

Appendix K

**Confidential Information Under Water Resources
Protection Act**

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

**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.

2.1. "Act" means the Water Resources Protection Act, W. Va. Code §§ 22-26-1 et seq.

2.2. "Claimant" means the person asserting a claim of confidentiality.

2.3. "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.

2.4. "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.

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

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

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

2.8. "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.

2.9. “WVDEP” means West Virginia Department of Environmental Protection employees, representatives, contractors, temporary employees, or interns.

§60-7-3. Claim of Confidentiality.

3.1. 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.

3.2. 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.

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.

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

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;

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;

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

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

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.

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 Environmental Protection

By: _____
Name:
Title:
Date:

By: _____
Name:
Title:
Date: