

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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FILED

Jan 19 2 02 PM '96

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

Bureau of the Environment
AGENCY: Air Quality Board TITLE NUMBER: 52
CITE AUTHORITY: W. Va. 29-B-1 et seq. & 29-3-3
RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW _____

AMENDMENT TO AN EXISTING RULE: YES _____, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 2

TITLE OF RULE BEING ADOPTED: Rules on Requests for Information
(FOI)

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS February 18, 1996

Ann L. Septon



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

GASTON CAPERTON
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.
COMMISSIONER

January 18, 1996

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

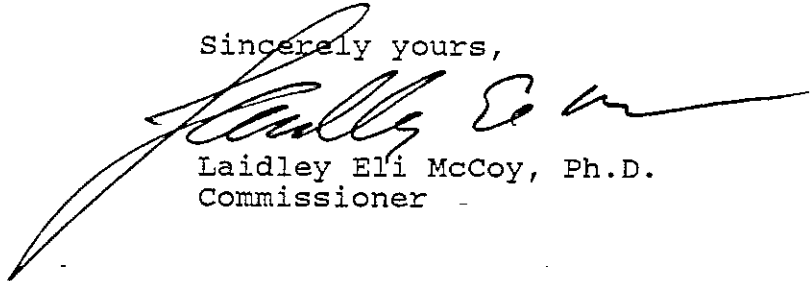
RE: 52-CSR-2 - "Procedural Rules on Requests for
Information"

Dear Ms. Cooper:

This is to advise you that I am giving approval for the filing of the above-captioned rule as a FINAL rule with your office and Legislative Rule-Making.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Roger T. Hall at 759-0515.

Sincerely yours,


Laidley Eli McCoy, Ph.D.
Commissioner

LEM:jrb

Attachment

FILED

TITLE 52
PROCEDURAL RULES
AIR QUALITY BOARD

JAN 19 2 02 PM '96

SERIES 2
RULES ON REQUESTS FOR INFORMATION

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§52-2-1. General

1.1. Scope. -- These rules prescribe the procedures under which the public may inspect and obtain information and records generated, developed or held by the Air Quality Board (the "Board"). These rules do not apply to the disclosure of information to any officer, employee or authorized representative of the state or federal government.

1.1. Authority. -- W. Va. Code 29B-1 et seq. and 29A-3-3.

1.3. Filing Date. -- January 19, 1996.

1.4. Effective Date. -- February 2, 1996.

§52-2-2. Definitions.

2.1. For the purpose of these rules:

(a) "Act" means the Freedom of Information Act, Chapter 29B, article 1 of the West Virginia Code.

(b) "Board" means the Air Quality Board located at 1615 Washington Street, East, Charleston, West Virginia 25311-2126.

(c) "Record" means any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics which are in the possession of the Board, but, does not include materials that are the personal property of a Board employee and does not include materials which are copyrighted or are readily available to the public such as books, journals and periodicals.

(d) "Request" means a written request made in accordance with these rules of procedure to inspect or obtain a copy of one or more records.

(e) "Requestor" means any person, including any natural person, corporation, partnership, firm or association, who has submitted a request to the Board.

§52-2-3. Policy on Disclosure.

(a) All Board records shall be available to the public unless they are exempt from the disclosure requirements of the Act.

(b) All nonexempt records shall be available to the public upon request regardless of whether any justification or need has been shown by the requestor and regardless of whether or not the request cites the Act.

§52-2-4. Form of Request.

A request shall be made in writing, shall reasonably describe the records sought in a way that will permit their identification and location, and should be addressed to the Air Quality Board, 1615 Washington Street, East, Suite 301, Charleston, West Virginia 25311-2126.

§52-2-5. Requests Which Do Not Reasonably Describe Records Sought.

If the description of the records sought in the request is not sufficient to allow the Board to identify and locate the requested records, the requestor will be notified within five working days that the request is denied until additional information is provided in an amended request. Until such additional information is provided, the Board has no further obligation to fulfill the request.

§52-2-6. Misdirected Requests; Oral Requests.

The Board cannot assure that requests received in a manner inconsistent with these rules will be answered in a timely fashion. The five-day period, as provided for in these rules of

procedure, shall begin at the time the Board receives the request. Oral or phone requests for the records may be honored if followed by a written request.

§52-2-7. Responsibilities of the Board.

(a) The Board shall, upon receipt of a written request, mark the request with the date of receipt and begin to identify and locate the requested information or ask for a more specific request.

(b) The Board shall respond in writing to the requestor within five working days of the receipt of the request. Such response shall:

- (i) Furnish copies of the requested information;
- (ii) Advise the requestor of the time and place at which he/she may inspect and copy the information;
- (iii) Deny the request in accordance with these rules of procedure; or
- (iv) Notify the requestor that the records require more than five days to assemble, and identify an approximate date of completion of the request.

§52-2-8. Denials of request.

- (a) Denials of requests may be issued only in the following circumstances:
- (i) the requested record is not known to exist;
 - (ii) the record is not in the Board's possession;
 - (iii) the record is exempt from disclosure under the Act; or
 - (iv) the description of the record sought in the request is not sufficient for the Board to identify and locate the record.
- (b) Written notification informing the requestor of the denial must be sent

within five days of the Board's receipt of the request. The notification must state the following:

- (i) the reason for the denial;
- (ii) that the agency's responsibility to provide information is at an end; and
- (iii) that the requestor may pursue injunctive or declaratory relief in the circuit court in the county where the public record is kept.

§52-2-9. Exemptions.

The following categories of information are specifically exempt from disclosure under the provisions of the act:

(a) Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors; provided that in no case shall the types and amounts of air pollutants discharged as defined in 45 CSR 31-2.6 and submitted pursuant to Chapter 22, Article 5 of the West Virginia Code be considered trade secrets under this paragraph.

(b) Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance; provided, that nothing in this article shall be construed as precluding an individual from inspecting or copying his own personal, medical or similar file;

(c) Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination;

(d) Records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters relating to law enforcement;

(e) Information specifically exempted from disclosure by statute;

(f) Records, archives, documents or manuscripts describing the location of undeveloped historic, prehistoric, archaeological, paleontological and battlefield sites or constituting gifts to any public body upon which the donor has attached restrictions on usage or the handling of which could irreparably damage such record, archive, documents or manuscript;

(g) Information contained in or relating to examination, operating or condition reports prepared by, or on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions, except those reports which are by law required to be published in newspapers; and

(h) Internal memoranda or letters received or prepared by any public body.

§52-2-10. Partial Disclosure.

If a requested record contains both exempt and nonexempt material, to the extent practicable, the nonexempt material shall be disclosed after the exempt material has been deleted.

§52-2-11. Fees.

Fees will be charged requestors for searching for and reproducing requested records, in accordance with the following:

(a) Copying costs including the certification of a record to circuit court, shall be twenty-five cents (\$0.25) per page provided that if the total cost is less than \$2.50, there shall be no charge.

(b) The charge for copying materials that must be reproduced outside the Board's facilities shall be the actual cost of such copying.

(c) A fee of twenty-five (\$25.00) per hour or fraction thereof shall be charged for the agency's time spent in locating and duplicating the requested records beyond the initial quarter hour used to locate such records.

(d) An invoice for the total amount of fees will be sent to the requestor. Payment shall be made by check or money order made payable to the Air Quality Board.

(e) Total or partial prepayment may be required if the Board determines that the unpaid fees attributable to one (1) or more requests by the same requestor exceed or will exceed ten dollars (\$10.00).

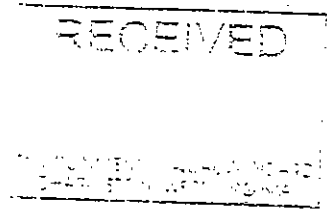
(f) The Board may waive the fees prescribed by these rules upon written request by a person requesting documents who shall state that he or she is unable to pay such fees.

Appalachian Power Company
PO Box 1000
Roanoke VA 24020-2121
703 985 2000



OVERNIGHT

Ms. Frances E. Hunter
Air Quality Board
1615 Washington Street, East
Suite 301
Charleston, West Virginia 25311-2126



Re: Comments of American Electric Power and
Appalachian Power Company on Amendments
to 46 CSR 8 and New Rule 52 CSR2: Regulations
on Request for Information - Freedom of Information Act

July 20, 1995

Dear Ms. Hunter:

On behalf of American Electric Power Service Corporation and Appalachian Power Company, I offer the attached comments on the West Virginia Bureau of the Environment, Environmental Quality Board's (EQB)/Air Quality Board's (AQB) proposed amendments/rules of Requests for Information (FOI). I would like to offer our appreciation for the opportunity to submit these comments and I look forward to a continued good relationship between our companies and the Bureau of the Environment.

If you have any questions concerning our comments, please contact Mr. Timothy P. Mallan of my staff at (540) 985-2367.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Robinson".

Robert J. Robinson
Environmental Affairs Director

RJR:d
Attachment

COMMENTS OF AMERICAN ELECTRIC POWER ON
THE PROPOSED REGULATIONS ON REQUEST FOR
INFORMATION - FREEDOM OF INFORMATION ACT
46 CSR 8 AND 52 CSR 2

Introduction

The American Electric Power Corporation, a holding company for the Appalachian Power Company, presents the following comments to the proposed amendment/rule, Regulations on Request for Information-Freedom of Information Act (FOI), of the Environmental Quality Board/and the Air Quality Board.

Comments

The Company has reviewed the proposed, but distinct, Regulations on Request for Information (FOI), which is either an amendment to the Environmental Quality Board's (EQB) 46 CSR 8, or a guide (52 CSR 2) to the Air Quality Board (AQB) and to private individuals for handling or making requests for information, as well as a fee schedule for the requests. We support the EQB's amendments and the adaptation of these rules into the procedures of the AQB and make note of the below referenced sections.

EQB §46-8-9(h) and AQB §52-2-9(h). Exemptions. These sections exempt "Internal memoranda or letters received or prepared by any public body." These types of documents would appear to be those which are reasonable and appropriate information for discovery, and should be subject to review.

EQB §46-8-11(e) and AQB §52-2-11(e). Fees. There appears to be a lack of uniformity in the State rules for assessing total or partial payment of fees generated by requestors. In the proposed Environmental Quality rules for fees, full or partial payment may be required when services exceed \$10.00, whereas, in the proposed Air Quality rules, full or partial payment is not triggered until fees exceed \$25.00. These fees should be similar.

Conclusion

The Company appreciates this opportunity to comment on this proposal and looks forward to the continuance of a good working relationship with the Division.

RECEIVED

Amended!

Comments by Ohio Valley Environmental Coalition regarding:
changes to FOIA rules for EQB (46 CSR 8),
adoption of FOIA rules for AQB (46 CSR 2)

ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

Ohio Valley Environmental Coalition
Lewis Baker, Chair
2630 Collis Ave.
Huntington WV 25702
304-522-9124 (voice and fax)

- 2.1 (e); Public interest groups should be added to the definition of "requestor"
- 3. (a) Add: "The Board shall list the title and date of all records which are determined to be exempt, stating the reason(s) for each exemption.
- 10. Add: "The Board shall list all records which have partial disclosures, stating the reason(s) for deleting (redacting) portions of a record.
- 11. (a) Twenty five cents per page is too high. Waiver of the fee for the first ten pages is too miserly. Federal FOIA rules allow for no charge for the first 100 pages.
- 11. (c) Twenty five dollars per hour, with the first quarter hour for free is also too expensive. Federal FOIA rules allow for the first two hours of search time to be free.
- 11.(f) Fees may be waived if a "person" requests it, however "person" is not defined. Public interest groups, the news media, educational and scientific research institutions as well as individual citizens should be eligible for fee waivers. Corporations should not be considered to be "persons".

Respectfully,

Lewis A. Baker, Chair
OVEC Board of Directors

FAX

DATE: Friday, July 21, 1995
TO: Fran Hunter, BOE EQB, BOE AQB
FAX: 1-304-538-4116
FROM: Kim Baker
PAGES: 2

MEMO

Amended comments (includes my address for your response)

RECEIVED
ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

RESPONSE TO COMMENTS

1. Comments from the American Electric Power Corporation

A. The American Electric Power Corporation commented that § 48-8-9(h), which exempts "Internal memoranda or letters received or prepared by any public body", should not exempt these documents. The Commentor stated that these documents "would appear to be those which are reasonable and appropriate information for discovery, and should be subject to review."

RESPONSE: The exception listed in § 48-8-9(h) parallels the exemption provided by the West Virginia Freedom of Information Act, W.Va. Code § 29B-1-4(8) and is a proper exemption in the rule.

B. The Commentor stated that § 52-2-11(e) lacks uniformity with proposed Environmental Quality Board rule § 46-8-11(e). The Environmental Quality Board's rule states that full or partial payment may be required when services exceed \$10.00. However, under § 52-2-11(e), full or partial payment may be required when services exceed \$25.00. The Commentor suggested that these fees be uniform.

RESPONSE: The Air Quality Board's rule, § 52-2-11(e) will be modified so that it will be uniform with the Environmental Quality Board's rule § 46-8-11(e) which triggers the full or partial payment when services will exceed \$10.00.

2. Comments from the Ohio Valley Environmental Coalition

A. The Commentor stated that "public interest groups" should be added to the definition of the requestor.

RESPONSE: The definition of "requestor" includes any "association" which is broad enough to cover public interest groups.

B. The Commentor stated that an addition should be made to § 48-8-3(a) requiring that "the Board shall list the title and date of all records which are determined to be exempt, stating the reason(s) for deleting (redacting) portions of a record."

RESPONSE: The Board will not make this amendment to the rule. There is no such requirement in the state FOIA Act. Our rule does require a statement of the reason for denial of a request which would probably require the Board to provide a reason for deleting or redacting a portion of a record.

C. The Commentor stated that an addition should be made to § 48-8-10 to require the Board to "list all records which have partial disclosures, stating the reason(s) for deleting (redacting) portions of a record."

RESPONSE: The Board will not make this amendment to the rule. The state FOIA Act does not have this requirement. Our rule does require a statement of the reason for denial of a request and deleting or redacting may be considered as a partial denial.

D. The Commentor stated that the fee of twenty-five cents per page is too high and the waiver of the fee for the first ten pages is too low.

RESPONSE: The Board seeks to bring its charges in line with the current costs and charges for photocopying. The Board feels that twenty-five cents per page is reasonable and that a waiver for the first ten pages is also reasonable for a state agency. The rule does provide a waiver provision for those who can not afford to pay.

E. The Commentor stated that the fee of twenty-five dollars per hour, with the first quarter hour free is too expensive.

RESPONSE: The Board believes that these fees are fair and appropriate for this service. The staff of the Board is small which makes fulfilling these requests expensive. The Board is, by the adoption of this rule, attempting to recoup its costs in processing these requests. Some of the hourly rate expense can be avoided by requestors who come to the Board's office and make their own photocopies. The rule does provide a waiver provision for those wh can not afford to pay.

F. The Commentor stated that in § 48-8-11(f), "person" requests it however "person" is not defined. The Commentor stated that certain groups should be eligible for fee waivers but that corporations should not.

RESPONSE: A "requestor" is defined in § 48-8-2.1(e) as a "person including any natural person, corporation, partnership, firm or association, who has submitted a request to the Board." Therefore, the use of person in § 48-8-11(f) refers back to the definition of "requestor" so that a definition for "person" is not necessary. Additionally, since a "requestor" and a "person" include any association, the groups listed by the Commentor would be eligible for fee waiver consideration. However, it would not be appropriate to automatically eliminate corporations from fee waiver consideration. A person requesting a fee waiver must state that they are unable to pay the fee. Certain corporations could be eligible under this condition. Many non-profit and public interest groups are incorporated and the elimination of all corporations would preclude them from fee waiver consideration.



KEN HECHLER
Secretary of State

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Deputy Secretary of State

STEPHEN N. REED
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

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WILLIAM H. HARRINGTON
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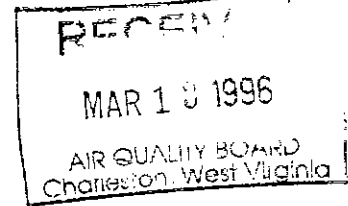
PENNEY BARKER
Supervisor, Corporations

STATE OF WEST VIRGINIA

SECRETARY OF STATE

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

(Plus all the volunteer help we can get)



TO: Britt Bernheim

AGENCY: Air Quality Board

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: March 11, 1996

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

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

SERIES: 2 TITLE: 52 Air Quality Board

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

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

SIGNED: Robert J. Charles

TITLE OF PERSON SIGNING: Attorney for Air Quality Board

DATE: 3-25-96

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