WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1985

ENROLLED
Committee Substitute for
SENATE BILL NO. 338

(By Mr. [Signature] President)

PASSED April 11, 1985
In Effect from Day of Passage
AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirty-one, relating to creating the "Community Right to Know Act"; providing short title; providing legislative findings and declarations; providing definitions; stating duties and responsibilities of the director; procedure for residents to request information on hazardous substances; stating information to be provided by employers; providing for notice of violation; civil penalties and injunctions; providing for the protection of proprietary information; criminal penalties for disclosure; providing for expiration of act upon passage of federal legislation; severability.

Be it enacted by the Legislature of West Virginia:

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article thirty-one, to read as follows:
ARTICLE 31. COMMUNITY RIGHT TO KNOW.

§16-31-1. Short title.
This article shall be known and may be cited as the "Community Right to Know Act."

§16-31-2. Legislative findings and declarations.
The Legislature finds that the health and safety of persons living in this state may be improved by providing access to information regarding hazardous substances to which they may be exposed in their daily lives; that individuals have a basic right to the information provided under this article, including the risks presented by hazardous substances, thereby allowing them to make reasoned decisions and to take informed actions with regard to their living conditions; that the manufacturing industry plays a significant role in the economy of this state and the lives of its citizens and that the creation, use and storage of hazardous substances, given the limits of current technology, is inherent in the operations of this industry; and that local fire officials require information about hazardous substances stored in their localities in order to adequately plan for, and respond to, emergencies.
The Legislature therefore declares that it is the intent and purpose of this article to establish a program for the disclosure of information about hazardous substances in and near the community, and to provide a procedure whereby residents of this state may obtain access to such information.

§16-31-3. Definitions.
(a) "Compressed gas" means:
(1) A gas or mixture of gases having, in a container, an absolute pressure exceeding 40 psi at 70°F (21.1°C); or
(2) A gas or mixture of gases having, in a container, an absolute pressure exceeding 104 psi at 130°F (54.4°C) regardless of the pressure at 70°F (21.1°C); or
(3) A liquid having a vapor pressure exceeding 40 psi at 100°F (37.8°C) as determined by ASTM D-323-72.
(b) "Director" means the director of the state department of health as described in article one of this chapter.
(c) “Employer” means a person engaged in a business in this state having a standard industrial classification, as designated by the standard industrial classification manual prepared by the federal office of management and budget, within major group members twenty through thirty-nine inclusive.

(d) “Facility” means the building, structure, equipment and contiguous area used for the conduct of business.

(e) “Flammable” means a chemical that falls into one of the following categories:

1. “Aerosol, flammable” means an aerosol that, when tested by the method described in 16 Code of Federal Regulations, Section 1500.45, yields a flame projection exceeding eighteen inches at full valve opening, or a flash-back (a flame extending back to the valve) at any degree of valve opening;

2. “Gas, flammable” means:
   i. A gas that, at ambient temperature and pressure, forms a flammable mixture with air at a concentration of thirteen (13) percent by volume or less; or
   ii. A gas that, at ambient temperature and pressure, forms a range of flammable mixtures with air wider than twelve (12) percent by volume, regardless of the lower limit;

3. “Liquid, flammable” means any liquid having a flash point below 100°F (37.8°C), except any mixture having components with flash points of 100°F (37.8°C) or higher, the total of which make up ninety-nine percent or more of the total volume of the mixture; and

4. “Solid, flammable” means a solid, other than a blasting agent or explosive as defined in 29 Code of Federal Regulations, Section 1910.109(a), that is liable to cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from manufacturing or processing, or which can be ignited readily and when ignited burns so vigorously and persistently as to create a serious hazard. A chemical shall be considered to be a flammable solid if, when tested by the method described in 16 Code of Federal Regulations, Section 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one tenth of an inch per second along its major axis.

(f) “Flash point” means the minimum temperature at
which a liquid gives off a vapor in sufficient concentration to ignite when tested as follows:

(1) Tagliabu's Closed Tester (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24-1979 (ASTM D 56-79)) for liquids with a viscosity of less than forty-five Saybolt Universal Seconds (SUS) at 100°F (37.8°C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

(2) Pensky-Martens Closed Tester (See American National Standard Method of Test for Flash Point by Pensky-Martens Closed Tester, Z11.7-1979 (ASTM D93-79)) for liquids with a viscosity equal to or greater than forty-five SUS at 100°F (37.8°C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

(3) Setaflash Closed Tester (See American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTM D3278-78)).

Provided, That organic peroxides, which undergo autoaccelerating thermal decomposition, are excluded from any of the flash point determination methods specified above.

(g) "Hazardous substance" means any element, chemical compound or mixture of elements and/or compounds which is a physical hazard as defined in this section or a health hazard as defined or listed in (1) the Federal Occupational Safety and Health Administration in 29 Code of Federal Regulations Part 1910.1000 through 1910.1045, Subpart Z, as in effect January 1, 1985; (2) the American Conference of Governmental Industrial Hygienists (ACGIH) "Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment", as in effect January 1, 1985; and (3) the National Toxicology Program "Annual Report on Carcinogens" as in effect January 1, 1985.

(h) "Hazardous substances fact sheet" means any document containing the information described in section five, subsection (a)(1) through subsection (a)(8) of this article.

(i) "Organic peroxide" means an organic compound that contains the bivalent -0-0-structure and which may be considered to be a structural derivative of hydrogen.
peroxide where one or both of the hydrogen atoms has been replaced by an organic radical.

(j) "Oxidizer" means a chemical other than a blasting agent or explosive as defined in 29 Code of Federal Regulations Part 1910.109(a), that initiates or promotes combustion in other materials, thereby causing fire either by itself or through the release of oxygen or other gases.

(k) "Person" means an individual, trust, firm, joint stock company, public, private or government corporation, partnership, association, state or federal agency, the United States government, the state of West Virginia or any other state, municipality, county commission or any other political subdivision of a state or any interstate body.

(l) "Physical hazard" means a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water reactive.

(m) "Proprietary information" means any formula, pattern, device, or compilation of information which is used in an employer's business, and which gives said employer an opportunity to obtain an advantage over competitors who do not know or use it.

(n) "Pyrophoric" means a chemical that will ignite spontaneously in air at a temperature of 130°F (54.4°C) or below.

(o) "Storage" or "to store" means to hold a hazardous substance for a temporary period, at the end of which the hazardous substance is used on site, transported off site, or treated, stored or disposed of elsewhere.

(p) "Unstable (reactive)" means a chemical which in the pure state, or as produced or transported, will vigorously polymerize, decompose, condense, or will become self-reactive under conditions of shocks, pressure or temperature.

(q) "Water-reactive" means a chemical that reacts with water to release a gas that is either flammable or presents a health hazard.

§16-31-4. Duties and responsibilities of the director; procedure for residents to request information on hazardous substances.

(a) Within thirty days of the passage of this article, the
director shall develop a list of hazardous substances as defined in section three, subsection (g) of this article. The director shall provide this list and the definition of a physical hazard to any employer who may request it.

(b) The director shall, by the first day of June, one thousand nine hundred eighty-seven, and every two years thereafter, review the most recent editions of the publications referenced in section three, subsection (g) of this article to determine whether there have been any additions to or deletions of hazardous substances listed in those publications. Where such additions or deletions have been made, and unless the director is presented with clear and compelling reasons to the contrary, the list of hazardous substances covered by section three, subsection (g) of this article shall be revised to reflect the changes made in the referenced publications. Such revisions shall be made in accordance with the administrative procedures act, chapter twenty-nine-a of this code. The director shall make available such revised list and the definition of a physical hazard to any employer who may request it.

(c) Any resident of this state may request from the director a copy of any hazardous substance fact sheet and other information submitted by an employer for any facility. The director, subject to the provisions of section six of this article, shall transmit the requested information within ten working days. The director may recover the actual cost of copying the requested information from the person making the request.

§16-31-5. Information to be provided by employers.

(a) Any employer who normally stores any hazardous substance in quantities greater than fifty-five gallons or five hundred pounds shall provide to the director, the county sheriff of the county, and to the fire chief of the local fire department most proximate to the facility at which such substance is stored within four months of the effective date of this article and once every two years thereafter during the month of November, the following information:

1. The chemical name or common name used on the material safety data sheet and/or container label;
2. Physical and major chemical characteristics of the hazardous substance (such as vapor pressure, flash point, solubility);
(3) The physical hazards of the hazardous chemical, including the potential for fire, explosion and reactivity;
(4) The health hazards of a hazardous substance including signs and symptoms of exposure, and any medical conditions which are generally recognized as being activated by exposure to such substance;
(5) The primary route(s) of entry (inhalation, physical contact);
(6) Any generally applicable precautions for safe handling and use which are known to the employer;
(7) Emergency and first-aid procedures and the name and address of the manufacturer of the hazardous substance, if other than the employer, if said manufacturer can provide additional information on the hazardous substance and appropriate emergency procedures, if necessary;
(8) Whether the substance is listed in the National Toxicology Program “Annual Report of Carcinogens”, referenced in section three, subsection (g) of this article;
(9) An average quantity of each hazardous substance on inventory at the facility over the last year to be reported by indicating the applicable range from the following: Five hundred pounds to four thousand nine hundred ninety-nine pounds, five thousand pounds to forty-nine thousand nine hundred ninety-nine pounds, fifty thousand pounds to four hundred ninety-nine thousand nine hundred ninety-nine pounds and five hundred thousand pounds and above: Provided, That for purposes of this subsection, “average” shall mean the arithmetic mean; and
(10) The amount of such substance, if any: (i) reported as having been managed in the most recent annual hazardous waste report filed with the department of natural resources pursuant to article five-e, chapter twenty of this code; (ii) reported as having been emitted in the most recent air emissions inventory filed with the air pollution control commission pursuant to article twenty, chapter sixteen of this code; and (iii) reported as having been discharged in the most recent discharge monitoring report filed with the department of natural resources pursuant to article five-a, chapter twenty of this code: Provided, That the information required in subsection (a)(10) is required to be reported to the director only: Provided, however, That if a discharge
monitoring report is used to provide the information, an
employer shall specify the inclusive time period of the
report.
(b) Where an employer stores a hazardous substance
that is manufactured by some person other than the
employer and where the information required in subsection
(a)(1) through subsection (a)(8) of this section has not been
made available by the manufacturer, the employer shall
certify to the director that this information is not available
and shall thereafter have an additional sixty days within
which to provide such information to the director.

§16-31-6. Notice of violation; civil penalties.
1 (a) An employer who fails to provide the information to
the director under subsection (a) of section five of this
article within the time period provided shall be deemed in
violation of this article. Employers not complying within
fourteen days following written notification from the
director of such violation shall be subject to civil penalties
of not more than two thousand five hundred dollars per
violation.
(b) An employer who fails to provide to the fire chief
information as required in subsection (a) of section five of
this article within the time period provided shall be deemed
in violation of this article. Employers not complying within
fourteen days following written notification from the
director of such violation shall be subject to civil penalties
not to exceed five thousand dollars per violation.
(c) Any person who willfully, knowingly and
deliberately makes any false material statement or
representation in any document submitted pursuant to
section five of this article shall be subject to a civil penalty
of not less than one thousand dollars nor more than five
thousand dollars per violation.
(d) When the director believes that a violation of the
provisions of this article has occurred he may request the
attorney general to file an action for civil penalties, or
injunctive relief as may be necessary to enforce the
provisions of this article. Such action may be brought in the
circuit court of Kanawha County or the county where the
employer’s facility or a major portion thereof is located.
§16-31-7. Protection of proprietary information; criminal penalties for disclosure.

1 (a) In submitting the information required under section five of this article, an employer may withhold the specific chemical identity, including the quantity, the chemical name and other specific identification of a hazardous substance, on the grounds that such information is proprietary information as long as:

2 (i) Other information is submitted pursuant to the request which describes the properties and effects of the hazardous substance; and

3 (2) The employer specifically indicates the type of information that is being withheld as proprietary information.

4 (b) The director may request any or all of the data substantiating the proprietary information claim to determine whether a claim made pursuant to this section is valid. The director shall protect from disclosure any or all information coming into his or her possession when such information is marked by the employer as confidential and shall return all information so marked to the employer at the conclusion of his or her determination.

5 (c) The employer shall have thirty days after notification by the director that a proprietary information claim is not valid to request an administrative hearing on the determination. Any such hearing shall be held in a manner consistent with that provided for hearings in contested cases under article five, chapter twenty-nine-a of this code, with the right to appeal such ruling to the circuit court of Kanawha County. No information relating to the proprietary information claim shall be communicated outside the department of health while the director's ruling is being contested.

6 (d) An employer shall provide to a physician any information for which a proprietary information claim is pending or has been approved pursuant to this section when such information is needed for medical diagnosis or treatment. The employer may require that the physician sign an agreement protecting the confidentiality of information disclosed pursuant to this subsection as soon as circumstances permit.
(e) The subject of any proprietary information claim pending or approved shall be treated as confidential information.

(f) Any person who knowingly and willingly divulges or discloses any information entitled to protection under this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or imprisoned for not more than six months, or both fined and imprisoned.


The Legislature recognizes that the United States Congress is considering the adoption of legislation relating to the dissemination of information to the public regarding hazardous substances stored in or near their communities. It is the intention of the Legislature that upon the passage of federal legislation which would assure access by citizens of this state to information substantially similar to that which they could obtain under this article, this article shall be subject to expiration, and therefore have no further effect. It shall be the responsibility of the director, upon the passage of such legislation by the United States Congress, to certify to the legislative rule-making review committee that such federal action has occurred. Such certification shall be subject to all of the procedures set out in chapter twenty-nine-a of this code, relating to the promulgation of a legislative rule.


Except where this act is declared to have no effect and be void pursuant to section eight of this article, if any section, part or provision of this article or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect any other section, part or provision of this article or its application, and to this end the provisions of this article are declared severable.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within approved this the 1st day of May, 1985.

Governor
PRESENTED TO THE
GOVERNOR

Date 4/19/85
Time 7:59 p.m.