

**TITLE 45
LEGISLATIVE RULE
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY**

**SERIES 31
CONFIDENTIAL INFORMATION**

§45-31-1. General.

1.1. Scope. -- This series establishes the requirements for claiming information submitted to the Director as confidential and the procedures for determinations of confidentiality in accordance with the provisions of W. Va. Code §22-5-10.

1.2. Authority. -- W. Va. Code §22-5-1 et seq.

1.3. Filing Date. -- June 27, 1997.

1.4. Effective Date. -- September 25, 1997.

1.5. Repeal of Former Rule. This legislative rule repeals and replaces 45 CSR 31, "Confidential Information" which became effective on July 7, 1993.

§45-31-2. Definitions.

2.1. "Director" means the Director of the Division of Environmental Protection or such other person to whom the Director has delegated authority or duties pursuant to W. Va. Code §22-1-1 et seq.

2.2. "Division of Environmental Protection" or "DEP" means West Virginia Division of Environmental Protection created by the provisions of W. Va. Code §22-1-1 et seq.

2.3. "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.

2.4. "Types and amounts of air pollutants discharged" means, with reference to any source of emission of any substance into the air --

2.4.a.

2.4.a.1. Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

2.4.a.2. Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

2.4.a.3. A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

2.4.b. Notwithstanding paragraph a of this subsection, the following information shall be

considered to be emission data only to the extent necessary to allow the Director to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow the Director to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

2.4.b.1. Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

2.4.b.2. Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

2.5. "Information" means any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics and all air quality data, emission data, and permit applications.

2.6. "Person" means any and all persons, natural or artificial, including the state of West Virginia or any other state, the United States of America, any municipal, statutory, public or private corporation organized or existing under the laws of this or any other state or country, and any firm, partnership, or association of whatever nature.

2.7. "Designee" means a natural person located in the State of West Virginia and identified in the cover document as the designated representative who shall receive notice of the Director's determination of confidentiality in accordance with this rule. Notice shall be deemed sufficient if the Director provides notice to the designee.

§45-31-3. Claim of Confidentiality.

3.1. Made When Information Submitted. A claim of confidentiality shall be made in accordance with this rule at the time the information claimed to be confidential is

submitted to the Director. If no claim of confidentiality is made at the time of submission or is not made in accordance with this rule, the Director may make the information available to the public without further notice.

3.2. Information Previously Submitted. Information claimed as confidential and submitted prior to the effective date of this rule may be made available to the public unless the person who submitted the information establishes their claim of confidentiality in accordance with this rule and within one hundred eighty (180) days of the effective date of this rule.

3.3. Submission of Information Claimed Confidential.

3.3.a. Confidential Information. With the exception of documents of a size greater than 8 ½" x 14", all information that is claimed to be confidential and which is submitted in hardcopy form should be submitted on colored paper in order to readily identify such information. The person submitting the information claimed as confidential shall mark each page with "Claimed Confidential" with the date of such claim of confidentiality.

3.3.b. Justification for Confidentiality in Cover Document. Each submission of information to the Director, any portion of which is claimed to be confidential, shall be accompanied by a cover document which shall be available for public disclosure. The document shall, at a minimum, identify the person making the submission of information claimed as confidential, identify the reason for the submission of information, identify the name, an address in the state of West Virginia, and telephone number of the designee who shall be contacted in accordance with this rule, identify each segment of information within each page that is submitted as confidential, provide the justification for each such segment of information that is claimed confidential, including the criteria set forth in subsection 4.1, and provide the period of time for which the confidential treatment is desired by the business (e.g., until a certain date, until the occurrence of a specified event, or permanently).

3.3.c. Cover Document as Basis for Review. In the event that a written request for information is received in accordance with W. Va. Code §29B-1-1 et seq., and which triggers a confidentiality determination under this rule, the cover document justifying the claim of confidentiality shall form the basis for the Director's review of the confidentiality claim.

3.4. Redacted Submission of Information Claimed Confidential for Public Disclosure. For each submission of information any portion of which is claimed to be confidential, a complete set of the information, including the document justifying the claim of confidentiality shall be submitted simultaneously on uncolored paper with the information claimed to be confidential blacked out, and with the words "redacted copy - claim of confidentiality" marked clearly on each such page, so that such a set of information is suitable for public disclosure and provides notice to the public that a claim of confidentiality has been made.

3.5. Electronic Media. Information that is claimed to be confidential and which is submitted in electronic form shall be identified as confidential in accordance with the conventions of the applicable software program. Such submissions shall include a cover document meeting all of the requirements of this section regardless of whether that cover document is submitted in electronic form or in hardcopy form. The submitter of information in electronic form that is claimed to be confidential shall provide notice to potential reviewers of the electronic data that information has been redacted from the submission.

§45-31-4. Determination of Confidentiality.

4.1. In the course of his or her determination of whether the information claimed to be confidential is a trade secret in accordance with this rule, the Director shall consider the following criteria:

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

4.1.b. The person asserting the claim of confidentiality has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;

4.1.c. The information claimed confidential is not, and has not been, reasonably obtainable without the person's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

4.1.d. No statute specifically requires disclosure of the information; and

4.1.e. Either--

4.1.e.1. The person has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or

4.1.e.2. The information is voluntarily submitted information, and its disclosure would likely to impair the State's ability to obtain necessary information in the future.

4.2. Notice of Determination by the Director.

4.2.a. Upon a determination made pursuant to request, the Director shall provide written notice of his or her determination of confidentiality to the designee and to the person requesting the disclosure of confidential information. If the Director determines that disclosure of information claimed confidential shall be made, the notice shall advise the designee and the person requesting disclosure of the information that will be disclosed, a time not less than ten (10) days from the date the notice was received by the designee, and place at which the person may inspect and copy the documents.

4.2.b. The Director may perform a determination of confidentiality without request, and upon such a determination, the Director shall

provide written notice of his or her determination of confidentiality to the designee.

§45-31-5. Use of Confidential Material by the Director.

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

§45-31-6. Types and Amounts of Air Pollutants Discharged.

6.1. No person shall claim as confidential, information concerning the types and amounts of air pollutants discharged.