

US EPA ARCHIVE DOCUMENT

**WEST VIRGINIA REVISION CHECKLIST FOR
SECTION 3006(f): AVAILABILITY OF INFORMATION**

- Titles of Legislation: 1. West Virginia Hazardous Waste Management Act, W. Va. Code, 1994 Cumulative Supplement, § 22-18-12.
 2. The West Virginia Freedom of Information Act, W. Va. Code, 1994 Supplement, Chapter 29B.
 3. W. Va. Hazardous Waste Management Rule (HWMR), 33 CSR 20, effective July 1, 1999, §33-20-11.19.
 4. Regulations on Requests for Information, 46 CSR 8, effective February 18, 1996, §§ 46-8-1 through 46-8-11.

FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
1. PROCEDURAL REQUIREMENTS			
1.1 Scope of records subject to State requests as broad as scope of records defined by EPA	2.100(b)	W. Va. Code 22-18-12 33-20-11.19.a 46-8-2.1(d) W. Va. Code 29B-1-2(4)	Coverage. West Virginia's provision at § 22-18-12 provides that information obtained by any agency under Article 18 shall be available to the public unless the Director certifies such information to be confidential. Under §33-20-11.19.a, all such records, reports and information must be available to the public for inspection and copying. The definitions of "record" at § 46-8-2.1(d) and "public record" at § 29B-1-2(4) are consistent with the Federal definition of "record" at 40 CFR 2.100(b).

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FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
1.2 Certain materials routinely available without formal FOIA request	2.104(b)	MOA	In the Memorandum of Agreement, West Virginia agrees to make certain materials routinely available without a formal FOIA request pursuant to the Federal Freedom of Information Act, 5 U.S.C. 552 (a)(2). Examples of these materials are final opinions or orders in case adjudications, State regulations, statements of Agency policy, and administrative staff manuals affecting the public. In addition, records prepared for routine public distribution will also be available. Examples of such records are press releases, copies of speeches, pamphlets, and educational materials.
1.3 Reasonable efforts to assist requestor	2.109(b)	W. Va. Code 29B-1-3(3); MOA	In the Memorandum of Agreement, the State Agency agrees to perform the custodial duties outlined in W. Va. Code § 29B-1-3(3) concerning public records. As part of those duties, the State Agency agrees to make reasonable efforts to assist a requestor in identifying records being sought, and to help the requestor formulate his or her request.

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FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
1.4 Respond to request within 20 days. Failure to do so is basis for judicial or administrative review	2.112	46-8-7(b) 46-8-8(b) 46-8-5 W. Va. Code 29B-1-3(4) W. Va. Code 29B-1-5(1) Office of Legal Services' Statement	Coverage. Under §§ 46-8-7(b) and 29B-1-3(4), West Virginia requires that the Public Information Office and Board must respond in writing to the requestor within five working days of the receipt of the request. Under § 46-8-8(b), if a request is denied, a letter informing the requestor of the denial must be sent within 5 days of receipt of the request. This is a more stringent requirement than the Federal code's requirement of a response within 10 working days, plus a possible additional 10-day extension. The provision at § 46-8-5, addressing requests which do not reasonably describe records sought, is consistent with 40 CFR 2.112(c). West Virginia does not have a provision which specifically addresses the requirements of 40 CFR 2.112(f). However, as indicated in the Office of Legal Services Statement, failure of the Division and the Board to respond within the required times may be interpreted as constituting being "denied the right to inspect the public record." Therefore, under § 29B-1-5(1), such a person is allowed to seek injunctive or declaratory relief under this provision when the State fails to respond within the required 5-day period.

**WEST VIRGINIA REVISION CHECKLIST FOR
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FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
1.5 If request is denied, provide basis for denial and notice of judicial/administrative procedures	2.113(f) and 2.114(a)	W. Va. Code 29B-1-3(4)(c) W. Va. Code 29B-1-5(1)	Coverage. West Virginia's provisions are consistent with the Federal requirements regarding providing the requestor with the basis of the denial and notice of judicial/administrative procedures. Sections 29B-1-3(4)(c) and 29B-1-5(1) specifically state that any person denied the right to inspect the public record of a public body may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.
1.6 Denial of judicial appeal because of untimely filing, provide 30 days to file timely appeal	2.114(b)	W. Va. Code 29B-1-3(4)(c) W. Va. Code 29B-1-5(1)	The State is more stringent than the Federal in that the type of appeal addressed by 40 CFR 2.114 and 2.115 is not needed for the person to go to court and, therefore, not addressed in West Virginia's FOIA. Under §§ 29B-1-3(4)(c) and 29B-1-5(1), if the request is denied the person can go directly to the circuit court in the county where the public record is kept and seek injunctive or declaratory relief. (Note that § 29B-1-5(1) is most analogous to 40 CFR 2.116(a), except that denial of the appeal is not needed.)

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FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
1.7 Decision on administrative appeal within 30 days or by next meeting of appellate body	2.117	W. Va. Code 29B-1-3(4)(c) W. Va. Code 29B-1-5(1)	The State is more stringent than the Federal in that the type of appeal addressed by 40 CFR 2.114 and 2.115 is not needed for the person to go to court; therefore, the requirements of 40 CFR 2.117 are not addressed in West Virginia's FOIA. Under §§ 29B-1-3(4)(c) and 29B-1-5(1), if the request is denied, the person can go directly to the circuit court in the county where the public record is kept and seek injunctive or declaratory relief. (Note that § 29B-1-5(1) is most analogous to 40 CFR 2.116(a), except that denial of the appeal is not needed.)
1.8 Failure to decide on appeal by deadline constitutes final agency action and requestor's right to judicial review	5 U.S.C. 552 (a)(6)(C)	W. Va. Code 29B-1-3(4)(c) W. Va. Code 29B-1-5(1)	The State is more stringent than the Federal in that the type of appeal addressed by 40 CFR 2.114 and 2.115 is not needed for the person to go to court and therefore, the requirements of 5 U.S.C. 552(a)(6)(C) are not addressed in West Virginia's FOIA. Under §§ 29B-1-3(4)(c) and 29B-1-5(1), if the request is denied, the person can go directly to the circuit court in the county where the public record is kept and seek injunctive or declaratory relief. Thus, this requirement is irrelevant to the West Virginia requirements.

**WEST VIRGINIA REVISION CHECKLIST FOR
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FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
1.9 Opportunity for judicial review of any final agency action denying the request	2.116	W.Va. Code 29B-1-3(4)(c) W.Va. Code 29B-1-5(1)	The State is more stringent than the Federal in that the type of appeal addressed by 40 CFR 2.114 and 2.115 is not needed for the person to go to court; therefore, the requirements of 40 CFR 2.116 are not addressed in West Virginia's FOIA. Under §§ 29B-1-3(4)(c) and 29B-1-5(1), if the request is denied, the person can go directly to the circuit court in the county where the public record is kept and seek injunctive and declaratory relief. (Note that § 29B-1-5(1) is most analogous to 40 CFR 2.116(a), except that denial of the appeal is not needed.)
1.10 Consider waiver of fees for copies of information	2.120(d)	46-8-11; MOA	Coverage. In the Memorandum of Agreement, West Virginia agrees that in addition to the waiver of fees under circumstances described in CSR § 46-8-11(a), (c) and (f), the State will allow for the reduction or waiver of fees in accordance with 40 CFR 2.120(d). A reduction or waiver of fees will be considered in connection with each request from a representative of the press or other communication medium, or from a public interest group. The State agrees to reduce or waive the fee if it determines that a reduction or waiver of the fee is in the public interest, because furnishing the information can be considered as primarily benefitting the general public.

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FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
1.11 Attorney's fees and expense	5 U.S.C. 552(a)(4)(E)	W. Va. Code 29B-1-7	Coverage. West Virginia allows any person, who is denied access to public records and who successfully brings a suit, the ability to recover his or her attorney fees and court costs. This is consistent with the Federal requirement (see EPA Guidance document, Summary of RCRA §3006(f) Issues, Issue 1 in the SAM).
2. SUBSTANTIVE REQUIREMENTS			
2.1 All records are available to the public unless exempt from disclosure	See 5 U.S.C. 552 for exemptions (See 40 CFR 2.118)	46-8-3(a) W. Va. Code 29B-1-3(1) W. Va. Code 29B-1-4 33-20-11.19.a Certified in the Office of Legal Services' Statement	Coverage. Section 46-8-3(a) requires that all Division and Board records must be available to the public unless they are exempt from the disclosure requirements of the Act. Section 29B-1-3(1) states that every person has a right to inspect or copy any public record, except as provided by § 29B-1-4 (Exemptions). The § 29B-1-4 exemptions are consistent with the Federal exemptions at 40 CFR 2.118, which addresses the 5 U.S.C. 552(b) exemptions. Section 33-20-11.19.a also requires that any records, reports or information and any permit, permit applications, and related documentation shall be available to the public for inspection and copying, provided they are not exempt.

**WEST VIRGINIA REVISION CHECKLIST FOR
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FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
2.2 All non-exempt records available to the public regardless of whether any justification or need for records shown by requestor	See 2.1	46-8-3(b); Certified in the Office of Legal Services' Statement	Coverage. Section 46-8-3(b) is equivalent in that it requires that all nonexempt records must be available to the public upon request regardless of whether any justification or need has been shown by the requestor and regardless of whether or not the request cites the Act.
2.3 Same types of records available as EPA provides	See 2.1	46-8-3(a) W. Va. Code 29B-1-3(1) W. Va. Code 29B-1-4 33-20-11.19.a Certified in the Office of Legal Services' Statement	Coverage. See comments for Item 2.1 of this checklist.
2.4 State agrees to fullest possible disclosure of records to public	§3006(f)	W. Va. Code, Chapter 29B, Article 1; W. Va. Code 22-18-12; 46 CSR 8; 33-20-11.19 MOA	Pursuant to W.Va. Code Chapter 29B, Article 1 (Freedom of Information Act), W.Va. Code § 22-18-12 (Confidentiality of Information), 46 CSR 8 (Regulations on Requests for Information), and CSR § 33-20-11.19 (Public Access to Information), the State agrees, in the Memorandum of Agreement, to make the fullest possible disclosure of records to the public, subject to any exemptions under the Federal FOIA recognized by the State.

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FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
3. CONFIDENTIAL BUSINESS INFORMATION (CBI)			
3.1 CBI not defined any more broadly than 40 CFR Part 2, Subparts A and B	2.201(e) and 2.208	W. Va. Code 22-18-12 33-20-11.19.a 33-20-11.19.d 33-20-11.19.e W. Va. Code 29B-1-4(1) 46-8-9(a)	Coverage. The State has requirements that are equivalent to the Federal code.
3.2 If no claim of CBI at first opportunity, release information	270.12	W. Va. Code 22-18-12 33-20-11.19.a	Coverage. West Virginia's provisions at § 22-18-12 and § 33-20-11.19.a make it clear that the State will release information if there is no claim of CBI.
3.3 If CBI claim cannot be resolved within 20 days of request, requestor must be notified of claim within 20 days and told that State denied claim so as to resolve CBI	2.204(d)(1)(ii)	MOA	West Virginia agrees, in the Memorandum of Agreement, that if a claim of confidentiality is asserted and cannot be resolved in the time period provided for an agency response to a request, the State will notify the requestor of the confidentiality claim within the maximum 20-day time limit provided for an agency response. In addition, the requestor will be told that the request was denied in order to resolve the business confidentiality claim.

**WEST VIRGINIA REVISION CHECKLIST FOR
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FEDERAL REQUIREMENT	RCRA CITATION	STATE AUTHORITY	COMMENT
4. OVERSIGHT OF STATE PROGRAM			
4.1 State must keep log or file of denials of requests available for inspection		MOA	In the Memorandum of Agreement, the State agrees to keep a log of denials of requests for information (or a file containing copies of denial letters sent to requestors) which will be made available to EPA during State review.
4.2 State informs EPA of proposed modification of its basic statutory/regulatory authority, forms, procedures, or priorities	271.21(a)	MOA	In the Memorandum of Agreement, the State agrees to keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities, as applied to Section 3006(f).