

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

FILED

JAN 22 2 43 PM '97

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 Environment
AGENCY: Div. Environmental Prot./Director's Office TITLE NUMBER: 60
CITE AUTHORITY: 29A-3-3, 29B-1-3(5), 22-1-1 et seq., and 22-5-10
RULE TYPE: PROCEDURAL XX INTERPRETIVE _____

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

AMENDMENT TO AN EXISTING RULE: YES _____, NO X

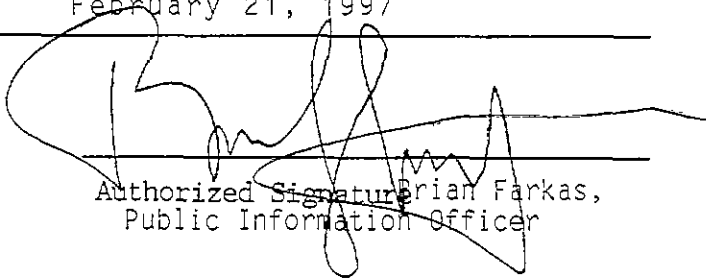
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 60 CSR 2

TITLE OF RULE BEING ADOPTED: Rules on Freedom of Information
Act Requests

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS February 21, 1997


Authorized Signature Brian Farkas,
Public Information Officer



BUREAU OF ENVIRONMENT

10 McJunkin Road
Nitro, WV 25143-2506

CECIL H. UNDERWOOD
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.
COMMISSIONER

January 22, 1997

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

RE: 60CSR2 - "Rules on Freedom of Information
Act Requests"

Dear Ms. Cooper:

This is to advise you that I am giving approval for filing with your office Notice of Agency Adoption of a Procedural Rule Exempt From Legislative Review of the above-referenced rule.

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

Sincerely yours,

Laidley Eli McCoy for
Laidley Eli McCoy, Ph.D.
Commissioner

LEM:cc

Attachment

cc: Mark Scott
Brian Farkas
Carrie Chambers

ENVIRONMENTAL PROTECTION

DIRECTOR'S OFFICE

BRIEFING DOCUMENT

Rule Title: 60CSR2 - "Rules for Filing Freedom of Information Act Requests"

A. AUTHORITY: WV Code 29A-3-3, 29B-1-3(5), 22-1-1 et seq. and 22-5-10

B. SUMMARY OF RULE:

Freedom of Information Request Procedures for the Division of Environmental Protection

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

To develop agency-wide rule on Freedom of Information Act requests

FILED

TITLE 60
PROCEDURAL RULES
DIVISION OF ENVIRONMENTAL PROTECTION
DIRECTOR'S OFFICE
SERIES 2
RULES ON FREEDOM OF INFORMATION ACT REQUESTS

JAN 22 2 50 PM '97
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§60-2-1. General.

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

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

1.2. Authority. West Virginia 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.

For the purposes of this rule:

2.1. "Act" means the Freedom of Information Act, West Virginia Code, Chapter 29B-1-1 et seq.

2.2. "Division" means the West Virginia Division 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 records.

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

§60-2-3. Policy on Disclosure.

3.1. All Division 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 is acceptable. Requests for information should be sent to Division 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 to identify and locate the requested information, the requester will be notified within five working days that the request is insufficient for the Division to locate and provide the information. Upon request, the Division will assist the requester in identifying the records sought. Until such additional information is provided, the Division has no further obligation to fulfill the request.

§60-2-6. Misdirected Requests. The Division 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.

7.1. The Division 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 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 possession;

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

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 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.

§60-2-9. Exemptions.

9.1. The Act provides that the Division 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 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.

§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. Copying costs shall be twenty-five cents (\$0.25) per page; provided that the first 20 pages are free;

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 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, 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;

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:

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

11.1.h. 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 of Environmental Protection;

11.1.i. Total or partial pre-payments may be required if the Division determines that the cost to reproduce the information will exceed twenty-five dollars (\$25);

11.1.j. Total or partial pre-payments may be required if the Division determines that unpaid fees on one (1) or more request by the same requester exceeds twenty-five dollars (\$25); and

11.1.k. 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 stating the reason the requester cannot afford to pay. If the Division agrees, the Division shall process the request in accordance with this rule and as if the fees have been paid.

Transcript of Division of Environmental Protection, Public Information Office Public Hearing on proposed procedural regulations covering Freedom of Information Act requests received by the agency.

The proposed regulation is: 60CSR2

Brian Farkas: Good evening. Today is November 6, 1996. It is a Wednesday. My name is Brian Farkas, I am the public information officer for the Division of Environmental Protection. The purpose of tonight's hearing is on a set of proposed procedural regulations being offered by the Division dealing with rules on Freedom of Information Act requests.

This was filed with the Secretary of State's office on September 30. We are having the public hearing tonight, and at the close of this hearing will be the close of the comment period.

We will run the hearing in three fashions. First is a general introduction.

The regulation is... What we are trying to do with this regulation is, essentially bring three different operating regulations and combine them into one.

When the Division was created back in 1991, and then formally merged in 1992, we have regulations dealing with the offices of Mining and Reclamation, Oil and Gas, and Abandoned Mine Lands and Reclamation. Regulations that were promulgated by the former Water Resources Board that covered the Office of Water Resources and the Office of Waste Management.

And then there were regulations that were in effect for the old Air Quality Board.

What we had were three different views of information release, including fees that ranged from 13 cents a page to 50 cents a page.

These regulations are an attempt to consolidate that into one regulation to cover all information releases from the agency.

The proposed fee is 25 cents a page after the first 20 pages. So, we would give you 20 pages for free and then after that it's 25 cents a page.

The other provision in the regulation is a, for a lack of a better word, is a search fee that essentially goes to the first half-an-hour of the search by the agency is free of charge and then after that there is a rate for a portion of an hour. The rates are broken down based on pay scale, an average of a the pay scales.

The range from \$11.46, that would be for your secretarial, which by the way, pretty much, those are the people, the office administrators, that would be dealing with this, all the way up to \$29.50 per hour that is the engineer and the professional class. And then, in between.

Public Hearing Transcript
Page 2

By and large, it's my belief because I receive, well today I received 10 requests for information from the agency and that's pretty much an average load, daily. So, we're looking for at in excess of 1,200 to 1,300 requests for information. Written requests. We get requests daily that are by phone. So, we process in excess, probably, 1,500 information requests a year.

By and large we believe the majority of the requests will be handled under that 20 page free, half hour free provision.

With that, I will accept... Let me state again, that the second part of the hearing is to accept you comments and the third part is to go through and if anybody has any questions of me, I will admit right now this language is, I drafted these regulations. They have gone through agency review. I looked at regulations from EPA. I looked at regulations from other states. It is an attempt to try and be fair and have the flow of information in the least disruptive manner as possible.

I do want you to know that comments that are designed as constructive criticisms with the goal of improving these regulations. I am all in favor of listening. If it is a better approach than what I've seen, I have no problem discussing it and perhaps modifying the regulations for final.

With that I will begin accepting comments from the three people who are hear.

Joe Carney: My name is Joe Carney and I live in Charleston.

I would like to make a comment on paragraph 8.1.h, which is on page four and that deals with the exemptions from the Freedom of Information Act. What paragraph 8.1.h says is what will be exempted will be internal memoranda or letters received or prepared by any public body.

I am a consulting engineer by profession and I am a registered professional engineer in West Virginia and over the years I have dealt with a lot of branches of DEP and I've always felt DEP people to be very straight forward and forthcoming when I request information on why they made decisions. I'm not talking about through Freedom of Information because I've never used that, but just on a day-to-day basis.

If they had a letter from another agency that requested something they would always give me a copy. If they had discussions or internal memoranda I was always able to have those.

I think that is the way it should be. I think this type of information should be public knowledge. If you would exclude them from the Freedom of Information Act and set up a situation where DEP could say, make a decision, and if you ask why they say "I can't tell you because it's the result of an internal memorandum or the result of a letter received from another public body."

Public Hearing Transcript
Page 3

I think in all fairness to the public and to the people affected by the regulations and the requirements of DEP, internal memoranda and letters prepared by public bodies should be available to the public for their review.

I honestly cannot think of one example or one situation where these types of information should be exempt, therefore I don't feel this type of exemption is justified in this Freedom of Information Act.

Farkas: Is that your only comment?

Carney: Yes. I have a letter.

Farkas: Great. Thank you sir.
Bob Foster.

Bob Foster: My name is Bob Foster and I am here tonight representing the West Virginia Manufacturer's Association and I've handed you written copies of your comments.

I will just summarize them off the cuff here. There's only one concern we have, Brian, and that is reviewing the similar regulation for the Environmental Quality and Air Quality Board we find both those contain sections that are not addressed in this 60CSR2, and that section was a section pertaining to requests that do not reasonably describe the records sought, in that if an agency received a request for information and for some reason or other the individual has not properly or did not really have or not be able to identify properly so the agency can secure that for them, it provides them with an other opportunity to go and say, "We couldn't find this based on your description. Would you help us out and give us more, another opportunity to help you out."

It provides them another opportunity to better describe what they are looking for and that way the agency can fulfill the request. I think it is a good idea.

Some citizens, I'm sure, don't have full descriptions, really don't know what they are looking for. They write it down on paper and its a little sketchy. So, it just provides another opportunity to describe better for the agency really what they are looking for.

It allows the agency to bend over backwards to help them out.

So, that's really the only comment we've got.

Farkas: Ok. Only two comments received. That ends the formal part of the hearing. I will turn off the tape recorder and then let me talked to you a little bit.

With that this hearing comes to conclusion on proposed regulations on Freedom of Information Act requests by the Division of Environmental Protection.

**Response to Comments Received on
Title 60
Procedural Rules
Division of Environmental Protection
Director's Office
Series 2
Rules on Freedom of Information Act Requests**

1. Several comments pointed out the incorrect Rule number was used in Section 1.5, Repeal of Former Rule.

Response: The error was corrected. The rule being repealed is 38CSR9, "Rules and Regulations Governing Requests for Information."

2. Several comments questioned exemption 60-2-9.1h dealing with "Internal memoranda or letters received or prepared by any public body."

Response: The language used in the Division's Rule is the same as allowed under West Virginia Code 29B-1-4(8), and is in keeping with the recent state Supreme Court ruling on the withholding of Internal memoranda or letters received or prepared by any public body.

Section 9.1 was modified to say, "The Act provides that the Division may exempt the following from disclosure:"

3. A request was made to include a provision for "Requests that do not reasonably describe records sought." Such a provision is included in the Air Quality Board and Environmental Quality Board rules on Freedom of Information Act requests.

Response: The section was added.

4. Comments were received questioning the definition of Request meaning a "written request."

Response: The Division believes written requests are administratively necessary to ensure that the nearly 1,000 Freedom of Information requests received annually are handled in accordance with the law.

5. A comment was received regarding the definition of Record.

Response: The Division has deleted the definition of Record and replaced it with definitions for *Public Record* and *Writing*. Both definitions are taken from West Virginia Code 29B-1-2(4) and (5).

6. Comments were received about inconsistencies between sections 60-2-2.4, 60-2-5, and 60-2-6.

Response: The Division has deleted the last two sentences in Section 60-2-5, and amended the section caption to match the new 60-2-5.

7. A comment was received that no address, or telephone number was included in Section 60-2-4.

Response: An address was purposely not included because addresses and telephone numbers are subject to frequent change.

8. Comments were received about Section 60-2-7, Denials of Requests.

Response: Because of the addition of Section 60-2-5, the Division deleted 60-2-7.1.d.

9. A comment was received on how the Division would fashion a denial of an information letter under Section 60-2-7.2.a.

Response: Division letters denying the release of information will be written in accordance with the recent state Supreme Court ruling, *The Daily Gazette Company Inc. v. The West Virginia Development Office and its Director, Thomas C. Burns*.

10. A comment was received on Section 60-2-8.1.a. (Trade Secrets) and a court ruling upholding the release of production information as effluent data.

Response: Except for the statement, "provided that in no case shall effluent data submitted pursuant to West Virginia Code, Chapter 22, be considered exempt from disclosure," the definition of Trade Secret used in this proposed rule is the same as contained in West Virginia Code, Chapter 29B.
The Division also notes that the court ruling appears consistent with "in no case shall effluent data...be considered exempt" language of 8.1.a since the court ruled the company's "discharge permit pretreatment standard is expressed in terms of allowable pollutant per unit of production. Therefore Revere's production data were necessary to determine its compliance with its effluent discharge limits under the Clean Water Act..."

11. A comment was received on Section 60-2-9, Partial Disclosure.

Response: If a situation contemplated by this Section occurs, the Division will follow the procedure set forth in the recent Supreme Court ruling, *The Daily Gazette Company Inc. v. The West Virginia Development Office and its Director, Thomas C. Burns*.

12. Several comments were received regarding the fee structure and the waiving of fees to the media, public interest groups and citizens.

Response: The Division believes the proposed fee structure is reasonable and reflects the actual cost to reproduce Division records.

The West Virginia Code, Chapter 29B-1, does not contain provisions exempting certain persons from paying fees.

The Division's proposed Rule, however, provides that the first 20 pages of information are free and that no charge will be required if the total cost to produce the information is \$5 or less. The Rule also allows the waiving of a fee if an affidavit is filed.

These provisions should take care of the majority of requests received from the media, public interest and citizen groups.



Division of Environmental Protection
Public Hearing Sign-In

Name	Address	I would like to comment
1.		
2. Joe Carney	111 Hayes Ave. Charleston 25314	Yes
3. Kerby Ward	Chas Gazette 1001 Va. St. E. Chas 25301	No
4. Bob Foster	W.V. Mfr. Assoc.	Yes
5.		
6.		
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19.		

FOIA Comments



David A. Raese
Publisher

October 9, 1996

Mr. Brian Farkas
Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143-2506

Dear Mr. Farkas:

We wish to express our opposition to certain provisions of your proposed 60CSR2 "Rules for Filing Freedom of Information Act Requests" which we recently received from the Administrative Law Division of Secretary of State Ken Hechler's office. Specifically, we believe that your proposed hourly charges for searching for requested records, as set forth in 60-2-10, 10.1 and 10.1.G, are contrary to the intent of the Legislature in enacting the Freedom of Information statute, Chapter 29B, Article 1 of the West Virginia Code.

In Code 29B-1-3(5), the Legislature authorized a public body to "establish fees reasonably calculated to reimburse it for its actual cost in making reproductions" of requested records. However, your proposed rules establish fees to be charged "**for searching** and reproducing requested records."

We believe the absence in the FOI statute of authorization to establish fees for searching for requested records is simply due to the Legislature's recognition of the fact that West Virginia taxpayers were already paying, through funds appropriated for personal services, the costs of personnel to create and maintain public records and to make those records available to the public as part of their regular duties.

Therefore, we view the proposed establishment of hourly charges ranging from \$11.46 to \$29.50 "for the Division's time spent **in locating** and duplicating requested records" as an effort to, in effect, cause the Division to receive funds twice for providing the emphasized service. Accordingly, we strongly disagree with your assessment of the "Economic Impact on Citizens/Public at Large" of the proposed rules as "N/A" and hereby request that said hourly charges be deleted.

Very truly yours,

David A. Raese

cc: West Virginia Press Association
Secretary of State Ken Hechler

1251 Earl L. Core Road • Morgantown WV 26505-6298 • (304) 291-9400 • FAX (304) 291-2326

the ^{Charleston} Gazette

November 5, 1996

Laidley Eli McCoy
Commissioner, Bureau of Environment
State of West Virginia

Dear Commissioner McCoy,

Please consider this letter to be a written comment by The Charleston Gazette to proposed rules for handling requests under the Freedom of Information Act.

There are several sections that concern me and several of our reporters.

Of the highest concern is the definition of "request." Section 2.4 states that a "request" means a written request. As you are aware, news reporters frequently need immediate information from the Division of Environmental Protection to fulfill our responsibilities of informing the public.

I can foresee situations in which our reporters will ask for information needed that day and will be told to make a request in writing and wait for an answer in five days.

Obviously, written requests should be required only in cases where large amounts of material are sought. Otherwise, reporters should be able to ask for and to receive information or have access to it.

Likewise, news reporters must be able to seek information from the person most likely to have the information or know the answer. Public information officers can be quite helpful, but they should never be the sole information source for an agency.

I also have to protest the fee schedule proposed for complying with the Freedom of Information Act. The Act permits public bodies to be reimbursed for "its actual cost in making reproductions of such records."

Laidley Eli McCoy
November 5, 1996
Page 2

The Act contains no provisions for charges for searches, for computer printouts, in-house programming, etc. Nor should there be. Surely, if public bodies can afford public information offices to process information it wants the public to know, it can afford to provide information that the public wants to know.

Under the federal Freedom of Information Act, agencies are allowed to waive fees for newspapers, public interest groups and citizens. I urge you to adopt a similar provision.

I believe the objections I have listed are reasonable and could easily be rectified.

Sincerely,

A handwritten signature in black ink that reads "James A. Haught". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

James A. Haught
Editor

JAH:ss

**COMMENTS OF THE WEST VIRGINIA MANUFACTURERS
ASSOCIATION REGARDING PROPOSED RULES ON
FREEDOM OF INFORMATION ACT REQUESTS**

60 C.S.R. 2

I. INTRODUCTION

On September 30, 1996, the West Virginia Division of Environmental Protection ("DEP" or "Division") Director's Office filed with the Secretary State a proposed rule setting forth procedures for filing requests with the DEP for the inspection and copying of Division records under Chapter 29B-1-1 et seq. of the West Virginia Code, 1931, as amended (commonly known as the Freedom of Information Act). Accompanying the proposed rule was a notice requesting both written and oral comments. Pursuant to this notice, the West Virginia Manufacturers Association ("WVMA") has undertaken a review of the enclosed rule and files these comments.

The WVMA represents a broad cross-section of large and small industrial concerns throughout the State of West Virginia. In keeping with the WVMA's supportive position regarding the development of West Virginia's environmental regulatory program, the WVMA offers these comments as a means to facilitate progress toward a reasonable and protective program, consistent with the requirements of environmental statutes and regulations.

II. COMMENTS

WVMA is pleased that the proposed rule, with minor exceptions, is consistent with the rules applicable to both the Environmental Quality Board ("EQB") and Air Quality Board ("AQB") at 46 C.S.R. 8, and 52 C.S.R. 2, respectively. WVMA suggests that all three rules be consistent and, to that end, notes that both the EQB and the AQB Freedom of Information Act rules contain a section titled "*Requests Which Do Not Reasonably Describe Records Sought*." This section does not appear in proposed 60 C.S.R. 2. The apparent purpose of this section in the other two rules is to continue

the request and response process until such time as the requestor provides sufficient information to allow the respective Board to identify and locate requested records. Proposed 60 C.S.R. 2 does not allow for the continuance of such process; rather, the proposed rule results in a denial of the request if the description sought is insufficient for DEP to identify and locate the materials. See proposed 60 C.S.R. 2-7.1.d. WVMA suggests, inasmuch as the sufficiency of a record description is subjective in nature and insufficiency could be used on a default basis for denial of requests, that the proposed rule be revised to include a section regarding requests which do not reasonably describe records sought and which would result in the continuation of the information request process in such instances.

WVMA appreciates the opportunity to provide comments regarding proposed 60 C.S.R. 2 and would be pleased to provide clarification to any of its comments if desired by DEP.

Respectfully submitted, this the 6th day of November, 1996.


for Karen S. Price, President
West Virginia Manufacturers Association
2001 Quarrier Street
Charleston, West Virginia 25311
Telephone: 342-2123

Prepared by:

Robinson & McElwee
Post Office Box 1791
Charleston, West Virginia 25326

Contact:

Edward L. Kropp, Esq.
Telephone: 347-8342

LAW OFFICES

CALWELL & MCCORMICK405 Capitol Street
Suite 607

P. O. Box 113

Charleston, West Virginia 25321

Telephone: (304) 343-4323

FAX: (304) 344-3684

Toll Free: 1-800-876-5529

Stuart Calwell
Jeremiah F. McCormick
John Skaggs
Mary McQuain
Shirley A. Skaggs
David H. Carriger *Virginia only
Deborah Nicholson

2602 First Avenue
P.O. Box 715
Nitro, West Virginia 25143
Telephone: (304) 755-8161
FAX: (304) 755-8739

November 6, 1996

Mr. Brian Farkas,
Public Information Officer
West Virginia Division of
Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143-2506
VIA FACSIMILE: 759-0526

Re: Comments to proposed FOIA regulations

I am writing on behalf of my client, the Affiliated Construction Trades Foundation, ("ACT"), to submit the following comments to the proposed FOIA regulations, (60 CSR 2), submitted by the West Virginia Division of Environmental Protection, ("DEP"):

1. **Section 60-2-1.5** states that the rule repeals and replaces 38 CSR 12. That rule is titled "Solid Waste" and has nothing to do with FOIA requests. "Rules and Regulations Governing Requests for Information (Freedom of Information Act)" are found at 38 CSR 9.
2. **Section 60-2-2.3** defines "Record". Rather than adopt the proposed definition, we recommend that the DEP tailor the definition of "Record" found in the federal FOIA regulations at 40 CFR 2.100(b). In particular, the federal definition makes clear that the "term includes informal writings (such as drafts and the like)".

3. **Section 60-2-2.4** defines a "Request" as a "written request". The federal definition of "Request" does not include the description "written". We suggest that the DEP delete "written" from the definition of "Request" in order to avoid inconsistencies with other sections of the proposed regulation (described below).
4. **Sections 60-2-2.3 and 60-2-2.4** proposes limiting requests to public information officers amounts to a gag rule on DEP employees. We recommend that simple requests can be handled most efficiently by individual DEP employees who are working on the task in question. DEP department policy could cover controversial topics or requests that take a significant amount of time to fill.
5. **Section 60-2-2.5** proposes that the Division "will honor oral or telephone requests if followed by a written request". Aside from the inconsistency that in Section 60-2-2.4 a request is defined as a written request, this language is confusing when compared with

Section 60-2-6.1 which proposes that the Division "shall begin to identify and locate" the requested information only upon receipt of a written request. If no action is commenced until after a written request is received, what is the intent of the Division's proposed regulation to honor oral or telephone requests? We recommend that the inconsistencies among Sections 60-2-2.4, 60-2-5 and 60-2-6.1 be resolved.

6. **Section 60-2-4** proposes that requests be sent to the Public Information Office and that facsimile requests are acceptable but fails to provide an address or a facsimile number.
7. **Section 60-2-7** proposes circumstances under which requests can be denied. One of those circumstances is that the requested information is exempt from disclosure under the Act or another statute (60-2-7.1.c). Federal FOIA regulations have a similar provision (40 CFR 2.113) but require that the denial be made only after the EPA has decided that the public interest would not be served by the disclosure of the exempt records. Conversely, if the EPA decides that the public interest would be served by the disclosure, they

need not deny the request. We suggest that the West Virginia FOIA regulations established this flexibility for the DEP.

Another circumstance that is listed as a reason for denial is that "the description of the record sought is insufficient for the Division to identify and locate" (Section 60-2-7.1.d). However, the proposed regulations offer no guidance or assistance to the requestor as to how to better describe the record so that the Division can identify and locate the requested record. Federal FOIA regulations provide that the "EPA will make every reasonable effort to assist in the identification and description of records sought and to assist the requestor in formulating his request" (40 CFR 2.109). We recommend that the DEP consult the federal FOIA regulations at 40 CFR 2.109 and tailor those regulations for use in West Virginia in an effort to enhance disclosure of public records to the public.

8. **Section 60-2-7.2.a** proposes that if the DEP denies a request, a denial letter will be sent to the requestor that states, in part, the reason for denial. We recommend that the DEP consult federal FOIA regulations at 40 CFR 2.113 which addresses denials of requests and tailor those regulations for use in West Virginia. In particular, 40 CFR 2.113(d) requires that a determination to deny a request "shall identify the records that are being withheld (individually, or, if the denial covers a large number of similar records by described category), and shall state the basis for denial for each record or category of records being withheld."
9. **Section 60-2-8.1.a** proposes that production data are, in certain circumstances, trade secrets and, therefore, exempt from disclosure. The proposed rule continues: "that in no case shall effluent data submitted pursuant to Chapter 22 of the West Virginia Code be considered trade secrets." We believe that it is important that the regulations recognize that production data necessary to determine compliance with applicable effluent standards is itself "effluent data" and is not eligible for confidential treatment under FOIA. This position is supported by federal FOIA regulations dealing with confidential business information at 40 CFR 2.302(e) and the definition of "effluent data" at 40 CFR 2.302(a)(2)(I)(B) and was recently affirmed by the U.S. District Court for the Southern District of New York (*RSR Corp v. Browner*, DC SNY, No. 95 Civ. 0354, 5/1/96). [See attached news release].

10. **Section 60-2-8.1.h** proposes to exempt from disclosure "internal memoranda or letters received or proposed by any public body." This proposed rule goes so far beyond the exempt categories set forth in the federal FOIA regulations at 40 CFR 2.118 that its implementation would have the effect of significantly stifling the intent of FOIA to make the fullest possible disclosure of records to the public. The federal FOIL regulations establish as an exempt category "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency (40 CFR 2.118(a)(5)). West Virginia regulations should be no more limiting than the federal regulations.
12. **Section 60-2-9** proposes that "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." We recommend that if material has been deleted or redacted, the DEP, in accordance with federal FOIA regulations at 40 CFR 2.113(d), identify the records being withheld and state the basis for denial for each record or category of records being withheld (see Paragraph 7, above).
13. **Section 60-2-10.1.k** proposes a method for those who cannot afford to pay the fees associated with their request to, nevertheless, have their request processed by the DEP. We recommend that in addition to this proposed rule, the DEP incorporate the Federal FOIA regulations for reduction or waiver of fees at 40 CFR 2.120(d). This regulation allows the reduction or waiver of fees if the agency determines that disclosure of the information is in the public's interest and is not primarily in the commercial interest of the requestor. We recommend that the regulations follow our statute and federal law by charging reasonable fees for making reproductions. (**Section 60-2-10**).

In general, we believe the proposed FOIA regulations are not well thought out, are in some cases confusing and contradictory, and will stifle rather than promote public access to public records. We recommend that the DEP withdraw these proposed regulations and start afresh, using the federal FOIA regulations at 40 CFR 2 as a guide.

Thank you for your attention to this matter. If there are any questions, please call.

Very truly yours,


Shirley A. Skaggs

cc: Mr. Steve White

2ND STORY of Level 1 printed in FULL format.

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ENR NATIONAL ENVIRONMENT DAILY

May 16, 1996

LENGTH: 456 words

OOY:

Water Pollution
PRODUCTION DATA SUBMITTED TO EPA
NOT SHIELDED FROM FOIA DISCLOSURE

WASHINGTON (ENR) -- Production data, submitted by a lead smelting company so that federal authorities could monitor its compliance with Clean Water Act discharge limits, is not shielded from public disclosure, a federal court ruled May 1 (RSM Corp. v. Browner, DC NY, No. 93 Civ. 0384, 5/1/96).

The U.S. District Court for the Southern District of New York said RSM's smelting and refining Corp.'s production information was subject to release under the Freedom of Information Act because it was "effluent data," or information necessary to determine whether RSM was complying with its discharge permit limits. Such information is not eligible for confidential treatment under FOIA, the court said.

RSM submitted the data to the Environmental Protection Agency in accordance with the Clean Water Act's semi-annual reporting requirements. EPA subsequently received an FOIA request for records pertaining to RSM's compliance with the act at its Walkill, N.Y., facility, including the semi-annual compliance reports.

After EPA notified RSM of the FOIA request, the company said its production data should not be disclosed because the information would put the company at a competitive disadvantage by revealing its decision-making strategies about production to competitors.

FOIA Disclosure Arguments

RSM argued that EPA's refusal to protect its production data was arbitrary and capricious because the agency failed to show the information was ineligible for confidential treatment and the law regarding effluent data did not apply to the Walkill facility, which is not a point source.

The district court said EPA's determination that the information was effluent data was reasonable because the Walkill facility's discharge permit pretreatment standard is expressed in terms of allowable pollutant per unit of production. Therefore, RSM's production data were necessary to determine its compliance with its effluent discharge limits under the Clean Water Act, the court said.

RSM claimed its Walkill facility was not a point source because it does not discharge pollutants directly into receiving waters, but pretreats its waste water and then sends it to a publicly owned treatment plant from which it is discharged into the Walkill River.

ATTACHMENT 1

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The court, however, said the plain statutory language, earlier court opinions, and the remedial purposes of the Clean Water Act all established that the Walkill facility was a point source subject to the act's reporting and disclosure requirements.

LANGUAGE: ENGLISH

Mrs. Eddie Harris
5106 Dorsey Ln
Mgtn, WI 26375
October 14, 1996

Dear Mr. Lee Farkas,

I am writing because I
am in agreement with the
editorial in the Dominion
post of October 9, 1996.

And of course this will
happen a day after the election
so that they will think we
want know they're trying to
put one over on us.

Sincerely,
Eddie Harris

November 5, 1996

Joseph T. Carney
111 Hayes Avenue
Charleston, WV 25314

Division of Environmental Protection
Training Center
#10 McJunkin Road
Nitro, WV 25143-2506

Attn: Brian Farkas

RE: Rules for Filing Freedom of
Information Act Requests

Dear Mr. Farkas:

The following comment is offered regarding the proposed "Rules for Filing Freedom of Information Act Requests":

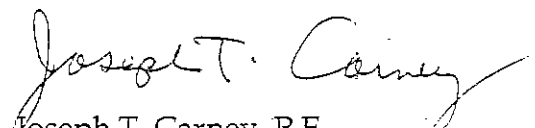
8.1.h exempts "Internal memoranda or letters received or prepared by any public body."

This exemption, in my opinion, is not justified. Internal memoranda and letters received or prepared by any public body should be part of the public record. This exemption would place a cloak of secrecy over the internal workings of DEP.

I am a Consulting Engineer and work with several branches of DEP. The DEP personnel have always been very straightforward and open about explaining the basis of their decisions and requests. I have never encountered a situation where DEP personnel felt a need to withhold their internal memoranda or letters received.

Additional information justifying the DEP's need for this exemption should be submitted and analyzed before a decision is made to adopt these rules. Thank you for the opportunity to submit these comments.

Very truly yours,


Joseph T. Carney, P.E.

To: Brian Farkas,

I agree totally. Paying
twice for the same service
is not only wrong to Uni-
American.

I'll sign my name to anything
that fights against this ridiculous
regulation.
10/9/96 Donna Jean Mayfield

304-292-2450

Donna Jean Mayfield
1029 Richmond Ave.
Morgantown, W.V.
26505

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

JAN CASTO
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000
FAX: (304) 558-0900



STATE OF WEST VIRGINIA

SECRETARY OF STATE

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

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

PENNEY BARKER
Supervisor, Corporations

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MAR 5 10 10 AM '97

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE (Plus all the volunteer
help we can get)

TO: CARRIE CHAMBERS

AGENCY: DEP-DIRECTORS' OFFICE

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: February 20, 1997

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: 60 DEP-DIRECTORS' OFFICE

* 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: Carrie Chambers

Judy,

*Per our discussion today, attached is the
FOIA rule with Brian Ferkas' Corrections.*

Shark