

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #1

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2010 JUN 14 AM 11:10

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Department of Environmental Protection - Secretary's Office TITLE NUMBER: 60

RULE TYPE: Procedural CITE AUTHORITY: W.Va. Code 29A-3-3, 29B-1-3(5), 22-1-1, 22-5-1

AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 2

TITLE OF RULE BEING AMENDED: Freedom of Information Act Requests

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: July 15, 2010 TIME: 6 p.m.

LOCATION OF PUBLIC HEARING: Department of Environmental Protection
Cooper's Rock Training Room
601 57th Street SE
Charleston, WV 25304

COMMENTS LIMITED TO: ORAL ☐ WRITTEN ☐ BOTH ☒

DATE WRITTEN COMMENT PERIOD ENDS: July 15, 2010 TIME: 8 p.m.

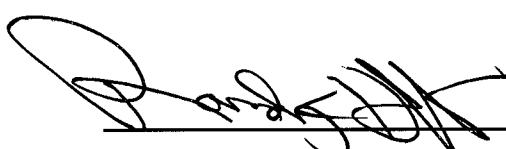
WRITTEN COMMENTS MAY BE MAILED TO:

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

Kathy Cosco
Public Information Office
WVDEP
601 57th Street SE
Charleston, WV 25304
dep.comments@wv.gov

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL


Authorized Signature

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
BRIEFING DOCUMENT**

Rule Title: Freedom of Information Act Requests

A. AUTHORITY: W.Va. Code § 29A-3-3, 29B-1-1 et seq., and 22-5-10

- ❖ **B.SUMMARY OF RULE:** Promulgated last in 1997. Revisions to this rule include changing the fee structure for searching for and reproducing requested records to bring it in line with other State agencies by setting a flat search fee of \$20.00 per hour (or a quarter fraction thereof) for a Division's time spent in locating, duplicating or compiling the requested records providing and a cost of \$10.00 if the information is produced on diskette, tape or other storage media.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE: The rule did not reflect changes made to the Federal Rule that had been made, the fee schedule was outdated and there were incorrect references to the Department as a Division.

D. FEDERAL COUNTERPART REGULATIONS – INCORPORATION BY REFERENCE / DETERMINATION OF STRINGENCY:

A federal counterpart to the proposed rule exists. Because proposed revisions are consistent with the federal counterpart regulation, no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION

In accordance with W. Va. Code §§ 22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

At its meeting on June 3, 2010, the Environmental Protection Advisory Council discussed the proposed rule. See attached minutes for Council's discussion.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Freedom of Information Act Requests

Type of Rule: ☐ Legislative ☐ Interpretive ☒ Procedural

Agency: Department of Environmental Protection

Address: 601 57th Street SE
Charleston, WV 25304

Phone Number: 304-926-0499 Ext. 1331 Email: Kathy.Cosco@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

There will be no cost associated with this rule change.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "--")	Next Increase/Decrease (use "--")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues			

Rule Title: Freedom of Information Act Requests

Rule Title:

Freedom of Information Act Requests

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

Because each division within the agency invoices recipients for the FOIA requests it fulfills, we don't currently have a documented figure for how much revenue comes in to the agency from fulfilling these requests.

This fiscal year, the agency is on track to receive 1,100 Freedom of Information Act Requests. Much of the staff time is spent searching for, making available, copying or formatting the information requested. Depending upon the volume of the request, some requests are fulfilled for free while others cost hundreds of dollars.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date:

6/14/10

Signature of Agency Head or Authorized Representative



FILED

TITLE 60
PROCEDURAL RULE
~~DIVISION~~ DEPARTMENT OF ENVIRONMENTAL PROTECTION
~~DIRECTOR'S~~ SECRETARY'S OFFICE

2010 JUN 14 AM 11:11

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 2
RULES ON FREEDOM OF INFORMATION ACT REQUESTS

§60-2-1. General.

1.1. Scope. This rule sets forth the procedures for filing requests with the ~~Division~~ Department of Environmental Protection for the inspection and copying of ~~Division~~ Department records under W. Va. Code § 29B-1-1 et seq., as amended (commonly known as the Freedom of Information Act or Act).

The ~~Division~~ Department of Environmental Protection's policy is to provide public access to ~~Division~~ Department records, when access is allowed by law, and to minimize costs and time delays to those requesting such information.

1.2. Authority. W. Va. Code §§ 29A-3-3, 29B-1-3(5), 22-1-1 et seq., and 22-5-10.

1.3. Filing Date. ~~January 22, 1997.~~

1.4. Effective Date. ~~February 21, 1997.~~

1.5. ~~Repeal of Former Rule.~~ This procedural rule repeals and replaces 38CSR9, "Rules and Regulations Governing Requests for Information," which became effective on May 1, 1988.

§60-2-2. Definitions.

2.1. "Act" means the Freedom of Information Act, W. Va. Code § 29B-1-1 et seq.

2.2. "~~Division~~ Department" means the West Virginia ~~Division~~ Department of Environmental Protection.

2.3. "Public Record" includes any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body.

2.4. "Writing" includes any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics.

2.5. "Request" means a written request made in accordance with these rules of procedure to inspect or obtain a copy of one or more ~~Division~~ Department records.

2.6. "Requester" includes any person, corporation, partnership, firm or association.

§60-2-3. Policy on Disclosure.

3.1. All ~~Division~~ Department records shall be available to the public unless they are made exempt by the disclosure requirements of the Act.

3.2. All nonexempt records shall be available to the public upon request regardless of whether any

justification or need has been shown by the requester and regardless of whether the request cites the Act.

§60-2-4. Form of Requests.

A request shall be made in writing and shall reasonably describe the record(s) sought so as to make their identification and location possible. A written request sent by facsimile ~~machine~~ or electronic mail is acceptable. Requests for information should be sent to ~~Division~~ Department of Environmental Protection's Public Information Office.

§60-2-5. Requests That Do Not Reasonably Describe Records Sought.

If the description of a record sought is not sufficient to allow the ~~Division~~ Department to identify and locate the requested information, the requester will be notified within five (5) working days that the request is insufficient for the ~~Division~~ Department to locate and provide the information. Upon request, the ~~Division~~ Department will assist the requester in identifying the records sought. Until such additional information is provided, the ~~Division~~ Department has no further obligation to fulfill the request.

§60-2-6. Misdirected Requests.

The ~~Division~~ Department cannot assure that a response to requests received in a manner inconsistent with this rule will be handled in a timely manner.

§60-2-7. Responsibilities of the ~~Division~~ Department.

7.1. The ~~Division~~ Department 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.

7.2. The ~~Division~~ Department shall respond in writing to the requester within five (5) working days of receipt of the request. The response shall:

7.2.a. Furnish copies of the requested material;

7.2.b. Advise the requester of the date, time, and place where the information may be inspected and copied; or

7.2.c. Deny the request or inform the requester that the information does not exist.

§60-2-8. Denial of Requests.

8.1. Denial of requests may be issued only in the following circumstances:

8.1.a. The information is not known to exist;

8.1.b. The information is not in the ~~Division's~~ Department's possession;

8.1.c. The requested information is exempt from disclosure under the Act or another statute.

8.2. A denial letter shall be sent within five (5) working days of receiving the request. The letter shall state the following:

8.2.a. The reasons for denial;

8.2.b. That the ~~Division's~~ Department's responsibility to provide information is at an end; and

8.2.c. The requester may pursue injunctive or declaratory relief in the circuit court ~~in the county where the public record is kept~~ of Kanawha County.

§60-2-9. Exemptions.

9.1. The Act provides that the ~~Division~~ Department may exempt the following from disclosure:

9.1.a. Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compounds, procedure, production data, or compilation of information that is not patented and 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 that gives its users an opportunity to obtain business advantage over competitors; provided that in no case shall effluent data submitted pursuant to ~~West Virginia Code, Chapter 22 the West Virginia Water Pollution Control Act~~ [W. Va. Code § 22-11-1, et seq.] be considered exempt from disclosure;

9.1.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 rule shall be construed as precluding an individual from inspecting or copying his or her own personal, personnel, medical or similar file;

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

9.1.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 that are maintained for internal use in matters relating to law enforcement;

9.1.e. Information specifically exempted from disclosure by statute;

9.1.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, document or manuscript;

9.1.g. Information contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of any agency responsible for the regulations or supervision of financial institutions, except those reports that are by law required to be published in newspapers; and

9.1.h. Internal memoranda or letters received or prepared by any public body;

9.1.i. Records assembled, prepared or maintained to prevent, mitigate or respond to terrorist acts or the threat of terrorist acts, the public disclosure of which threaten the public safety or the public health;

9.7.j. Those portions of records containing specific or unique vulnerability assessments or specific or unique response plans, data, databases, and inventories of goods or materials collected or assembled to respond to terrorist acts, and communication codes or deployment plans of law enforcement or emergency response personnel;

9.7.k. Specific intelligence information and specific investigative records dealing with terrorist acts or the threat of a terrorist act shared by and between federal and international law enforcement agencies, state and local law enforcement and other agencies within the Department of Military Affairs and Public Safety;

9.7.l. National security records classified under federal executive order and not subject to public disclosure under federal law that are shared by federal agencies and other records related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism;

9.7.m. Computing, telecommunications and network security records, passwords, security codes or programs used to respond to or plan against acts of terrorism which may be the subject of a terrorist attack;

9.7.n. Security or disaster recovery plans, risk assessments, tests or the results of those tests;

9.7.o. Architectural or infrastructure designs, maps or other records that show the location or layout of the facilities where computing, telecommunications or network infrastructure used to plan against or respond to terrorism are located or planned to be located;

9.7.p. Codes for facility security systems or codes for secure applications for such facilities referred to in subdivision (o) of this subsection;

9.7.q. Specific engineering plans and descriptions of existing public utility plants and equipment; and

9.7.r. Customer proprietary network information of other telecommunications carriers, equipment manufacturers and individual customers, consistent with 47 U.S.C. § 222.

§60-2-10. Partial Disclosure.

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

§60-2-11. Fees.

11.1. Fees will be charged to the requester for searching for and reproducing requested records, in accordance with the following:

11.1.a. A search fee of twenty dollars (\$20.00) per hour will be charged, or a quarter-fraction thereof, for the Department's time spent in locating, duplicating and compiling the requested records.

11.1.ab. Copying costs shall be twenty-five cents (\$0.25) per page; provided that the first 20 pages are free; Copying of the first 20 pages shall be free. For each page thereafter, a copying cost of twenty-five cents (\$0.25) per page shall be charged to the requester.

11.1.b. No charge will be made if the total fee to process a request is five dollars (\$5) or less;

11.1.c. The charge for copying materials that must be reproduced outside the Division's Department's facilities shall be the actual cost to reproduce the record;

11.1.d. Mailing or delivery charges may be charged, at the actual cost, in connection with sending the requested information to a requester;

11.1.e. If the information requested exists as a computer record in the form of a printout, diskette, or

tape, and the request is for the information to be produced in electronic form (such as an Excel spreadsheet), the fee will be the actual cost of the computer system time added to any applicable search, in-house programming, reproduction, or contract programming costs;

11.1.f. Diskette, tape or other storage media will be provided at actual cost to agency for medium a cost of ten dollars (\$10.00) each);

11.1.g. A fee will be charged per hour, or quarter fraction thereof, for the Division's time spent in locating and duplicating requested records. The first half hour used to locate such records is free. The fee is:

<u>Category</u>	<u>Pay Grades</u>	<u>Hourly Rate Averages (includes 31% for benefits)</u>
1.	Pay Grades 1-10	\$11.46
2.	Pay Grades 11-15	\$18.82
3.	Pay Grades 16-23	\$29.50

11.1.hg. An invoice for the total amount of fees will be sent to the requester. Payment shall be made by check or money order payable to the West Virginia Division Department of Environmental Protection;

11.1.ih. Total or partial pre-payments may be required if the Division Department determines that the cost to reproduce the information will exceed twenty-five dollars (\$25.00);

11.1.ji. Total or partial pre-payments may be required if the Division Department determines that unpaid fees on one (1) or more requests by the same requester exceeds twenty-five dollars (\$25.00); and

11.1.kj. Any requester who claims that he or she cannot afford to pay the fees established by this rule may file an affidavit with the Division Department stating the reason the requester cannot afford to pay. If the Division Department agrees, the Division Department shall process the request in accordance with this rule and as if the fees have been paid.

ENVIRONMENTAL PROTECTION ADVISORY COUNCIL

MEETING MINUTES

June 3, 2010

I. CALL TO ORDER

Kristin A. Boggs, Ex Officio Chair designated by Secretary Randy Huffman, called to order a special meeting of the DEP Advisory Council at 1:40 p.m. on June 3 2010 at the headquarters of the West Virginia Department of Environmental Protection, 601 57th Street Southeast, Charleston, West Virginia. Agendas were distributed.

II. ROLL CALL

Members present: Lisa Dooley, Jackie Hallinan, Larry Harris, Karen Price, Bill Raney, and Rick Roberts.

The meeting was also attended by the following DEP personnel: Randy C. Huffman, DEP Cabinet Secretary; Lisa McClung, DEP Deputy Cabinet Secretary; Kathy Cosco, DEP Chief Communication Officer; Daniel T. Arnold, Division of Water and Waste Management; Bill Timmermeyer, Division of Water and Waste Management; Charles Sturey, Division of Mining and Reclamation; Dave Vandelinde, Division of Mining and Reclamation, Office of Explosives and Blasting; Yvonne Anderson, Division of Mining and Reclamation; Ken Holliday, Division of Water and Waste Management; Yogesh Patel, Division of Water and Waste Management; Fred Durham, Division of Air Quality; Jim Mason, Division of Air Quality; Lewis Halstead, Division of Mining and Reclamation.

Also in attendance were: Don Garvin of the Ohio Valley Environmental Coalition; Katherine Crockett and Emily Moy of Spilman Thomas & Battle; and Lewis Baker of the West Virginia Rural Water Association.

III. OLD BUSINESS

Minutes of the May 27, 2010 Meeting. The minutes were emailed and provided to Council in hard copy. Ms. Dooley moved for approval of the minutes, Mr. Raney seconded the motion, and it was carried by acclamation of Council.

IV. PROPOSED 2011 LEGISLATIVE RULES

Because the Advisory Council had received summaries of the rule two weeks prior to the meeting, Bill Raney suggested that Ms. Boggs simply read the title of the rule and allow Council members to ask questions, rather than read the summaries to Council. The suggestion was well taken. Summaries of the proposed rules are set forth herein for completeness of the record, and so the minutes will reflect the complete information provided to Council.

Division of Air Quality

- ❖ 45 C.S.R. 8 – *Ambient Air Quality Standards*. Promulgated last in the 2010 Session. Revisions to the rule include a change in format to incorporation by reference, rather than reiterating the NAAQS in the rule. The rule now incorporates by reference the NAAQS promulgated by EPA under 40 C.F.R. § 50 and the ambient air monitoring reference methods and equivalent methods under 40 C.F.R. § 53, which become effective June 1, 2010. EPA has established a new primary one-hour NO₂ standard at a level of 100 parts per billion, based on the three-year average of the 98th percentile of the yearly distribution of one-hour daily maximum concentrations, to supplement the existing primary annual standard of 53 parts per million. This new NO₂ primary standard is incorporated by reference in this rule.

Section 2, titled *Anti-Degradation Policy*, has been stricken for two reasons. First, the new incorporation by reference format incorporates the federal significant deterioration of air quality provisions under 40 C.F.R. § 50.2(c). Second, because West Virginia adopted the federal Prevention of Significant Deterioration program under 45 C.S.R. 14 in the early 1980s, the State has more than satisfied the intent of the relic language in Section 2 to protect the air quality in areas that were in attainment of the NAAQS. Section 2 was authored in the early 1970s as a placeholder in anticipation of the future PSD program and its provisions for best available control technology.

- ❖ 45 C.S.R. 14 – *Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration*. Promulgated last in the 2010 Session. Revisions to the rule include deletion of federally stayed provisions for fugitive emissions and clarification of affected facilities at large coal prep plants. EPA is now reconsidering inclusion of fugitive emissions and will issue a final rule in the future. Fugitive emissions from stockpiles (now an affected source under 40 C.F.R. § 60, Subpart Y) are now counted for large coal prep plants (but haul roads are still excluded). Other minor revisions ensure consistency with federal counterpart language.
- ❖ 45 C.S.R. 16 – *Standards of Performance for New Stationary Sources*. Promulgated last in the 2010 Session. Revisions to this rule are the annual incorporate-by-reference amendments to the NSPS, including Standards of Performance for Coal Preparation and Processing Plants. These final amendments include revisions to the emission limits for particulate matter and opacity standards for thermal dryers, pneumatic coal cleaning equipment, and coal handling equipment located at coal preparation and processing plants.
- ❖ 45 C.S.R. 18 – *Combustion of Solid Waste*. Promulgated last in the 2008 Session. Revisions to the rule include new federal emission guidelines for existing hospital/medical/infectious waste incinerators (HMIWI). The revised rule has been restructured to better comport to respective federal counterpart language. The stricken provisions in Section 12, *Compliance Dates*, have been moved to respective sections for existing HMIWI and commercial and industrial solid waste incinerators. The revisions

strike obsolete language regarding repealed provisions, as well as add new definitions to the rule. Other miscellaneous revisions are included that improve the clarity and accuracy of existing rule language.

- ❖ 45 C.S.R. 19 – *Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution Which Cause or Contribute to Nonattainment*. Promulgated last in the 2010 Session. Revisions to the rule include a new subsection 1.5, which provides that references to the federal counterpart will be construed as the version that was in effect as of June 1, 2010. Also, the term “affected facilities” has been clarified. Fugitive emissions from stockpiles (now an affected facility under 40 C.F.R. § 60, Subpart Y) are now counted for large coal prep plants (but haul roads are still excluded). Other minor revisions ensure consistency with federal counterpart language to date.
- ❖ 45 C.S.R. 25 – *Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities*. Promulgated last in the 2010 Session. Revisions to the rule include annual incorporation-by-reference updates. Definitions that are not used in the rule have been stricken and requirements pertaining to ignitable, reactive or incompatible wastes have been updated to reference a federal counterpart. The fee schedule for hazardous waste management facilities has been simplified.
- ❖ 45 C.S.R. 34 – *Emission Standards for Hazardous Air Pollutants*. Promulgated last in the 2010 Session. Revisions to this rule include the annual incorporation-by-reference revisions to the Hazardous Air Pollutant rule that include the following source categories of new or revised NESHAP standards promulgated as of June 1, 2010 for non-major area sources: Chemical Manufacturing Area Sources. The revised rule also incorporates by reference the following source categories of new or revised NESHAP standards promulgated as of June 1, 2010 for major sources: Petroleum Refineries and Reciprocating Internal Combustion Engines.
- ❖ The following source categories of newly promulgated NESHAPS affecting non-major area sources of hazardous air pollutants are being excluded from incorporation by reference: Prepared Feeds Manufacturing; Aluminum, Copper, and Other Non-Ferrous Foundries; Asphalt Processing and Asphalt Roofing Manufacturing, Paints and Allied Products Manufacturing; and Chemical Preparations Industry. EPA has not provided any additional funding to implement these new federal area source air toxics rules. Further, DAQ considers these standards to be resource-intensive and costly to implement as a practical matter, without achieving commensurate air quality benefits. For these reasons, West Virginia is one of Several States in Region III that are adopting some, but not all, of these standards. EPA Regional Offices will be implementing those standards not adopted by the States, thereby providing a measure of regulatory certainty and consistency.

Division of Water & Waste Management

- ❖ 33 C.S.R. 20 – *Hazardous Waste Management System*. Promulgated last in the 2010 Session. Revisions to this rule include striking “Expansion to RCRA Comparable Fuel Exclusion” from exclusion from incorporation by reference of the federal rule.

- ❖ 47 C.S.R. 12 – *Requirements Governing Groundwater Standards*. Promulgated last in the 2010 Session. The proposed revision to this rule is technical cleanup from last year's revision. Last year's amendment incorrectly set a numeric standard for radon, which the EPA proposed in draft language in 2009 but has not yet finalized. Therefore, West Virginia's adoption of a radon standard for groundwater was premature.
- ❖ 47 C.S.R. 60 – *Monitoring Well Design Standards*. Promulgated last in the 2010 Session. Revisions to this rule are needed to correct requirements for documentation submittals to DEP. The current version requires reporting of all borehole abandonment, which is unenforceable and unnecessary. Revisions to this rule will require abandonment documentation for "high risk" boreholes and permanent monitoring wells, as was the original intention of the 2010 amendments recommended by the Monitoring Well Advisory Council.

Secretary's Office

- ❖ 60 C.S.R. 2 – *Rules on Freedom of Information Act Requests*. Promulgated last in 1997. Revisions to this rule include changing the fee structure for searching for and reproducing requested records to bring it in line with other State agencies by setting a flat search fee of \$20.00 per hour (or a quarter fraction thereof) for a Division's time spent in locating, duplicating or compiling the requested records providing and a cost of \$10.00 if the information is produced on diskette, tape or other storage media.

Division of Mining & Reclamation

- ❖ 38 C.S.R. 2 – *West Virginia Surface Mining Reclamation Rule*. Promulgated last in the 2009 Session. In addition to the amendments discussed at the December 9, 2009 meeting, which are currently in effect as an Emergency Rule, the proposed revisions include the following: (1) Clarification of the format and information necessary for complete application submittal and clarification on the renewal process to take into account DEP's electronic filing processes; (2) Provision for advertisement of the application when it is technically complete, as opposed to administratively complete; (3) Provision for reopening of the public comment period; (4) Provision that pre-subsidence surveys shall be confidential and only used for evaluating damage relating to subsidence; (5) Clarification of when an operator is considered to be in compliance with applicable environmental performance standards; (6) Provision that the Secretary has the authority to initiate bond release in lieu of the permittee; (7) Clarification that bonding for a permit in inactive status shall remain in effect for the life of the operation; and (8) Provision that the Secretary shall provide email notice of the issuance of a show cause order to members of the public who have subscribed to the Secretary's email notification service and otherwise provide notice to any person whose Citizen Complaint has resulted in the issuance of any violation that led to the issuance of a show cause order.

- ❖ 199 C.S.R. 1 – *Surface Mining Blasting Rule*. Promulgated last in the 2008 Session Revisions to this rule include modifying the definitions of “other structure” and “structure” to provide for dams as defined in 38 C.S.R. 4 § 2.7 and to provide that those dams will be exempt from the maximum air blast and ground vibration standards of the rule.

V. COMMENTS FROM COUNCIL

Ms. Dooley moved that Council recommend to the Secretary that the Air Quality rules contain language in their sections entitled “Inconsistency Between Rules” to read as follows: “In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, the inconsistency shall be resolved by the determination of the Secretary and the determination shall be based upon the application of the more stringent provision, term, condition, method, or rule using sound scientific information.” See, 45 C.S.R. 8 proposed § 4.1. Ms. Dooley pointed out that DEP uses this language in some of its other Divisions’ rules and some states surrounding West Virginia also use this language or similar language. Mr. Raney seconded the motion and discussion ensued. Ms. Hallinan pointed out that the proposed language is vague and may cause *Daubert*-related problems for attorneys arguing before boards and the courts using these rules. A vote was taken, and Ms. Dooley’s motion passed by a majority vote of Council; Ms. Hallinan voted no and Dr. Harris abstained.

Regarding 45 C.S.R. 8, Dr. Harris asked about removing the anti-degradation section. He expressed concern about how many areas of the State are in attainment and asked if West Virginia does not still need the policy in order to stay in attainment. He was also concerned that removing the specific reference to “anti-degradation” might lead the public to believe that DEP does not enforce any such policy anymore. Mr. Mason explained that the anti-degradation was meant as a placeholder back when the rule was originally promulgated in the 1970s until the states could get their own programs up and running. Because West Virginia adopted the federal Prevention of Significant Deterioration program under 45 C.S.R. 14 in the early 1980s, the State has more than satisfied the intent of the relic “anti-degradation” language in Section 2 to protect the air quality in areas that were in attainment of the NAAQS. “Prevention of significant deterioration” in Rule 14 means the same thing as “anti-degradation.”

Regarding 45 C.S.R. 14, Dr. Harris inquired about the justification for the proposed changes to the rule. Mr. Mason explained why the rule is being amended and a discussion ensued about fugitive emissions.

In relation to 45 C.S.R. 25, Mr. Roberts asked how many hazardous waste treatment, storage, and disposal facilities are in West Virginia, and Mr. Mason advised Council that he would have to research those numbers and report back.

Finally, regarding 45 C.S.R. 34, Dr. Harris asked for a definition of "area sources" and whether the federal EPA would enforce those provisions. Mr. Mason explained what area sources are and that EPA will enforce those standards.

In relation to 33 C.S.R. 20, Ms. Dooley inquired whether hazardous waste fees were being changed, and Ms. Boggs explained that, while fees are regurgitated in this rule, the statutory authority to change the fees was set forth in the statute; there are no changes to the fee structure proposed in this rule.

Dr. Harris asked the record to reflect that the Groundwater Standards rule was not submitted by the deadline, so Council had not yet had an opportunity to review the text or a summary of the rule prior to the Council meeting. Mr. Timmermeyer was on hand and did answer questions regarding why the rule had to be promulgated this year.

Regarding 60 C.S.R. 2, Ms. Dooley inquired about the language "shall furnish copies," and Ms. Boggs explained that the language for § 7.2 is in the disjunctive: the agency shall furnish copies or advise the requester when he or she can come in and review documents or deny the request. Ms. Dooley then inquired about the new exemptions, and Ms. Boggs explained that the exemptions mirror the West Virginia Freedom of Information Act, which is set forth at W. Va. Code 29B-1-1 et seq., and the federal Freedom of Information Act. Finally, Ms. Dooley asked whether the proposed fee changes would be sufficient to cover the agency's costs in responding to FOIA requests, and Ms. Cosco affirmed that they would.

Finally, regarding 38 C.S.R. 2, Dr. Harris inquired about the provisions relating to the addition of a trust account as an approved form of bond. Specifically, he asked whether the proposed trust account would cover perpetual treatment. Mr. Clarke explained that the proposed trust account is intended to be another form of bonding, not be a replacement for the Special Reclamation Fund. Dr. Harris then inquired as to how the cost of perpetual treatment is calculated. Mr. Clarke explained that the federal Office of Surface Mining Reclamation & Enforcement (OSM) has developed a computer model that estimates cost by developing a formula based on a mechanism that allows treatment for 40 or more years.

VI. COMMENTS FROM THE PUBLIC

Mr. Garvin asked for clarification on the trust account proposed by the Division of Mining and Reclamation. Mr. Clarke answered his questions.

Mr. Garvin then had several questions for Mr. Mason and Mr. Durham regarding the proposed Air Quality rules, which were duly answered.

VII. ADJOURNMENT

Mr. Raney moved that the meeting be adjourned, Ms. Dooley seconded the motion, and it carried by acclamation of Council. The meeting was adjourned at 3:05 p.m.