

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

FILED

1992 Sept 18

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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: 45CSR32

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: 45CSR32

TITLE OF RULE BEING PROPOSED: "Serious and Minor Violations of
Applicable Rules"

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 9:31
 OFFICE OF WEST VIRGINIA
 SECRETARY OF STATE

Rule Title: 45CSR32 - "Serious and Minor Violations of Applicable Rules"

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 1993-94	1994-95
Estimated Total Cost	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

West Virginia Code §16-20-8 requires the West Virginia Air Pollution Control Commission to define "serious" and "minor" violations of air pollution laws and regulations. No additional personnel are necessary to implement this legislative rule.

3. Objectives of these rules:

The primary objective of this rule is to define serious and minor violations as required by the provisions of the WV Code §16-20-8(a).

Appendix B
Fiscal Note For Proposed Rules
Page Two

4. Explanation of overall economic impact of proposed rule.

A. Economic impact on state government.

None.

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


None.

C. Economic impact on citizens/public at large.

None.

Date: September 18, 1992

Signature of agency head or authorized representative:



G. Dale Farley
Secretary
West Virginia Air Pollution Control Commission



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.

45CSR32

TITLE 45
LEGISLATIVE RULES
WEST VIRGINIA AIR POLLUTION CONTROL COMMISSION

SERIES 32
SERIOUS AND MINOR VIOLATIONS OF
APPLICABLE RULES

§45-32-1. General.

1.1. Scope. -- The West Virginia Air Pollution Control Commission hereby promulgates this legislative rule defining "serious violation" and "minor violation" for the violation of any provision of the Act, or for violation of any rules issued pursuant to the Act, or for the violation of any order, agreement, or permit, or any part thereof, issued under the Act.

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

1.3. Filing Date. --

1.4. Effective Date. --

§45-32-2. Definitions.

2.1. "Act" or "the Act" means the provisions of article twenty, chapter sixteen of the West Virginia Code, as amended. [§16-20-1, et seq.]

2.2. "Applicable Requirements" means all state, interstate compact, 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 technology guidelines, and 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.

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



RECEIVED

92 JUN -8 AM 10:43

WEST VIRGINIA
GASTON CAPERTON
GOVERNOR
AIR POLLUTION
CONTROL COMMISSION

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 9:32
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

RE: Proposed Rules - Title 45, Series 32 (Civil Penalties)

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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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

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- VI. Legislative Interims
- VII. Orders
- IX. Ethics Commission Opinions
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- XII. Publication Deadlines and Publication Dates

Do Not Mark In This Box

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION
Form #1

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION
Form #1

167 99 17 (V 1:4)

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

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

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.

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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

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
JUL 22 AM 11:18
REC'D

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.*

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 such 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.



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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OTHER

Commission Meeting Agenda
August 5, 1992
Page -2-

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

1558 Washington Street, East
Charleston, West Virginia 25310

TELEPHONE: (606)344-4022
or (606)344-1296
FAX: (606)344-1187

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.

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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 Intra-source 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.*

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 [Signature]
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

[Signature]
Notary Public of Raleigh County,
West Virginia

R/H

COPY OF PUBLICATION

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 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, County and State aforesaid, do hereby certify that the annexed

Notice of Public Hearing

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.

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 office of the West Virginia Air Pollution Control Commission, 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

State of West Virginia, County of Randolph, ss.

RECEIVED
92 JUN 29 12:08

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

19 92 as required by law.

Given under my hand this 24 day of June 19, 92

James Hoffman
Publisher

Printer's Fee: \$ 22.66

Subscribed and sworn to before me this 24 day of June 19, 92

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)

RECEIVED
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 ^{days} _{weeks}
in The Journal Publishing Company a newspaper published in the City of Martinsburg, W. Va., in its issue beginning

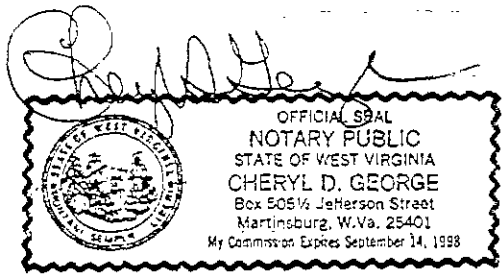
6/18.....
and ending

6/25.....

The Journal

Parula S. McCamey

Fee \$ 21.81



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

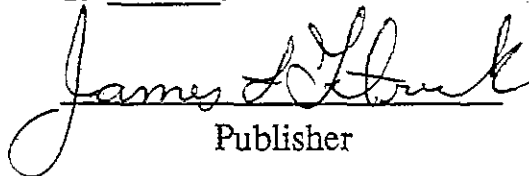
17th day of, June

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

RECEIVED

being first duly sworn, says that the

notice of public hearing -- AUGUST 5th

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

Robin 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:

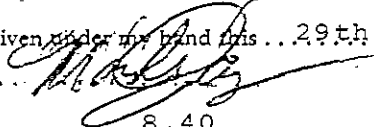
Mark Davis

.....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.....

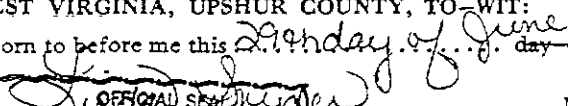


.....Advertising Manager

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.....



.....Notary Public.

My Commission Expires.....

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

.....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

1558 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
1558 Washington Street, East
Charleston, West Virginia 25311
(6-17-24)

NOTICE OF PUBLIC HEARING

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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 interest 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

RECORDED
92 JUL -1 AM 11:52
WEST VIRGINIA
AIR POLLUTION CONTROL 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

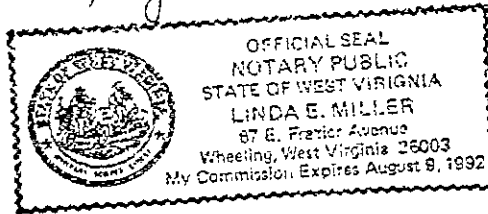
Sworn to and subscribed before me this 29th day of June 19 92 at WHEELING, OHIO COUNTY, WEST VIRGINIA

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, Delba R. 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

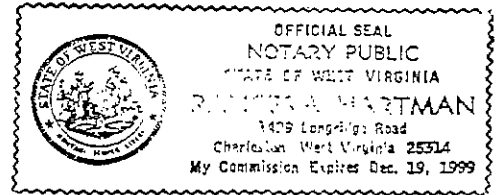
SUBSCRIBED AND SWORN TO BEFORE ME THIS

26TH DAY OF JUNE , 1992 .

Maureen R. Hartman

NOTARY PUBLIC OF KANAWHA COUNTY, WEST VIRGINIA

PRINTERS FEE \$ 30.84



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 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)

AFFIDAVIT OF PUBLICATION

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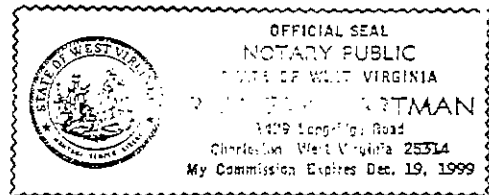
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G. Dale Farley
Secretary
West Virginia
Air Pollution
Control Commission
1558 Washington Street, East
Charleston,
West Virginia 25311
(901134)

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

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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	Monongahela Pover Fr 1310 Fairmount Ave Fairmount	
Robert L. Foster	Chas Ryan Assn Ches, WV	
Karyo M. Schmidt	600 United Cntr	Robinson; McElwee
Beland Huson	600 United Center	Robinson & McElwee
Missy Workman	1324 Virginia St. E.	WV - CAG
J. Hallman	Calwell Mc Cormick	405 Capital Dr Abingdon, VA
John Cumming	Robinson & McElwee	600 United Center
Karen Price	WNMA	WV A-Hill Capital Bldg.
Freddie A. Sizemore		
Hebbie Johnson	Chesaco Systems	

LEGAL DEPARTMENT



Monongahela Power Company

Part of the Allegheny Power System

1310 Fairmont Avenue
P. O. Box 1392
Fairmont, WV 26555-1392
(304) 366-3000

07573-1-1140 58

September 3, 1992

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

RE: **Comments on Administrative Penalties**
45 CSR 32

Dear Commission:

Enclosed for filing are the comments of Monongahela Power Company and The Potomac Edison Company on proposed rules for civil penalties. We appreciate the opportunity to comment.

Sincerely yours,

Gary A. Jack
Attorney

GAJ:drf
Enclosures

**COMMENTS OF MONONGAHELA POWER COMPANY AND
THE POTOMAC EDISON COMPANY TO CIVIL PENALTY REGULATIONS**

45 CSR 32

10:20
09/05/92 10:20
Monongahela Power Company and The Potomac Edison Company are electric utilities that generate, distribute and provide electric service to customers in central and northern West Virginia among other areas. Our comments to the proposed regulations on civil penalties are as follows:

Due to the discussions on these civil penalty rules at the public hearing on August 5, 1992 with the Commission in Charleston, our comments have been significantly modified.

First, our Companies feel there is no state statutory authority that would allow the imposition of this civil penalties rule. All legislative rules must have their genesis from a state statute providing for the promulgation of such a rule. In the Air Pollution Control statute such authority is not provided. Therefore, we feel the rule is unsupported by proper authority and is likely invalid.

More importantly, however, our Companies cannot envision significant benefits that would flow from these rules. During our discussions on August 5, it was stated that perhaps these rules might provide some structure and guidance for consent order settlements. However, these rules will also provide constraints upon the Commission and its Staff in being able to formulate acceptable settlements for parties in disputed matters. In other words, the Commission Staff might want to settle on certain grounds but cannot because it would be prohibited by these rules having been promulgated. In short, we do not feel that these rules will be helpful in settling disputed matters. Accordingly, it is our recommendation that these rules be withdrawn.

The following comments are made in case the Commission decides to promulgate these rules (which, of course, we do not advocate). If the Commission decides to withdraw the rules, then these additional comments should be ignored. Only if the rule is to be promulgated should these comments be considered.

Section 2.6 - Definition of Minor Violation. The definition includes the word "the first violation". This should be changed to read just "a violation". The rationale for deleting "the first" is that a separate violation could occur years later and it would automatically be considered a serious violation even if it meets the criteria of a minor violation.

Section 2.7 - "Serious Violation". Part (1) of the definition should be eliminated. A second violation of any act, rule or regulation should not automatically be a serious violation. Moreover, Part (3)a.D. takes into account whether or not it is a continuing violation. Additionally, we have no objection to adding a criteria for considering repeat violations as an addition under gravity of the violation. For example, (3) H could be added which states "the number of times the same violation is repeated".

Section 2.7d. We agree with the violation analysis contained in 2.7a, 2.7b and 2.7c. However, after setting forth the appropriate criteria to analyze and determine whether a serious violation has occurred, Section d deviates from this premise and is contrary to the analysis that all circumstances will be taken into account when determining whether it is a minor violation or a serious violation. For instance, Section d says that any reckless, grossly negligent or wilful violation automatically is serious. This does not take into account seriousness, harm and other circumstances that may have occurred. With Section dB, any harm automatically causes it to be a serious violation. It should be substantial harm, if this provision is to remain at all. Section dC states that whenever a standard is exceeded by

more than 30% it is automatically serious which again ignores various other circumstances. For instance, opacity can at times very easily exceed the standard by over 30%. In short, we support the analysis that incorporates all factors of culpability and gravity but there should not be certain performance, such as proposed in dA, dB, and dC, that automatically will cause a problem to be considered a serious violation.

Section 3.4. This language should be changed. The phrase "minor first violation" should be modified to "minor violation" in two places.

Section 3.5. The word "administrative" should be removed in the first line since these are not administrative penalties but are settlements of civil lawsuits.

Section 3.7. This Section has ranges for penalty amounts. These ranges should be changed to a maximum amount only. For example:

Class I violation shall be no more than \$5,000.

Class II violation shall be no more than \$7,000.

Class III violation shall be no more than \$10,000.

Section 3.8. The word "administrative" should be removed in the first line since these are not administrative penalties but are settlements of civil lawsuits.

Section 3.8d. Our Companies feel it is inappropriate to assess or determine a penalty based on economic benefit accrued. This has the potential to cause grave consequences for business and employment and is one in which we feel is almost impossible to calculate.

While we understand the purpose and intent behind such a provision, the implementation that could cause such drastic results as to warrant its deletion.

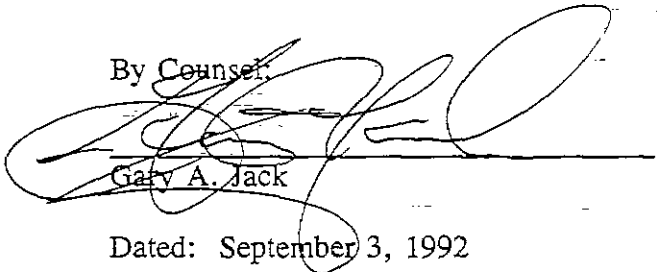
Monongahela Power Company and The Potomac Edison Company reserve the right to make additional comments and to amend, modify or delete the comments herein prior to issuance of acceptable final regulations. The submission of these comments is not intended as a waiver of any rights or privileges to which Monongahela Power Company and The Potomac Edison Company may be entitled by law, equity, practice or court order.

Monongahela Power Company and The Potomac Edison Company appreciate the opportunity to comment on these proposed regulations.

Respectfully submitted,

Monongahela Power Company and
The Potomac Edison Company

By Counsel:



Gary A. Jack

Dated: September 3, 1992



**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 32,
Civil Penalty Regulations

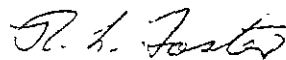
Dear Chairman Thomas:

Attached, please find for purposes of filing the comments of the West Virginia Manufacturers Association ("WVMA") regarding the Commission's proposed Series 32, "Civil Penalty Regulations."

The WVMA does not oppose the Commission's development of general guidelines or interpretive rules for use in negotiation of Consent Orders. However, the WVMA objects to the promulgation of these regulations as legislative rules until such time as the State Air Pollution Control Act has been amended to grant the Commission the necessary authority. In addition, the WVMA has made certain specific objections to the proposed regulations which would be relevant even if the necessary legislative authority were to be obtained.

The WVMA appreciates this opportunity to offer these comments to the Commission, and trusts as always that these comments will be given the Commission's due and deliberate consideration. Please contact me at 342-0161 at your convenience if you wish to discuss any of the comments in further detail.

Very truly yours,


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

RLF/bic
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
CIVIL PENALTY REGULATIONS
45 C.S.R. SERIES 32

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 32
"CIVIL PENALTY REGULATIONS"

The West Virginia Air Pollution Control Commission (the Commission) has proposed regulations concerning assessment of civil penalties.

These comments on those proposed regulations are filed on behalf of the West Virginia Manufacturers Association (the WVMA), 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 Regulations Exceed Statutory Authority.

The West Virginia Air Pollution Control Act (the Act) mandates adoption of regulations defining "serious and minor violations," but authorizes only the Kanawha County Circuit Court to fix penalties. Therefore, even though the Act, as a result of amendments adopted on March 7, 1992, provides that any "monies" received by the Commission as a result of a consent order are to be paid into the Air Pollution Education and Environment Fund, there is no statutory authority for imposition or collection of administrative penalties by the Commission or Director as embodied in the draft regulations.

The Commission is not empowered to promulgate rules with respect to or to impose administrative penalties on sources. Monies received in conjunction with consent orders

constitute agreed upon payments in settlement of enforcement disputes. They are not administrative penalties and cannot be imposed by the Commission upon a party without that party's agreement.

With respect to settlement payments, the most the Commission is authorized to do is issue interpretive rules that set forth the general bases on which sums may be deemed acceptable in arriving at consent order settlements. By establishing mandatory specific minimum amounts, these proposed regulations go beyond interpretive. Rather, they have become substantive.

Accordingly, these rules cannot legally be pursued as drafted. The Commission should revise the rules simply to define serious and minor violations for use by courts of law in imposing civil, not administrative, penalties.

The WVMA objects totally to the rules as proposed. Nonetheless, we are going to comment as if the statutory authority existed. However, such comments are not an indorsement of regulations which exceed statutory authority.

The Distinction Between "Serious" and "Minor" Violations is Unclear and Confusing.

Section 2.6., which defines "Minor Violations," on first reading seems to divide minor violations into two categories. The initial category appears to be "the first violation" of any specific provision of the Act, any regulations, or any permit, regardless of the cause. The second category appears to be any failure to comply with a final direct order of the Director where that failure is a result of simple negligence, oversight or accident "that is not considered serious by the director" under the factors provided in Section 2.7. of the regulations. (How the

director would offer any characterization to the court, the only legally authorized forum, is not explained. Presumably the director would have to be called as a witness.)

On the other hand, upon a second reading the definition for minor violation appears to say that any act of simple negligence, oversight or accident which results in a first violation of a specific provision of the Act, any regulations, any permit conditions, or a final direct order of the Director and which would not otherwise be a serious violation, shall be a minor violation. Or, stated another way, only an unintentional non-serious first violation shall qualify as a minor violation.

This second interpretation is supported by the fact that Section 3.4. calls for the Director "to first determine whether a violation is a minor first violation or is a serious violation." (Emphasis added.)

That support is enhanced by the first of three numbered types of "serious" violations established immediately below in Section 2.7. (We note that the division of serious violations into additional classifications upon which the amount of administrative penalties "shall range" also is beyond the scope of statutory authority, and would be even if the statute provided for imposition of administrative penalties.)

Minor Violations Should Not Be Limited To "First" Violations.

The WVMA believes that the arbitrary delineation of any "second or subsequent violation" as a serious violation is totally unreasonable and unnecessary since the number of past violations and similarity of recent previous violations are properly included in the factors to be considered in determining the amount of any penalty.

The first class of violations provides any second or subsequent violation of a specific provision of the Act, a rule or regulation, permit condition or final order is, by definition, a serious violation.

Class II violations are any violations specifically designated as serious violation in any rule or regulation of the Commission.

And Class III provides "any violation the director determines is serious after evaluating the violator's culpability and the gravity of the violation [as provided in subsections 2.7.a. and b.]" is also a serious violation.

Moreover, Section 2.7.d. mandates that any violation which causes actual harm to humans, animals or the environment, any act or condition which results in more than a 30 percent exceedance of any standards, or any reckless, grossly negligent or willful violation "shall" will be deemed serious regardless of other factors. Since this provision is part of 2.7. such violations, even if "first violations," apparently are ineligible for downgrading from serious to minor even if they otherwise meet the criteria of Section 2.6., "Minor Violations."

**Minor Violations Should Not Be Limited To "First" Violations;
Classifications Should Be On Overall Evaluation of Various
Factors.**

The arbitrary classification of "any second or subsequent violation of a specific provision" as a serious violation is unreasonable, unjustified, and unsupported by the language of §16-20-8 of the Act.

Section 16-20-8(a), which calls for the Commission to define serious and minor violations, states "[t]hat for the first such minor violation, if such person corrects the violation within such time as was specified in the notice of violation issued by the director, no such civil

penalty may be recovered." (Emphasis added). Further, the statute states that for "any serious or subsequent serious or minor violation" a party is liable for a civil penalty. (Emphasis added).

By the plain language of the statute, therefore, it is obvious that the legislature intended for the commission to adopt a broader definition of "minor" and did not intend the definition to be limited to an initial violation.

To effectively lump almost all violations into the serious category does not accomplish what the legislature directed.

Furthermore, such arbitrariness is unnecessary since the factors proposed for determining the amount of any penalty include consideration of past compliance history.

The WVMA strongly disagrees with such an arbitrary, restrictive definition of minor violations and urges revision to a much broader definition in order that West Virginia might have the opportunity for a fair, equitable enforcement program based on an analysis of all facts and circumstances.

"First Violation" Needs Additional Definition and Should be Time Restricted.

As stated above, the WVMA believes strongly that the "first violation" distinction should be deleted from these regulations. Nonetheless, since this is the only opportunity to address the regulations as proposed, we will comment on the "first violation" provisions as they exist. These comments are not to be considered an endorsement in any manner.

As proposed, the regulations make a distinction between minor violation and serious violation on the basis of whether a particular violation is "the first violation of a specific provision" (Section 2.6.) as opposed to "any second or subsequent violation of a specific provision" (Section 2.7.). If retained, this distinction needs additional delineation.

First, there should be some time limit placed on the provisions so that a second violation of a specific provision significantly remote in time, for instance two years, from the first violation would not automatically be deemed a serious violation.

Additionally, only those violations which occur after the effective date of these regulations should be considered in determining whether a violation is a "first violation."

Thirdly, as the regulation is currently drafted, it is unclear what constitutes "a specific provision" for purposes of a "first violation" determination. It should be limited to a violation of the same requirement, (i.e. emission limit, reporting obligation, permit condition.).

Finally, it also is unclear whether each of several operating locations throughout the state, or each operation unit throughout large facilities, would be considered independently or as a single entity for purposes of a "first violation." Any application broader than single operating units would be grossly inequitable.

Sections Limiting Director's Discretion Should be Deleted.

An additional conflict involves Subsection 2.7.a.A., where actual harm is given as a factor to be considered in determining gravity, and Subsection 2.7.d.B., which states that any act or condition which results in actual harm "shall" be determined to be serious regardless of the presence of any other factors.

The WVMA urges that Subsection 2.7.d. be deleted in its entirety as unnecessary in light of Subsection 2.7.a.A and Subsection 2.7.c., which allows the Director to determine a violation is serious based on even one factor under either the gravity or culpability factors. If the Director is to be given such broad discretion, it is unnecessary to restrict that discretion by

mandating a finding of seriousness on the basis of any actual harm or any other single factor.

Subsection 2.7.d. should be deleted.

Minimum Penalties Should Be Eliminated.

The minimum penalties based on violation classes should be eliminated. The proposed regulations would impose a minimum \$1,500 fine for each day of any violation other than a "minor first violation." Particularly with reference to violations which pose "little or no risk of harm" (3.5.a.B), such automatic minimum penalties are unjustified and too restrictive. Overall consideration of the factors provided is a more rational approach and will provide sufficient basis for determination of fair, effective penalties.

Knowledge Should be Required Before Liability Attaches For Not Reporting Conditions Resulting From Causes Beyond An Alleged Violator's Control.

Section 2.7.e. should be changed by inserting the words "upon discovery" so that there is no violation for conditions caused by acts of God, etc. "unless the alleged violator does not immediately **upon discovery** report the condition and act promptly to mitigate or cure the condition."

Objective Evaluation of Inspector's Findings Should Precede Issuance of NOV or Penalty Documents.

The proposed regulations should be amended to provide an objective preview of the department's information and the inspector's findings before issuance of any Notice of Violation or penalty documents. Such procedure should be similar to that outlined in the West Virginia Groundwater Protection Act, §20-5M-10. This review should be by an assessment officer who works directly under the Director, is not charged with enforcement responsibilities, and has the obligation to objectively advise the director in writing concerning issuance of such

documents. Such practice would reduce the burden on both the regulators and the regulated by reducing the likelihood of initiation of unjustified enforcement actions.

Appeal Procedures Should Be Included.

A provision should be added to the regulations to provide that any appeal from a determination on a civil penalty shall be in accordance with the provisions of §16-20-7 of the Air Pollution Control Act.

The Proper Standard for Violation Classifications Is Risk to the Environment or Public Health.

The term "and safety" should be deleted from both Section 3.5.a.B., dealing with Class I violations, and Section 3.5.b., dealing with Class II violations. The proper standard, risk of harm to the environment or public health, would remain.

A Threshold Amount of Harm Should be Required.

Section 3.5.c.A. should be amended to insert the word "substantial" to restrict its applicability to "any violation that poses a major risk of substantial harm or that causes **substantial** actual harm to the public health or the environment." This is necessary since arguably, any emissions violation will cause some actual harm, even if no more than microscopic. Therefore, unless the degree of required harm is quantified in some manner, the provision is overly broad.

Mandated Penalty Factors Should Be Reduced, Clarified.

The number of factors which the Director is required to address under Section 3.8. are so numerous that they will be unworkable and meaningless. Furthermore, the mandate to address so many factors, many of which may be inappropriate in a given situation, will tend to create unnecessary controversy.

"Cost of Enforcement" Should Be Limited.

Section 3.8.j. requires consideration of cost of enforcement as a factor "in mitigation or aggravation." That cost would include "actual costs incurred after the person has been notified of the violation and may include sampling and analysis, evaluation of the person's property or facility, preparation of enforcement documents and acts, and similar costs."

The WVMA objects to this concept because it places a chilling effect on the accused party's rights to contest an alleged violation by placing on that party not only the costs of its own good faith defense but also the cost of the state relating to any negotiations or prosecution. This is patently unfair.

Consecutive Days of Violation Should Not Be An Enhancement Factor.

Consecutive days of violation are designated as separate violations under both §16-20-8(d) of the Act and Section 3.3. of the proposed regulations. Therefore, they should be deleted as an enhancement factor under Section 3.8.a.

History of Violations Should Be Limited.

Section 3.8.f. should be specifically limited to allow only consideration of any history of past violations of requirements under the Act as an enhancement or mitigation factor. Further, it should be limited to the alleged violator's history for the 24 months immediately preceding the alleged violation. This would provide a reasonable recognition and encouragement for improvements in performance over time.

Any Interest Factor Applied to Economic Benefits Should Reflect Market Rates.

Subsection 3.8.d. mandates "interest, at a minimum of ten percent (10%) per annum, on the funds not expended that would have been necessary to timely comply with applicable requirements." If interest is to be applied to such sums, it should be keyed to actual interest rates available during the period of non-compliance and should not contain an artificial minimum with no maximum.

An Administrative Civil Penalty Should Bar Any Further Penalties for the Violation.

The proposed regulations should be amended to provide that any civil penalties imposed under these regulations shall be in lieu of any other penalties for the same violation.

Respectfully submitted this ____ day of _____, 1992.

STAFF RESPONSES
TO COMMENTS OF
THE WEST VIRGINIA MANUFACTURERS ASSOCIATION
REGARDING PROPOSED 45CSR32
"SERIOUS AND MINOR VIOLATIONS OF APPLICABLE RULES"

COMMENT 1. The regulation exceeds statutory authority.

The WVMA expressed concern regarding the ability of the Office of Air Quality to impose administrative penalties on air emission sources.

In response to this comment, weighting factors involving the seriousness of a violation and factors for the chief to consider when determining an appropriate penalty were deleted.

The focus of the regulation was adjusted to define "serious" and "minor" violations consistent with the legislative mandate in W. Va. Code §16-20-8.

COMMENT 2. The distinction between "serious" and "minor" violations is unclear and confusing.

In response to this comment, the definition of "serious" was expanded to include certain factors considered by U.S. EPA in its guidelines to determine "significant violators". In addition, "minor violation" is defined and designed as a catchall to include all those matters which do not fall under the "serious" definition.

COMMENTS 3 AND 4. Minor violations should not be limited to "first" violations. Classification should be on overall evaluation of various factors.

This agency agrees. "Minor second violations" have been excluded from the definition of "serious violation". "Minor" has been changed and is not limited to initial violations.

Further, the term "serious violation" has been further defined to that which causes "significant harm".

COMMENT 5. "First Violation" needs additional definition and should be time restricted.

This agency agrees the "first violation" distinction for minor violations should be eliminated from these rules, except as contained in section 4.3 which involves separate violations.

COMMENT 6. Sections limiting director's discretion should be deleted.

The referenced section (now 3.1.j) has been changed such that "significant actual" harm must be shown to trigger a serious violation under this particular provision.

COMMENT 7. Minimum penalties should be eliminated.

In conjunction with the response to Comment 1, sections involving penalties, and the determination thereof, have been deleted from this rule.

COMMENT 8. Knowledge should be required before liability attaches for not reporting conditions resulting from causes beyond an alleged violator's control.

The WVMA's suggested provision that violations occur "upon discovery" seems overly broad. However, the point is well-taken and language has been inserted such that the violator must "know or should have known". (Now subsection 3.2)

COMMENT 9. Objective evaluation of inspector's findings should precede issuance of NOV or penalty documents.

See Comment 7.

COMMENT 10. Appeal procedures should be included.

See Comment 7.

COMMENT 11. The proper standard for violation classification is risk to the environment or public health.

See Comments 1 and 7. Violation classifications for penalty purposes were deleted from this rule.

COMMENT 12. A threshold amount of harm should be required.

The cited provision in violation classifications has been deleted from the current rule.

COMMENT 13. Mandated penalty factors should be reduced, classified.

See Comment 7.

COMMENT 14. "Cost of enforcement" should be limited.

See Comment 7.

COMMENT 15. Consecutive days of violation should not be an enhancement factor.

The enhancement factor referenced was in regard to weighting factors for determined appropriate civil penalties. References to determinations of civil penalties have been deleted from this rule.

COMMENT 16. History of violations should be limited.

See Comment 15.

COMMENT 17. Any interest factor applied to economic benefits should reflect market rates.

See Comment 7.

COMMENT 18. An administrative civil penalty should bar any further penalties for the violation.

See Comment 7.

**STAFF RESPONSES
TO COMMENTS OF
MONONGAHELA POWER COMPANY AND THE POTOMAC EDISON COMPANY
REGARDING PROPOSED 45CSR32
"SERIOUS AND MINOR VIOLATIONS OF APPLICABLE RULES"**

COMMENT 1. There is no State statutory authority for such a rule.

The WVMA expressed concern regarding the ability of the Office of Air Quality to impose administrative penalties on air emission sources.

In response to this comment, weighting factors involving the seriousness of a violation and factors for the chief to consider when determining an appropriate penalty were deleted.

The focus of the regulation was adjusted to define "serious" and "minor" violations consistent with the legislative mandate in W. Va. Code §16-20-8.

COMMENT 2. That the rule will provide unnecessary constraints on the chief in matters of settlement.

In conjunction with the response to Comment 1, sections involving penalties, and the determination thereof, have been deleted from this rule.

COMMENT 3. Definition of "minor violation" to include only a first violation of a specific provision is unfair.

The reference to first violation has been deleted except in reference to 4.3. The definition of minor violation has also been changed.

COMMENT 4. Part of the definition of "serious violation" should be eliminated which denotes any second violation of an applicable provision as a "serious violation".

The applicable provision was deleted.

COMMENT 5. In setting forth the criteria for "serious" violation, section 2.7.d deviates from the weighting factors in 2.7.a, 2.7.b, and 2.7.c (all now under 3.1).

This section has been expanded such that "serious violation" is more clearly delineated. In addition, the weighting factors have been retained. The agency believes that the situations outlined in subsection 3.1 are "serious" without weighing other provisions.

Also, the rule has been changed from any harm to "significant actual harm".

The thirty percent (30%) requirement referred to by the commentor has been deleted.

COMMENT 6. "Minor first violation" language should be changed to "minor violation".

This agency agrees.

COMMENT 7. References to "administrative" penalties should be deleted.

In response to this comment, the definition of "serious" was expanded to include certain factors considered by U.S. EPA in its guidelines to determine "significant violators". In addition, "minor violation" is defined and designed as a catchall to include all those matters which do not fall under the "serious" definition.

COMMENT 8. Minimum ranges for penalty amounts should be deleted.

See Comment 7.

COMMENT 9. "Administrative" should be removed in reference to negotiated settlements of consent order penalties.

See Comment 7.

COMMENT 10. It is inappropriate to base a penalty on economic benefit accrued.

See Comment 7.



West Virginia Department of
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Air Pollution Control Commission

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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.

45CSR32
SIGNIFICANT CHANGES MADE TO
PROPOSED
"SERIOUS AND MINOR VIOLATIONS OF APPLICABLE RULES" REGULATION
AS A RESULT OF COMMENTS OR COMMISSION ACTION

ONE. As a result of comments received, (see Comments of the West Virginia Manufacturers Association and Comments of Monongahela Power Company) the focus of the rule was adjusted. The original focus of the rule was the promulgation of definitions of "serious" and "minor" violations coupled with the use of these definitions to assess and/or negotiate agreed civil penalties.

The concept of guidelines for negotiated civil penalties was deleted from the rule in response to the above comments. However, the Commission is mandated by the provisions of W. Va. Code §16-20-8 to define "serious" and "minor" violations. Thus, the title of the rule was changed from "Civil Penalties" to "Serious and Minor Violations of Applicable Rules".

Subsection 1.1 "Scope" was accordingly changed to reflect the above.

TWO. Changes in nomenclature were made in response to the Governor's Executive Order 8-92 (e.g. "director" changed to "chief".) See changes in definitions 2.3, 2.5, and 2.6. Note "Staff Response to Governor's Executive Order 8-92".

THREE. The definition of "minor violation" contained in subsection 2.7 was modified to become a catchall for all those violations not defined as serious. References to "minor first violations" were deleted. The definition of "serious violation" was expanded to include its own section (three) and numerous additional circumstances to be considered as serious violations as adapted from U.S. EPA's guidelines for "significant violators". See Response to Comments WVMA and Monongahela Power.

FOUR. The definition of "serious violation" as now contained in section three deletes the phrase "any second or subsequent violation of a specific provision of the Act, or rule or regulation promulgated under the Act, or any permit condition or limitation established pursuant to the Act, or a failure or refusal to comply with any final order of the director issued as provided in the Act".

As per number three, the definition has been expanded for sake of clarity.

FIVE. The previous section three entitled "Civil Penalties" has been deleted. See number one.

SIX.

A section entitled "Separate Violations" has been added to inform the reader of provisions of the W. Va. Code regarding separate violations. In addition, some language adapted from the Code informs the reader that a first minor violation, upon notice and correction, is not subject to a civil penalty.

SEVEN.

A severability section has been added as boilerplate to be consistent with other regulations of the Commission.

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

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I N D E X

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<u>Witnesses:</u>	<u>Direct</u>
Robert L. Foster	11
Jacqueline A. Hallinan	14
Robert L. Foster	33
Roland Houston	34
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P R O C E E D I N G S

(11:25 A.M.)

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

17 MR. FARLEY: In the last legislative session some
18 changes were made to the code and there were changes made
19 in reference to data reports and files and so forth, files
20 with the agency. And pursuant to that the commission was
21 put in position of needing to develop a rule that would
22 describe how confidential information would be shared
23 particularly with employees of the--this is what brought
24 this about anyway, but particularly with the employees of
25 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

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
11 confidentiality 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.

A.C.R.

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DR. WALLACE: Yeah.

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

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

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

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

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

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

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

MR. KOPELMAN: No.

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

A.C.R.

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

A.C.R.

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

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 showing
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

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

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.

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MR. BENEDICT: I thought the penalty rate changed.

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

MR. BENEDICT: Interest.

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

DR. WALLACE: According to--

MR. SUITOR: In the alternative.

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

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

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

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

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

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

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

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.

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.

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

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

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

MR. KOPELMAN: Okay.

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

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

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

MR. KOPELMAN: All right.

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

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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MR. KOPELMAN: Let me back up then.

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

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

MR. HOUSTON: Okay.

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

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

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

MR. HOUSTON: Consent order is between the--

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

MR. HOUSTON: Correct.

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

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

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

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

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

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

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

MR. HOUSTON: That's right.

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

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

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

MR. HOUSTON: Correct.

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

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

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

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

An interpretive rule gets a little grayer. The code says that you don't have to go through the rule making 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?

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

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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 caldron approach. These
17 guidelines give you the caldron 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

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.

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REPORTER'S CERTIFICATE

1
2
3 STATE OF WEST VIRGINIA;
4 COUNTY OF KANAWHA, to-wit:
5

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

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

16 I further certify that I am not connected by blood or
17 marriage to any of the parties to this action, am not a
18 relative or employee or attorney or counsel of any of the
19 parties, nor am I a relative or employee of such attorney or
20 counsel, or financially interested in the action, or
21 interested directly or indirectly in the matter in
22 controversy.
23
24
25

A.C.R.

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

Tracy Rae Dunlap

Tracy Rae Dunlap, Court Reporter
and Notary Public

My commission expires January 27, 2002.

A.C.R.