 CFR 2 and 51 in developing this rule. The Chamber urges the DAQ to adopt the WVMA recommendations.

Very truly yours,

David M. Flannery

David M. Flannery
Chairman
Environmental Committee
WV Chamber of Commerce

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March 21, 2003

John A. Benedict, Deputy Director
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7012 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304-2943

Re: Proposed Interpretive Rule 45 CSR 31B, "Confidential Business Information and Emission Data."

Dear Deputy Director Benedict:

The West Virginia Manufacturers Association ("WVMA") submits these comments regarding proposed 45 CSR 31B on behalf of its many members who comprise the industrial base of the State. This issue is of great importance to our membership as they compete in a national and global economy. Our concerns are focused on giving trade secrets and other confidential information maximum protection from disclosure to competitors and to those who might seek to do harm armed with sensitive details of operations and products.

We appreciate DAQ's proposal of this interpretive rule to deal with problems that have arisen in interpreting and applying Regulation 31, the underlying rule, which leaves certain terms undefined. We believe that a final version of Regulation 31B will be of great near-term assistance to the regulated community and the public in charting these waters.

The WVMA recognizes that proposed Regulation 31B is an interpretive rule and, as such, can only address the agency's interpretations, policy or opinions regarding laws or regulations administered by it. See W.Va. Code §29A-1-2(c). However, the WVMA is cognizant of and critically interested in recent legislation that added certain procedural requirements that apply to the agency's dealings with confidential information and add important safeguards to the protection of this information. See H.B. 3155, passed by the Legislature on March 8, 2003. We appreciate the DAQ's cooperation in addressing issues raised by this legislation with the legislators. The WVMA is prepared to work with the DAQ to conduct outreach or otherwise assist in the implementation of the new provisions as soon as they are effective. We also urge the DAQ to go forward this summer with amendments to Regulation 31 necessary to provide consistency with the new provisions of law in the rules and to update Regulation 31 to address other substantial issues regarding confidential information.

The DAQ has basically adopted a template for this rule taken from the very recently adopted EPA Consolidated Emissions Reporting Rules ("CERR's"), 67 FR 39602 (June 10, 2002). The WVMA, however, has some suggestions for changes to the proposed rule which we think will clarify it and tie it more closely to the mandates of our statute and the base rule, Regulation 31.

We do not in these comments repeat the points made in our October 28, 2002 letter to the Director on this developing rule since those are already a part of this rulemaking record, although we rely upon the authority cited there and may re-emphasize a few points. Our specific suggestions follow.

Subsection 2.2. "Necessary"

This subsection really is the crux of the matter in determining what information would be disclosed even if it was properly claimed confidential. As an initial comment, we support the approach of requiring the disclosure of information that would otherwise qualify as trade secret and be protected from release only where "there is no readily available non-confidential alternative." The interpretive rule does not state who has the initial burden of demonstrating that a non-confidential alterative is not readily available and by what criteria the standard of "readily available" will be judged. We believe that this burden is properly placed on the person who seeks the disclosure of the trade secret and, because of the critical nature of trade secret information to the business, the standard that would require disclosure should be a high one - that is, "by clear and convincing evidence." We suggest the following additional refinements to the proposed language for subsection 2.2:

> 2.2 "Necessary," as used in this rule, means data or information indispensable or essential to determine ~~determining emissions or location~~ types and amounts of air pollutants discharged as defined in 45 CSR 31-2.4 ~~and~~ for which there is no readily available non-confidential alternative. The burden will be on the requester to demonstrate through clear and convincing evidence that a non-confidential alternative is not readily available. ~~Where the determination of emissions involves a series of calculations or prescribed parameters or prescribed parameters only the final series of calculations or parameters preceding the final emissions rate will be deemed "necessary" under this rule.~~
>
> 2.2.a. In making determinations as to "necessary" disclosures, the Secretary will consider whether it is possible to obtain the affected business's consent to disclosure of certain portions of records while protecting the information which is or may be entitled to confidentiality (e.g., by withholding such portions of a record as

would identify a business, or by disclosing data in the form of industry-wide aggregates, multi-year averages or totals, or some other or similar form). [See 40 C.F.R. 2.202(f)]

2.2.b. For most purposes a document or other record may usefully be treated as a single unit of information, even though in fact the document or record is comprised of a collection of individual items of information. However, in making disclosure determinations, it will often be necessary to separate the individual items of information into two or more categories, and to afford different treatment to the information in each such category. The need for such differentiation may arise, e.g., because a business confidentiality claim covers only a portion of the information, or because only a portion of the information is eligible for confidential treatment. [See 40 C.F.R. 2.202(e)]

2.2.c. The Secretary may disclose any information claimed confidential if the Director obtains the prior written consent of each affected business to such disclosure. [See 40 C.F.R. 2.209(f)]

2.2.d. Readily available, non-confidential data constituting types and amounts of pollutants discharged include, but are not limited to:

2.2.d.1. Applicable emissions standards, rule-based limits, permit limits, and limits in Consent Orders, court orders or non-confidential settlement agreements which specify the type and amount of emissions the source is authorized to emit.

2.2.d.2. Emissions statements and reports, including monitoring reports, listing the types and amounts of pollutants which have been emitted by the source.

2.2.e. Where the types and amounts of pollutants discharged cannot be determined by readily available non-confidential data, or agreed upon means other than calculations claimed confidential, then only the final value multiplied against an emission factor to generate the amount of emissions emitted or authorized to be emitted will be deemed "necessary." In such cases, the Secretary

may disclose such information in group, average, or aggregate forms to afford as much confidential protection as possible to the data claimed confidential, including the use of example calculations or surrogate values.

Section 3-Data Types Considered Non-Confidential

We believe that the data referenced in Tables 2A through 2D of Appendix A to Subpart A of 40 CFR Part 51, and the Glossary, do provide effective guidance on what types of information are likely to be non-confidential. We also believe that the DAQ should follow Virginia's lead in deeming it guidance only. The DAQ may have intended that by the qualifying phrase "if the information is necessary to determine...," but we think greater clarity would be added by the following revisions:

3.1. Add the word "usually" after the word "thus," and add the words "found to be" before the word "necessary."

3.2. Add the phrase "found to be" before the word "necessary."

3.3. Add the phrase "which must be disclosed as necessary" after the words "emission data."

The WVMA strongly supports the inclusion of subsection 3.3 to make it clear that all determinations will be case-by-case, not on presumptions by data type or class, etc.

Sec. 4. Contents of Permit

We agree that the contents of Title V permits cannot be claimed confidential under EPA rules for major sources but the blanket statement that all contents of any permit issued under Regulation 13, 14, 19 or 30 may not be claimed as confidential cannot be reconciled with the provision of W. Va. Code 22-5-10 which allows confidential treatment for trade secret information, wherever it appears. In any event we assume the DAQ would intend to apply the provisions of subsection 4.1 to permits issued in the future and not to permits already issued by the agency for which a claim for confidential treatment has been recognized.

Sec. 5 Information Determined Emission Data by EPA.

We urge the revision of subsection 5.1 to avoid delegating to the U.S. EPA the authority to determine what is confidential **under West Virginia law**, which would be unconstitutional. See *State v. Grinstead, 157 W.Va. 1001, 1013; 206 S.E.2d 912, 920 (1974).*

Accordingly, we suggest the following revisions to subsection 5.1:

> ~~Notwithstanding the provisions of this rule~~, [I]nformation and data determined to be "emissions data" by EPA in accordance with 40 C.F.R. § 2.301 for a specific source will be ~~deemed emission data~~ given consideration, but not presumptive authority by the Secretary for that source; provided, however, that ~~the mere fact~~ the mere inclusion of information or data ~~is included~~ in Tables 2A through 2D of 40 C.F.R. Part 51 ~~and EPA has not made a case specific determination~~ alone shall not be considered a determination for purposes of this section where EPA has not made a case-specific determination of confidentiality.

Voluntarily Submitted Information

The WVMA also encourages the DAQ to add to Regulation 31B some guidance on the term "voluntarily submitted information" under 45 CSR 31-4.1.e.2. We believe that such guidance should deal, to the extent possible, with information which is not required by state law to be submitted, but which would encompass security-sensitive information. Specifically, we are mindful of information such as that requested by federal, state and local agencies regarding assessments and analytical information relating to threats of terrorism and vulnerabilities. Under the Homeland Security Act of 2002, such material is protected from unauthorized disclosure (Sec. 203. Access to Information) and information shared with the Department of Homeland Security by the private sector, state and local governments, and individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism is not subject to public disclosure under the federal Freedom of Information Act. (Section 204. Information voluntarily provided.) Under HB 3009, which was adopted in the most recent legislative session, the State Freedom of Information Act was amended to protect information that may threaten the public health or safety if publicly disclosed. However, this protection may not apply, absent a statutory change, to information submitted under the State Air Pollution Control Act. See W. Va. Code §22-5-10(d)(added in HB 3155).

The WVMA believes that such security-sensitive information, when voluntarily provided, should clearly be determined to be protected under 45 CSR 31-4.1.e.2, as its disclosure would be detrimental to the public's and State's interests and would definitely "impair the State's ability to obtain necessary information in the future."

Accordingly, we urge the following addition as section 6 to the rule:

§45-31B-6. **Voluntarily Submitted Information.**

6.1. Information and data in the possession of the Secretary which has been determined by the U.S. EPA or the Department of Homeland Security to be protected information voluntarily submitted under 40 C.F.R. Part 2 or under the Homeland Security Act of 2002 dealing with infrastructure or other vulnerabilities to terrorism may be considered confidential by the Secretary. Where no prior federal determination has been made which can be taken into account, the Secretary will make a case-by-case determination based upon the claim and justification provided by the source as to such information under 45 CSR 31.

The WVMA appreciates this opportunity to share our concerns and suggestions regarding this proposed rule, and we support this effort by the DAQ to timely address these interpretive concerns. These determinations to disclose are of immense importance to our members who need both the maximum protection of such data allowed by law and clear guidance on what can and cannot be kept confidential.

Sincerely,

John K. Pitner

John K. Pitner
Air Team Leader
Environmental, Safety & Health
Committee of the West Virginia
Manufactures Association

cc: Karen S. Price, President, WVMA
Members, Air Team

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Mr. John A. Benedict, Acting Director
Division of Air Quality
West Virginia Department of Environmental Protection
7012 MacCorkle Avenue, SE
Charleston, WV 25304

Dear Mr. Benedict:

The U.S. Environmental Protection Agency (EPA) would like to thank you for the opportunity to review and to comment on the new proposed interpretive rule, 45CSR31B, entitled "Confidential Business Information and Emission Date." We have reviewed the documentation and have several observations that may be germane.

In particular, we have reviewed the proposed definition of "necessary" under West Virginia regulation 45-31B-2.2. Based on our reading of the second sentence of this proposed definition, it appears that West Virginia Department of Environmental Protection (WVDEP) may limit the public's ability to obtain emissions data submitted to the State by a source of air emissions.

Section 114(c) of the Federal Clean Air Act (CAA), 42 U.S.C. 7414(c), authorizes full disclosure to the public of any information that meets a broad definition of "emission data," as indicated by Congressional intent to preclude any air emission source from making a claim of confidential business information if such information is emission data. EPA's regulations on public information incorporate Congress's broad interpretation of emission data under the Agency's "special rules governing certain information obtained under the CAA," 40 C.F.R. §2.301 et seq. Section 2.301(a)(2)(i) includes in that definition not only the amount of actual or permitted emissions, but "information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions . . . (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source)."

WVDEP has included almost identical language in its present regulatory definition of "emission data" under 45-31B-2.1.a.1. and 2.1.a.2, with exceptions similar to those included in EPA's regulations (see 45-31B-2.1.b.). The new language included in WVDEP's definition of "necessary," in section 2.2, which states that "only the final series of calculations or parameters preceding the final emissions rate will be deemed "necessary" under this rule, appears to be inconsistent with the definition of emission data in section 2.1.a, which provides that any and all information necessary to calculate and determine any characteristics of the final emissions be available to the public (Region III emphasis added).

It is the Agency's position that the public has the right to all information, necessary to calculate air emission from sources, so that the public can replicate the source's final emission to assure compliance with legal requirements. State regulations that limit public access to such information would appear to be inconsistent with the CAA's mandate making such records "public information." Our own regulations do not define the term "necessary." We believe that it may be better to leave the term undefined so that the regulatory authority can make the determination of what is "necessary" to determine emissions on a case-by-case basis.

In addition, the first sentence of the proposed definition of "necessary" suggests that information that is "readily available" from a "non-confidential alternative" is not necessary to determine the emissions. We are unsure of the intended scope or impact of this language, but it appears to suggest that information might be withheld as not necessary, even if it were otherwise not suitable for treatment as "confidential information."

Region III would like to continue to work with WVDEP regarding the ongoing development of this confidential business information rule. Should you have any question or comments please contact Makeba A. Morris, of the Air Quality Planning and Information Services Branch, at 215-814-2187 or Robert J. Smolski, of the Office of Regional Counsel, at 215-814-2691.

Sincerely,

Judith M. Katz, Director
Air Protection Division

cc: Karen Watson, Executive Office

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West Virginia Department of Environmental Protection

Bob Wise
Governor

Stephanie R. Timmermeyer
Cabinet Secretary

RESPONSE TO COMMENTS—45CSR31B

The following is a response to the comments provided during the public comment period on the Division of Air Quality's ("DAQ's") proposed interpretive rule, 45CSR31B-- "Confidential Business Information and Emission Data." Written comments were accepted until March 21, 2003. No public hearing was held. There were three comments, each of which will be addressed below.

I. COMMENTER: West Virginia Chamber of Commerce ("the Chamber")

COMMENT A. *Actual versus Allowable Emissions.*

This comment recommends revising the definition of the term "types and amounts of air pollutants discharged" to exclude the entire paragraph pertaining to allowable emissions and further states that the agency's proposed rule correctly focuses upon actual emissions.

RESPONSE A. The Chamber has incorrectly characterized the agency's proposed rule; it does not focus on actual emissions ("actuals"). The proposed rule treats allowable emissions ("allowables") and actuals in an equal manner, as it must to be consistent with the underlying legislative rule, 45CSR31 ("Rule 31"). Both actuals and allowables are included in Rule 31's definition of the term "types and amounts of air pollutants discharged." An interpretive rule cannot be used to delete substantive language that is part of an existing legislative rule. It can only clarify and interpret existing law. Rule 31 is a legislative rule that has been law for ten (10) years. Removing the language pertaining to allowable emissions would alter, not clarify, existing State law.

Furthermore, the definition of the term "types and amounts of air pollutants discharged" in Rule 31 mirrors federal law, and removing the paragraph relating to allowable emissions would create

a major inconsistency between State and federal law.[1] As other commenters have noted in previous correspondence, State provisions relating to confidential business information need to be consistent with federal law, for at least two reasons: (1) data in the possession of the DAQ can also easily be in the possession of the U.S. Environmental Protection Agency ("EPA") and thus be potentially subject to disclosure under federal law; and (2) in order to obtain and retain delegated authority to administer federal Clean Air Act ("CAA") programs in lieu of EPA, State law needs to be consistent with federal. See West Virginia Manufacturers Association's ("WVMA's") October 28, 2002, letter submitted during the Advance Notice of Proposed Rulemaking on this issue.

Finally, the CAA and its underlying regulations specifically state that a State Implementation Plan ("SIP") is to include information on emissions actually emitted by a source as well as the allowable standards for that source and that this information is to be made available to the public. See CAA §110(a)(2)(F)(ii) and (iii) and 40 C.F.R. §51.116(c).

COMMENT B. *Definition of "Necessary".*

The Chamber agrees with the comment provided by the WVMA with respect to expanding the definition of "Necessary" in section 2.2 of the interpretive rule.

RESPONSE B. See Response to WVMA's Comments II.B through E below.

COMMENT C. *What Constitutes Emission Data.*

The Chamber supports the WVMA's suggestion that the agency consider 40 C.F.R. Part 51 as guidance, rather than wholesale adopting the federal regulations.

RESPONSE C. See Response to WVMA's Comment II.F below.

COMMENT D. *Contents of Permit.*

The Chamber recommends deleting section 4 of the proposed rule in its entirety to be more consistent with W.Va. Code §22-5-10. Section 4 of the proposed rule states that the contents of any air pollution control permit may not be claimed confidential.

RESPONSE D. First, concerning permits under 45CSR30 (Title V permits), the proposed rule parallels section 503(e) of the CAA, which specifically prohibits Title V permits from containing confidential information. EPA's implementing regulations repeat this prohibition. See 40 C.F.R. §70.4(b)(3)(viii). West Virginia has made an express commitment to follow this requirement in its Title V program. See Supplemental Attorney General's Statement, November 1994, pp. 13-16. The primary reason for not allowing pre-construction or New Source Review ("NSR") permits to contain confidential information is more practical -- if Title V permits

[1] The definition of the term "types and amounts of air pollutants discharged" under Rule 31 is virtually the same as the term "emission data" under 40 C.F.R. §2.301. The two terms will be used interchangeably throughout this document.

cannot contain confidential information, neither can the underlying NSR permit terms and conditions that will become "applicable requirements" in Title V permits.

In addition to the more practical problems presented by the NSR/Title V interface, there are public policy reasons for not allowing the conditions in any permit, no matter what its type, to be treated as confidential. These reasons were articulated in West Virginia's Title V program submission to EPA in the Supplemental Attorney General's Statement referenced above, pp. 13-16. That Statement said that a permit by its very nature could not contain confidential information, while recognizing that an application may. The Statement said, ". . . There is no expectation of privacy with regard to a permit issued by a regulatory agency." The Statement further said, "Permits are regulatory tools to enforce program requirements and are inherently public documents."

COMMENT E. *Information Determined Emission Data by EPA.*

The Chamber supports the WVMA's recommendations regarding this subject.

RESPONSE E. See Response to WVMA's Comment II.H below.

II. COMMENTER: West Virginia Manufacturers Association (WVMA)

COMMENT A. *General Comment—Rule 31 Revision.*

The WVMA requests the DAQ amend Rule 31, a legislative rule, to provide consistency with the newly amended provisions of W.Va. Code §22-5-10.

RESPONSE A. It is unnecessary to reopen Rule 31 to make it consistent with the new provisions of the Code. The only provision of the new Code changes that appears inconsistent with Rule 31 is the 30-day time frame for releasing public information after a determination by the Secretary, as opposed to the 10-day time frame found under Rule 31. These provisions are actually not conflicting, because Rule 31 states that the information may be disclosed at anytime "not less than ten (10) days." This means the information could be disclosed at anytime 10 days or later, even up to 30 days. Furthermore, the DAQ considers the more recent Code amendment of 30 days to control over a previously enacted rule addressing the same requirement.

COMMENT B. *Specific Comments—Definition of "Necessary"*

This comment concerns the definition of "Necessary" in subsection 2.2 of the proposed rule. The WVMA supports the proposed rule's approach of requiring disclosure only where "there is no readily available non-confidential alternative." The WVMA goes further to point out that the rule does not state who has the initial burden of demonstrating that a non-confidential alternative is not readily available and by what criteria the standard will be judged. The

WVMA believes the burden should be on the person requesting the information and that the standard requiring disclosure should be high, i.e., "by clear and convincing evidence."

RESPONSE B. Responding first to the "clear and convincing" issue, adding this language to the rule would create a significant new legal requirement where none currently exists, in either Rule 31 or the statute. An interpretive rule is not an appropriate mechanism to change or create new law. Moreover, adding such a requirement would create a major inconsistency between State and federal law.

Regarding the issue of who should have the burden of finding non-confidential alternatives, the agency, working with the permit applicant, is in the best position to find non-confidential alternatives to determining emissions. The agency has the resources and expertise to make this assessment, while the general public usually does not. Additionally, it is the agency's responsibility to establish monitoring methods in the first place, typically in the permitting process. In fulfilling its obligation to determine emissions monitoring methods, the agency is required by the CAA to impose methods that are both practical and enforceable. Thus, when a permit writer is presented with the issue of whether confidential information is "emission data," i.e., "information necessary to determine emissions," the question becomes whether the information is required to develop a practically enforceable permit. This question must be answered in the context of the applicable rules and standards against which compliance is being measured. These principles should assist in understanding the meaning of the terms "indispensable or essential" in the proposed rule and in evaluating alternative methods of determining emissions.

Consistent with the above, the agency has retained the language from the proposed rule relating to "indispensable or essential" and the concept of "non-confidential alternatives." The latter concept has been expanded somewhat to allow for the development of alternatives that may not be readily available, through the use of certain tools, as long as such use is consistent with applicable standards and results in a practically enforceable permit. Also, the final rule has been restructured to take the language relating to "Necessary" out of the definitions section and place it under section 4, the primary substantive section dealing with what constitutes "emission data."

COMMENT C. *Paragraphs under Definition of "Necessary."*

The WVMA proposes five (5) paragraphs under section 2.2, the definition of "Necessary." The first three paragraphs have their origin in EPA's general regulations on business confidentiality contained in 40 C.F.R. Part 2, Subpart B, §§201-300. More specifically, the first two paragraphs suggested by the WVMA (paragraphs 2.2.a and 2.2.b) deal with the procedural subjects of segregation of confidential from non-confidential information and ensuring that a confidentiality claim is as narrow as possible. The third paragraph suggested by the WVMA provides that the DAQ may disclose confidential information to the public only if the Director obtains the "prior written consent" of the affected business.

RESPONSE C. The WVMA's suggested language goes beyond the scope of the proposed interpretive rule, which is confined to the single issue of further defining what constitutes

"emission data." Moreover, it is unnecessary to address these issues in this interpretive rule because Rule 31 already covers them. See 45CSR §§31-3.3 and 3.4.

The WVMA cites general federal regulations pertaining to business confidentiality as authority for its suggested language, but the more pertinent federal regulations are EPA's regulations regarding the CAA and "emission data," found at 40 C.F.R. §2.301. This regulation overrides any more general authority to the extent there is a conflict. See 40 C.F.R. §2.202 (c). Indeed, the WVMA's suggested third paragraph requiring a business' consent before information claimed confidential may be released to the public contravenes the specific legal proposition found under both the federal and State air pollution laws that where information is "emission data," it cannot be claimed confidential. See 40 C.F.R. §2.301 and 45CSR §31-6.1.

COMMENT D. *Fourth paragraph under definition of "Necessary."*

The fourth paragraph the WVMA proposes provides examples of what information constitutes "readily available non-confidential data." The language includes two categories, the first being applicable emissions standards, rule-based limits, permit limits and limits in consent orders which specify the type and amount of emissions the source is authorized to emit and the second being emissions statements and reports listing the types and amounts of pollutants which have been emitted by the source.

RESPONSE D. The suggested language is unhelpful to further defining what is "emission data" because the language is circular, coming back to the very term being defined, "types and amounts of air pollutants discharged," or "emission data." The WVMA's suggestion would be sound only if the definition of "types and amounts of air pollutants discharged" said simply "types and amounts of air pollutants discharged means types and amounts (or other characteristics) of air pollutants discharged." It does not. The term is defined as "*the information necessary to determine*" types and amounts, a key distinction. This definition is consistent with the fact that in the air pollution arena, unlike other media, direct means of monitoring emissions are usually not available or economical, and it is therefore often necessary to use process and other detailed information to determine emissions.

COMMENT E. *Fifth paragraph under definition of "Necessary."*

The WVMA also suggests paragraph 2.2.e be included in the proposed rule. This paragraph deals with situations where the agency cannot find readily available non-confidential alternatives for determining emissions. In that case, the comment provides that only the final value multiplied against an emission factor will be deemed "necessary." The comment goes further to authorize the agency in using tools such as aggregation and surrogate values to afford as much protection as possible to confidential information.

RESPONSE E. This comment recognizes that there will be times when non-confidential alternatives are not readily available and suggests that the inquiry should not necessarily stop at this point. The agency agrees with this concept and has incorporated language in the final rule to specifically address this point. While the DAQ does not believe the particular language

pertaining to the "final value multiplied against an emission factor" to be appropriate, it does agree that the use of certain tools such as aggregating and surrogates can lead to viable alternatives for determining emissions, albeit not ones that are typical or readily available. Accordingly, the DAQ has revised the proposed rule to include the tools mentioned by the commenter as well as three additional ones that could be used to develop non-confidential alternatives. The final rule includes aggregation, categorization, surrogate parameters, emissions monitoring or sampling, and parametric monitoring, and provides a general description of each in the definitions section of the rule. These tools can, in proper instances, provide the public with information sufficient to determine emissions, although differing somewhat from the information used by the agency.

The agency believes this approach to be better than one that artificially limits the amount of information to "only the final series of calculations preceding the final emissions rate" (agency's proposed rule) or to "only the final value multiplied against an emission factor" (the WVMA's language). As EPA noted in its comments (see below), the definition of "emission data" requires that *any and all* information necessary to determine emissions be available to the public. Also, it should be noted that the most common methods of determining emissions, emission factors and material balances, involve only one series of calculations, making the language pertaining to a final series of little utility.

The agency has also included language in the final rule reflecting two principles that it believes should accompany the use of the five named tools for the reasons discussed in Response II.B above. One is that any alternative method chosen must be "practically enforceable," and the other is that the use of such tools must be consistent with any applicable rules or standards, e.g., aggregation can only be used when the applicable standard applies to an aggregate of emission units, as opposed to individual emission units.

COMMENT F. *Data Types Considered Non-Confidential.*

The WVMA suggests that section 3 of the proposed rule be made clearer that the fact that information appears on a list in the recent federal regulations at 40 C.F.R. Part 51 is not controlling, but guidance only, as to whether the information is in fact considered "emission data." The comment strongly supports section 3.3 with its statement that all determinations will be made on a case-by-case basis.

RESPONSE F. The agency intended that the federal list serve as guidance, and in order to ensure this result, has modified the final rule to include two of the commenter's suggested language changes. The agency did not adopt the other language suggested by the commenter, because it was not helpful in clarifying the meaning of the provision, but in fact, created further confusion.

With respect to language in section 3.1 of the proposed rule, the DAQ points out that it has moved the language pertaining to "applicability" of the rule to a separate section dealing with that issue. The DAQ intended the interpretive rule to apply to the submission of all information, just as Rule 31 does, but had only included language addressing this point in the paragraph

dealing with the federal list of data elements contained in 40 C.F.R. Part 51. The DAQ believed it necessary to clarify this point because the federal regulations were promulgated in the context of the emission inventory program, and without specific language in the paragraph, one might conclude that the paragraph's provisions were confined to information submitted under the emission inventory program. Upon further review of the rule, the DAQ recognized it was best to clarify that the rule applies to the submission of all information, no matter what program or context, by including an "applicability" section in the rule.

COMMENT G. *Contents of Permit.*

The WVMA agrees that Title V permits cannot contain confidential information under federal law, but disagrees that all permits, including NSR permits, must be treated in a similar fashion. The WVMA states that in any event it assumes the DAQ would not apply the provisions of section 4.1 to permits previously issued.

RESPONSE G. For an explanation as to why the DAQ believes this prohibition should apply to all permits, see Response I.D above. Regarding whether the DAQ would revise previously issued NSR permits to remove confidential information, there may be circumstances where this is an appropriate use of agency resources. Any such revisions would also serve to expedite the processing of companion Title V permits.

COMMENT H. *Information Determined Emission Data by EPA.*

The WVMA comments that section 5 of the proposed rule unlawfully delegates to EPA the authority to determine what is confidential. The WVMA also suggests clarification of the rule's language regarding the inclusion of information on the federal list without a case-specific determination.

RESPONSE H. With regard to the first issue, the Grinstead case cited by the WVMA is not applicable. The case stands for the proposition that the State cannot delegate power to the federal government by adopting laws or rules that are not yet promulgated. In this case, the applicable law already exists, both State and federal, and is in fact the same in both jurisdictions. The only purpose of this section is to say that when EPA has made a case-specific determination of the emission data issue, the State will conserve its resources and defer to EPA's determination. This is simply a matter of comity and convenience, and this type of arrangement could just as easily be included in a memorandum of understanding between EPA and the State. It can likewise be addressed in an interpretive rule giving guidance on how the State is going to carry out the "emission data" provisions of Rule 31. As far as the WVMA's suggested clarification of the second part of section 5, the agency agrees and has included the suggested language in the final rule.

COMMENT I. *Voluntarily Submitted Information.*

This comment deals with the issue of voluntarily submitted information and in particular information covered by the Homeland Security Act. The comment suggests language be included

in the interpretive rule providing that such information may be kept confidential, stating that a recent amendment to W.Va. Code §22-5-10 may mean that the exemptions under the State Freedom of Information Act ("FOIA") related to homeland security may not be applicable.

RESPONSE I. First, the issue of homeland security and confidentiality is much broader in scope than the proposed interpretive rule, which is limited to the issue of defining "emission data." Moreover, the DAQ is not certain the language recently added to W.Va. Code §22-5-10 is in fact problematic as it relates to the homeland security exemptions recently added to the State FOIA law. Even if it is subsequently determined that there is a problem, the DAQ questions whether the issue should be handled under the "voluntarily submitted information" portion of Rule 31. The EPA has been in the process of revising the federal counterpart regulation at 40 C.F.R. Part 2 as it relates to "voluntarily submitted information" for several years now, independent of any issues posed by the Homeland Security Act. For these reasons, the DAQ has not added the WVMA's suggested language to the interpretive rule.

III. COMMENTER: U.S. Environmental Protection Agency ("the EPA")

COMMENT A. *Definition of "Necessary."*

The EPA comments that the second sentence in the proposed rule's definition of the term "Necessary" is inconsistent with the definition of the term "emission data," which provides that any and all information necessary to calculate and determine any characteristics of the final emissions be available to the public. The EPA states that this provision may limit the public's ability to obtain emissions data. The commenter suggests that it may be better to leave the term undefined so the regulatory determination of what is "necessary" can be made on a case-by-case basis.

RESPONSE A. As discussed above, the DAQ has decided to remove the second sentence in the proposed rule's definition of "Necessary," and to instead expand upon language that will facilitate the development of non-confidential alternatives. As far as making the determination on a case-by-case basis, the DAQ agrees this is appropriate and refers the commenter to the language in section 4.4 of the rule.

COMMENT B. *Definition of "Necessary."*

The EPA comments that the first sentence in the definition of "Necessary" suggests that information that is "readily available" from a "non-confidential alternative" is not necessary to determine the emissions and that this may suggest that information might be withheld as not necessary, even if it were otherwise not suitable for treatment as "confidential information."

RESPONSE B. The language in the first sentence was intended to mean simply that information that had been claimed confidential would be deemed "emission data" when two conditions exist: first, when the information is indispensable to determining emissions, and

second, when there are no other readily available non-confidential alternatives. The language in the final rule has been changed slightly (section 4.1) and now more clearly expresses that meaning.