

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #5

Do Not Mark In This Box

FILED

2005 SEP -9 A 10:30

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: WV Department of Environmental Protection/Secretary TITLE NUMBER: 60

CITE AUTHORITY: W. Va. § 22-26-3(m). § 22-26-4

RULE TYPE: PROCEDURAL _____ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 7

TITLE OF RULE BEING PROPOSED: Confidential Information Under Water Resources
Protection Act

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS October 11, 2005


Authorized Signature

\$5.80

60CSR7

FILED

TITLE 60
INTERPRETIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY'S OFFICE

2005 SEP -9 A 10: 30
OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 7

CONFIDENTIAL INFORMATION UNDER WATER RESOURCES
PROTECTION ACT

§60-7-1. General.

1.1. Scope. – This rule establishes the requirements for claiming information submitted to the Secretary as confidential and the procedures for determinations of confidentiality in accordance with the provisions of W. Va. Code §22-26-4.

1.2. Authority. – W. Va. Code §22-26-3(m); 22-26-4.

1.3. Filing Date. – September 9, 2005

1.4. Effective Date. – October 11, 2005

§60-7-2. Definitions.

1.1. “Act” means the Water Resources Protection Act, W. Va. Code §§ 22-26-1 et seq.

1.2. “Claimant” means the person asserting a claim of confidentiality.

1.3. “Confidential information” includes records, reports, information or data, or a particular portion thereof, that reveal a trade secret, contain protected information relating to homeland security or are subject to another exemption provided by the State Freedom of Information Act [W. Va. Code § 29B-1-1 et seq.]; “confidential information” shall also include records, reports or information, or a particular portion thereof, that if made public would:

2.3.a. Divulge production or sales figures or methods, processes or production unique to the submitting person;

2.3.b. Otherwise tend to adversely affect the competitive position of a person by revealing trade secrets, including intellectual property rights; or

2.3.c. Present a threat to the safety and security of any water supply, including information concerning water supply vulnerability assessments.

1.4. "Governmental entities" means every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; and any other body which is created by state or local authority or which is primarily funded by the state or local authority.

1.5. "Person" means an individual, public and private business or industry, public or private water service and governmental entity.

1.6. "Records", "reports", "information", "data" or "documents" shall include information, regardless of physical form or characteristics, including electronic information.

1.7. "Secretary" means the Secretary of the West Virginia Department of Environmental Protection or his or her designee.

1.8. "Trade Secrets" 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.

1.9. "WVDEP" means West Virginia Department of Environmental Protection employees, representatives, contractors, temporary employees, or interns.

§60-7-3. Claim of Confidentiality.

2.1. Time When Made. Any person required to submit information to the Secretary pursuant to the Act, which such person believes in good faith to constitute confidential information, may assert a confidentiality claim in accordance with this rule. Such claim must be made as soon as practicable, but no later than ten (10) days from the date the information was submitted. If a claim of confidentiality is not made within ten (10) days of submission, the Secretary may make the information available to the public without further notice.

2.2. Submission of Information Claimed Confidential.

3.2.a. Confidential Information – Hardcopy Submissions. All information that is claimed to be confidential and which is submitted in hardcopy form must be submitted on colored paper in order to readily identify such information. The claimant must mark each page containing confidential information "CONFIDENTIAL COPY."

The claimant must clearly underscore or highlight by shading the text all information in the confidential copy that the claimant asserts to be confidential in a manner that will be clearly visible on photocopies of the confidential copy.

3.2.b. Redacted Submission of Information Claimed Confidential for Public Disclosure. For each hardcopy submission of information, any portion of which is claimed confidential, a complete set of the information must be submitted simultaneously on uncolored paper with the information claimed to be confidential redacted, and with the words "REDACTED COPY" marked clearly on each page, so that a set of information is suitable for public disclosure and provides notice to the public that a claim of confidentiality has been made.

3.2.c. Confidential Information – Electronic Submissions. For electronic submissions containing information claimed confidential, the claimant must submit a cover document and written justification as required under subsection 3.3, regardless of whether that document is submitted in electronic or hardcopy form. Upon the request of the Secretary, the claimant must submit a redacted form of the information.

3.2.d. The claimant may assert that multiple pieces of data, which do not individually qualify as confidential information, could be pieced together to form confidential information if made publicly available. The Secretary will assess such "mosaic effect" claims on a case-by-case basis.

3.3. Cover Document.

3.3.a. Designee. Each submission of information to the Secretary, any portion of which is claimed to be confidential, must be supported by a cover document that identifies the name and address of the claimant and designates a person as the proper addressee of communications from the Secretary regarding information gathering under the Act, the name, address, and telephone number of the designated person; and a request that all WVDEP inquiries and communications regarding information claimed as confidential (oral and written) be directed to the designee. The cover document must be submitted when a claim of confidentiality is made in accordance with the time frame specified under subsection 3.1.

3.3.b. Justification for Confidentiality in Cover Document. In addition to the information required under subdivision 3.3.a, the cover document must, at a minimum, include the following: a statement that the information is being submitted pursuant to the "Water Resources Protection Act;" identification of each segment of information within each page that is submitted as confidential; and the period of time for which the confidential treatment is desired by the claimant (e.g., until a certain date, until the occurrence of a specified event, or permanently). Furthermore, the claimant must include a detailed justification for each segment of information that is claimed confidential. The justification must address the criteria set forth in subsection 4.1 and must include the following information:

3.3.b.1. If the reason for the claim of confidentiality is that the information would reveal a trade secret, the claimant must provide a description of the substantial harmful effects which disclosure of the confidential information would have upon the claimant's competitive position, an explanation of why such harmful effects are substantial, and an explanation of the causal relationship between disclosure and such harmful effects;

3.3.b.2. If the confidential information consists of information other than trade secrets, the claimant must provide a description of the information and an explanation as to how it meets the definition of "confidential information" under subsection 2.3; and

3.3.b.3. The claimant may provide any other substantiation that is relevant in establishing that the asserted confidential information is confidential.

3.3.c. Redacted Version. If the cover document contains confidential information, the claimant must provide a redacted version, which will be available for public disclosure.

3.3.d. Cover Document as Basis for Review. The cover document justifying the claim of confidentiality will form the basis for the Secretary's review of the confidentiality claim. If the claimant submits additional information to support the confidentiality claim pursuant to subdivision 4.2.c, the additional submission will also be considered.

3.4. Submission to Secretary.

3.4.a. Confidential Copy. The claimant must seal the confidential copy in an envelope displaying the word "CONFIDENTIAL" in bold type or stamp on both sides. This envelope must be enclosed in another envelope for transmittal to the Secretary. The outer envelope must bear no markings indicating the confidential nature of the contents.

3.4.b. Method of Delivery. The claimant must send the package containing all required information to the Secretary by certified mail, return receipt requested, or by other means providing a receipt for delivery.

§60-7-4. Determination of Confidentiality.

4.1. In the course of making a determination of confidentiality, the Secretary will consider the following criteria in addition to the required justification under subdivision 3.3.b.

4.1.a. The claim of confidentiality has not expired by its terms, nor been waived or withdrawn;

4.1.b. The claimant has satisfactorily shown that it has taken reasonable measures, and intends to continue taking such measures, to prevent disclosure of the information to others;

4.1.c. The information claimed confidential is not, and has not been, reasonably obtainable without the claimant's consent by other persons (other than governmental bodies) by use of legitimate means; for example, the information is not contained in materials which are routinely available to the general public, including without limitation material in administrative or judicial proceedings/decisions, press releases, copies of speeches, pamphlets and educational materials;

4.1.d. The extent to which the information has been disclosed to others and whether it was disclosed to other persons either by the claimant (except in a manner which protects the confidentiality of the information) or without the consent of the claimant (other than by subpoena or by discovery based on a showing of special need in a judicial proceeding, arbitration, or other proceeding in which the claimant was required to disclose the information to such other persons, as long as the information has not become available to persons not involved in the proceeding), and the precautions taken to prevent further disclosure;

4.1.e. If the Secretary, United States Environmental Protection Agency or any other agency has previously made a confidentiality determination relevant to the pending confidentiality claim, copies of all such confidentiality determinations; and

4.1.f. No law, regulation or order by a court or other tribunal of competent jurisdiction specifically requires disclosure of the information or provides that the information is not confidential information.

4.2. Notice of Determination by the Secretary.

4.2.a. If, after review of all the information submitted, the Secretary determines that the information is not confidential, the Secretary will notify the claimant by certified mail, return receipt requested. The notice will state the basis for the determination and that it constitutes final agency action concerning the confidentiality claim.

4.2.b. If, after review of all the information submitted, the Secretary determines that the information is confidential, the Secretary will treat such information as confidential in accordance with the provisions set out in section 6. The Secretary will send written notice of the determination to the claimant. This notice will state the basis for the determination and that it constitutes final agency action. The Secretary will send the notice by certified mail, return receipt requested.

4.2.c. If a determination has not been made prior to the time that a request for information is received from the public, the Secretary will, after allowing the

claimant up to ten (10) days to claim the information confidential in accordance with this rule, proceed expeditiously to make a final determination in accordance with this rule. Before making such determination, the Secretary will provide notice to the claimant that a request for the confidential information has been received and provide the claimant a period of five (5) days to submit a written response to the Secretary.

4.2.d. All requests to inspect or copy documents submitted under the Act must state with reasonable specificity the documents or type of documents sought to be inspected or copied. Within ten (10) business days of the receipt of a request, the Secretary will:

4.2.d.1. Advise the person making the request in writing of the time and place where the person may inspect and copy the documents which, if the request addresses information claimed as confidential, may not be sooner than twenty (20) days following the date of the determination to disclose, unless an earlier disclosure date is agreed to by the claimant; or

4.2.d.2. Deny the request, stating in writing the reasons for denial.

4.2.e. If the request addresses information claimed as confidential, the Secretary will provide notice of the action taken pursuant to subdivision 4.2.d to the claimant by certified mail, return receipt requested.

3.3. Treatment of information pending confidentiality determination. The Secretary will treat asserted confidential information as confidential in accordance with the provisions of section 6 until the Secretary has made a final determination that the asserted information is not confidential.

§60-7-5. Appeal of Confidentiality Determination.

5.1 Any person adversely affected by a determination regarding confidential information under the Act may appeal the determination to the appropriate circuit court pursuant to the provisions of W. Va. Code § 29A-5-1 et seq. Pursuant to W. Va. Code § 29A-5-4(b), an appeal must be filed within thirty (30) days after the date upon which the aggrieved person received notice of the final decision of the Secretary. The filing of a timely notice of appeal will stay any determination to disclose confidential information pending a final decision on appeal. The scope of review is limited to the question of whether the portion of the records, reports, data or other information sought to be deemed confidential, inspected or copied is entitled to be treated as confidential under the Act. The Secretary will take all measures to afford evidentiary protection in appeals as necessary to protect the confidentiality of the information at issue, including the use of in camera proceedings and the sealing of records when appropriate.

§60-7-6. Treatment of Confidential and Asserted Confidential Information.

6.1. Handling of confidential material by authorized personnel. Only those WVDEP persons whose activities necessitate access to information for which a confidentiality claim has been made may open and handle any envelope or file which is marked "CONFIDENTIAL."

6.2. Storage of records. The WVDEP will store any records containing confidential or asserted confidential information only in secure rooms, provided that if such records are in a form which is not amenable to such storage, the WVDEP will store such records in a manner which similarly restricts access by persons to whom disclosure of the confidential information in question is restricted. With regard to confidential electronic data, the WVDEP will take every reasonable precaution to safeguard the integrity of the data.

6.3. Confidential information clearly identified. Any records made, possessed, or controlled by the WVDEP and containing confidential or asserted confidential information, will contain indicators clearly identifying the confidential or asserted confidential information.

6.4. Record of persons accessing confidential information. The WVDEP will maintain a record of all persons obtaining access to confidential or asserted confidential information, including the date and time of, and the reasons for, the access.

§60-7-7. Release of Confidential Information To Other Governmental Entities.

7.1. Information designated as confidential may be released to governmental entities, their employees and agents when compiling and analyzing survey and registration information and as may be necessary to develop the legislative report required by the Act or to develop water resources plans. Any governmental entity or person requesting information designated as confidential must, prior to receiving such information, complete the "Description of Intent" form attached as Appendix A to this rule and agree to be bound by the terms of the "Non-Disclosure Agreement" attached as Appendix B to this rule. Any governmental entity or person receiving information designated confidential will take appropriate measures to safeguard such information and to protect against its improper disclosure.

§60-7-8. Use of Confidential Material by the Secretary.

8.1. A claim of confidentiality will in no way limit the Secretary in the exercise of his or her powers or duties under the West Virginia Code or any rule promulgated thereunder.

APPENDIX A

West Virginia Department of Environmental Protection
DESCRIPTION OF INTENT

Pursuant to the Water Resources Protection Act, W. Va. Code §22-26-1 to 22-26-6, (the "Act"), the WVDEP may release confidential information to governmental entities, their employees and agents when compiling and analyzing survey and registration information and as may be necessary to develop the legislative report required by the Act or to develop water resources plans.

All requesters of confidential information must read and agree to be bound by the terms of the attached Non-Disclosure Agreement.

Requesters of confidential information must provide in writing their reason(s) for requesting this information and provide specific account of the manner in which the information will be used and for what purpose(s). The requester must understand fully, and agree to be bound by the limits placed upon the use, reproduction, and dissemination of the information under the terms and conditions of the Non-Disclosure Agreement.

Description of Intent _____

Information Requested _____

Reason for Requesting Information (attach additional pages if necessary) _____

Name of Requester _____

Company/Institution _____

Project Title _____

Project Leader _____

Funding Source _____

Project Address _____

Contact Telephone _____

Contact Fax _____

Contact E-mail _____

Appendix B

West Virginia Department of Environmental Protection NON-DISCLOSURE AGREEMENT

THIS AGREEMENT dated the _____ day of _____, 200__ is made between the West Virginia Department of Environmental Protection (“Disclosing Party”) and _____ (“Receiving Party”) for the release of confidential information identified in the attached “Description of Intent” form.

1. Receiving Party agrees to use confidential information only for the reasons outlined on the “Description of Intent” form.
2. For confidential information received from Disclosing Party, Receiving Party agrees that each employee, temporary employee, contractor, subcontractor, agent or any other individual who is provided with confidential information shall take appropriate measures to safeguard such information and to protect against its improper disclosure, including, but not limited to, the following measures:
 - (a) Confidential information will be opened only by persons authorized by Receiving Party to handle the information.
 - (b) Only those employees of Receiving Party whose activities necessitate access to confidential information may open any envelope or file which is marked “CONFIDENTIAL.”
 - (c) Receiving Party shall store any records containing confidential information only in secure rooms; provided, however, that if such records are in a form which is not amenable to such storage, Receiving Party shall store such records in a manner which similarly restricts access by persons to whom disclosure of the confidential information in question is restricted.
 - (d) Receiving Party shall take every reasonable precaution to safeguard the integrity of confidential electronic data.
 - (e) Receiving Party shall maintain a record of all persons obtaining access to confidential information, including the date and time of, and the reasons for, the access.

(f) Any records made, possessed, or controlled by Receiving Party, and containing confidential information, shall contain indicators identifying the confidential information.

4. Obligations of parties under this Agreement shall not apply to information that:

(a) was already lawfully in the public domain when disclosed; or subsequently lawfully enters into the public domain when disclosed; or subsequently lawfully enters into the public domain other than through disclosure by the Receiving Party;

(b) was already lawfully in the possession of or known by the Receiving Party free of any obligation at the time disclosed to the Receiving Party;

(c) is rightfully received by the Receiving Party from a third party without a duty of confidentiality;

(d) is developed independently by the Receiving Party without use of the confidential information; or

(e) is disclosed pursuant to judicial or governmental order, provided that the Receiving Party notifies Disclosing Party so that an adequate opportunity is given to respond to such order.

4. Receiving Party agrees, upon the written request of Disclosing Party, to return to Disclosing Party all confidential information and confidential materials provided by Disclosing Party.

5. Receiving Party agrees, upon the written request of Disclosing Party, to provide Disclosing Party with analyses, studies, compilations, copies, extracts, reproductions, computer data, memoranda and notes and other writings prepared by Receiving Party based on or containing any of the confidential information.

6. Failure by either party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision. Any modifications to this Agreement must be made in writing and must be signed by both parties.

7. This Agreement constitutes the entire understanding between both parties regarding the release of the confidential information and merges all prior agreements between them relating to this information and its use.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

[*Receiving Party*]

West Virginia Department
of Environment Protection

By: _____
Name:
Title:
Date:

By: _____
Name:
Title:
Date:

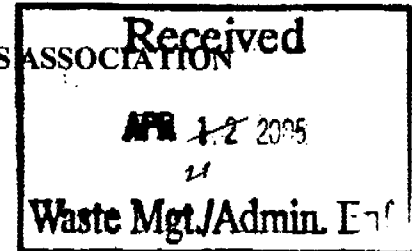


WEST VIRGINIA MANUFACTURERS ASSOCIATION

2001 Quarrier Street, Charleston, WV 25311
Telephone: (304) 342-2123
FAX: (304) 342-4552
wvma@wvma.com

April 18, 2005

COMMENTS OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION REGARDING CONFIDENTIAL INFORMATION UNDER WATER RESOURCES PROTECTION ACT 60 C.S.R. 7



I. Introduction.

The West Virginia Manufacturers Association (WVMA) is an association of manufacturers and related businesses dedicated to the advancement of manufacturing activities in West Virginia. The WVMA regularly comments upon rules of interest to its members. The WVMA offers these comments regarding the *Confidential Information Under Water Resources Protection Act*, 60 C.S.R. 7, proposed by the Department of Environmental Protection (DEP).

II. Comments.

A. General Comments

Most of the information that will be provided to the DEP consists of data generated in the course of performing the water use survey required by Section 3 of the Water Resources Protection Act (the Act), *W. Va. Code* Chapter 22, Article 26. In preliminary meetings discussing that survey the Secretary has explained that the surveys are to be completed electronically; there will be no paper copies accepted. However, when the rule explains how the confidentiality procedures work, almost all the procedures referred to the use of paper documents. Section 3.2.c of the proposed rule refers to electronic submissions, but also requires a "cover document and written justification as required under Section 3.3, regardless of whether that document is submitted in electronic or hard copy form." It is unclear how the person requesting the confidentiality will verify that the cover document is associated with the materials that are only to be submitted electronically.

Board of Directors

Ashland, Inc	Criterion Catalyst	Essroc	Kingsford Manufacturing Co.	PPG Industries, Inc
BASF Corporation	Dow Chemical Company	Flexsys	NGK Spark Plugs (U.S.A.), Inc.	Special Metals Corporation
Bayer CropScience	Downard Hydraulics, Inc.	Georgia-Pacific Corporation	Phillips Machine Service, Inc.	Spitman Thomas & Battle, PLLC
Bayer MaterialScience, LLC	DuPont	Haltown Paperboard	Pilgrim's Pride Corporation	Toyota Motor Manufacturing
Bruce Hardwood Floors	Eagle Manufacturing Co	Kanawha Manufacturing Co.	Potesta & Associates	U.S. Silica
Charles Ryan Associates, Inc.				

B. Specific Comments

1. Deadline for claiming confidentiality.

Section 3.1 of the proposed rule requires that a claim of confidentiality be made no later than seven days from the date information is submitted. We do not believe the seven day limitation is reasonable, and believe that it should be extended to at least thirty days. Regardless of the time the claim for confidentiality is made, though, we urge the DEP to respect the claim from that time forward. If a claim is made late, but no information was ever disseminated to the public before receipt of the confidentiality claim, there is no harm to the DEP, and there is benefit to the reporters, in allowing the claim of confidentiality. If information has already been given to someone, then the confidentiality would be lost, but there is no reason to deem the confidentiality lost when that has not in fact occurred.

The time deadlines for responses that are allowed in Section 4.2.c are too tight. Those submitting information are allowed only seven days to claim the information is confidential, and five days to submit a written response to the DEP once the DEP makes its determination regarding confidentiality. The DEP, on the other hand, has an unspecified time in which to "proceed expeditiously to make a final determination." The WVMA believes that these are excessively short deadlines for its members to take action, and should be extended to 30 days.

2. Demonstration of harmful effects.

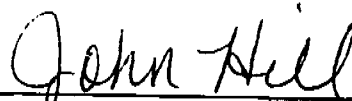
Subsection 3.3.b.1 of the proposed rule requires the person claiming confidentiality to provide "a description of the substantial harmful effects which disclosure of the confidential information would have upon the claimant's competitive position, an explanation of why such harmful effects are substantial, and an explanation of the causal or relation between disclosure and such harmful effects." We are not aware of any place in the Act requiring such explanations and disclosures, and believe they should only be required upon request of the Secretary, in the event that the need for confidentiality is not immediately clear.

3. Indicators of confidential information.

Proposed Section 6.3 requires all confidential information obtained by DEP to "contain indicators clearly identifying the confidential or asserted confidential information." It is not clear from this whether the records are to clearly identify the confidential information that is being protected, or should indicate that the records contain confidential information. The WVMA supports the latter, which will help protect confidentiality without identifying where the protected information is found. The WVMA would oppose identifying the confidential information in a document if it could become a convenient summary of the confidential information that is to be protected.

III. Conclusion.

The WVMA appreciates the opportunity to offer these comments on proposed 60 C.S.R. 7.



John Hill
West Virginia Manufacturers Association
Water Team Leader

RESPONSE TO COMMENTS – 60 CSR 7

The comment period for the Confidential Information Under Water Resources Protection Act rule, 60 CSR 7, closed April 18, 2005. Comments were received from the West Virginia Manufacturers Association (WVMA).

COMMENT A:

The WVMA commented that it was unclear how someone submitting a paper request for confidentiality would be able to insure those documents were related to their electronic submission.

RESPONSE A:

Sufficient information is required in the survey to be able to identify each piece of data that is submitted. Simply identifying the information specific to that facility in the Request for Confidentiality will link the electronic file to the paper request. The person making the request should be specific in their identification, such as "Item 17 on the Survey", or "all latitude and longitude data for water intake points."

The DEP does not believe a change in the rule is necessary.

COMMENT B:

The WVMA commented that the seven day deadline for making a confidentiality claim in Section 3.1 should be increased to 30 days, and that a late claim should be honored if, prior to the time the claim is made, no one has requested the information claimed to be confidential.

RESPONSE B:

The DEP believes a person should be required to make a claim of confidentiality as soon as practicable. The agency is under time restraints to respond to Freedom of Information Act Requests and a response is required within ten days of receipt of the request. Normally, the Agency requires claims to keep information confidential be submitted with the document in question. However, since electronic submission of the survey is, for practical purposes, instantaneous, it is impractical to require a submission of a claim for confidentiality be submitted with the data.

Furthermore, since a ninety-day "window" is provided for completion of the survey, there should be no need to wait until the survey is submitted to begin to determine whether the required data is confidential. After further consideration of the comment, the agency has expanded the 7-day period to 10 days.

Concerning the point about a late claim of confidentiality, the DEP points out that the statutory presumption is that a person will make a claim of confidentiality at the time of

submission, and the rule reflects that presumption. Companies should therefore make every effort to comply with this rule and determine whether their submission contains confidential information at the time of submission or within 10 days thereafter.

COMMENT C:

The WVMA also commented the deadline for a response to a determination in Section 4.2.c should be changed to 30 days, because five days is excessively short.

RESPONSE C:

Regarding the time frames in subdivision 4.2.c of the rule, the commenter states that the five day response time for the company is too stringent; however, this time frame is specifically established in the statute, and furthermore provides a *second opportunity* for the company to fully justify its claim. As far as the time frame for the agency to make a determination, the DEP has no specified time frame for evaluating claims for confidentiality because it does not know what type of claims may be made. Expertise to evaluate the claim may not be readily available. It would be a disservice to both the respondent and the public to make a hasty determination.

Therefore, the DEP will not change the language in this section.

COMMENT D:

The WVMA, in regard to Subsection 3.3.b.1 of the proposed rule, states that, " 'a description of the substantial harmful effects which disclosure of the confidential information would have upon the claimant's competitive position, an explanation of why such harmful effects are substantial, and an explanation of the causal or relation between disclosure and such harmful effects.' We are not aware of any place in the Act requiring such explanations and disclosures, and believe they should only be required upon request of the Secretary, in the event that the need for confidentiality is not immediately clear."

RESPONSE D:

The DEP is responsible for implementation of a number of environmental laws with confidentiality provisions. The rule's requirement that a person claiming confidentiality must provide some specific information supporting that claim is consistent with the same requirement in most of the other environmental programs, as well as under the Water Resources Protection Act. That Act requires a person making a claim of confidentiality to "provide written justification . . . stating the reasons for confidentiality and why the information should not be released or made public." The Secretary must then consider that demonstration and determine whether to approve or deny the request. Case law in West Virginia also supports the proposition that it is insufficient for a claimant to make mere conclusory statements that the information is entitled to confidential protection.

Therefore, the DEP will make no changes to the language of this subsection.

COMMENT E:

The WVMA commented that Proposed Section 6.3 was unclear on whether records maintained by the DEP should clearly identify the confidential information being protected, or whether the entire record should be identified as containing confidential information. WVMA is in favor of identifying the entire record as containing confidential information, as this would protect confidentiality without identifying where the confidential information is found.

RESPONSE E:

It would be impossible for the DEP to only indicate the document contains confidential information, and still be able to fulfill its obligations under the Freedom of Information Act while actually maintaining designated information confidential. The DEP must retain records that clearly designate which sections of a document or electronic record are considered confidential.

Section 6 details how the DEP (and its agents) will handle confidential information internally. Section 6.3 simply states that the records held by DEP will be marked in such a way to ensure that the information is flagged as confidential within the agency's own filing systems. This is in addition to what the company is required to do under section 3.2 to clearly mark the information when it is first submitted.

The DEP will not change the language of the proposed rule.