



WEST VIRGINIA BOARD OF COAL MINE HEALTH AND SAFETY

1615 Washington Street, E. • Charleston, West Virginia 25311 • Telephone 304-558-1425 • Fax 304-558-0062

FILED
22 AUG 30 PM 5:00
OFFICE OF THE SECRETARY OF STATE
WEST VIRGINIA

30 August 2012

Secretary Tennant,

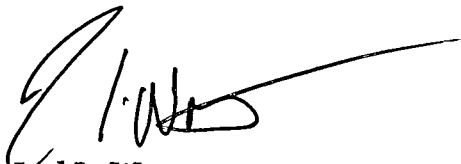
I am writing in a dual capacity. First, I am the Health and Safety Administrator for the West Virginia Board of Coal Mine Health and Safety; second, I am an *ex officio* member of the West Virginia Mine Safety Technology Task Force.

It has come to my attention that as of 30 August 2012 the Director of the Office of Miner's Health, Safety, and Training has filed two emergency rules. These two rules are 56.17, governing organization and implementation procedures for control of coal dust and rock dust standards, and 56.12, rules governing assessing health and safety violation penalties. I wish to express my sincere desire to see these rules returned to the agency for the following reasons.

First, the Coal Board and the Task Force have diligently examined the issue of rock and coal dust since April 2010 and have worked from time to time with the Director to insure that any developed rules would be thoroughly vetted and appropriately enacted. As you know, the Coal Board has the power to issue regulations, invested as such by the West Virginia Legislature, that are equal to emergency regulations. At this point in time, neither of these rules has been presented to the Coal Board. I believe that these rules should be appropriately vetted through the Coal Board before they become effective. Mine safety is an important issue, and we need to ensure that promulgated rules are effective in advancing mine safety. Indeed, a rock-dusting rule that is clear, objective, and defines a process for the accurate testing of rock dusting is a laudable goal. That is why we have been working on this issue for some time. I simply believe that more work needs to be done so that we move forward in an effective manner.

Second, while certainly these rules could be the subject of regular legislative rules, it is unclear that these rules constitute an actual emergency under 29A-3-15. With respect to rock-dusting, the Director currently has authority in absence of a rule to conduct rock dust examinations. MSHA has similar authority and is conducting rock dust examinations. In regards to 56.12, the Director cites 22A-1-21(a)(1). In 22A-1-(a)(2), a legislative rule is required, but not an emergency rule. Recently passed legislation does not provide the Director with the ability to promulgate emergency rules under this section. The fact that no emergency rules are required or authorized and because no emergency situation exists, should disqualify these rules as an emergency.

In addition, I have personally found considerable substantive issues with the wording and structure of the rules. I have serious legal concerns as well about the persons indicated in 57.17.8.1. I, as a member of the Task Force and the Administrator of the Coal Board, encourage you to act in accordance with 22A-3-15a to disapprove the emergency rules.

A handwritten signature in black ink, appearing to read 'J. L. Watts', with a long horizontal stroke extending to the right.

Joel L. Watts
Health and Safety Administrator
Board of Coal Mine Health and Safety

Judy Cooper

FILED

From: Holst, LindaGail X <LindaGail.X.Holst@wv.gov>
Sent: Thursday, August 30, 2012 5:47 PM
To: Judy Cooper
Subject: FW: HB 4351

2012 AUG 31 AM 9: 34

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Hello and Good Morning, Miss Judy:

Joel Watts asked me to forward this letter to your office with a request that your office pay particular attention to Item No. 4.

Thanks so much.

Lindagail

From: Watts, Joel L
Sent: Thursday, August 30, 2012 5:36 PM
To: Holst, LindaGail X
Subject: Fwd: HB 4351

Sent from my iPhone

Begin forwarded message:

From: Chris Hamilton <CHamilton@wvcoal.com>
Date: August 30, 2012 5:35:32 PM EDT
To: "Phillips, Cecil A" <Cecil.A.Phillips@wv.gov>, "White, Eugene E" <Eugene.E.White@wv.gov>, "Watts, Joel L" <Joel.L.Watts@wv.gov>
Subject: HB 4351

August 30, 2012, 2012

CA Philips, Director
WV Office of Miners' Health, Safety & Training
#7 Players Club Drive
Suite #2, Charleston WV 25311-1626

Re: HB 4351

Dear Director Phillips:

As a follow-up to our recent discussion over HB 4351, I am writing to request a meeting at your earliest convenience to discuss the state's implementation plan and proposed policies for HB 4351 which became effective June 4, 2012.

I feel it would be mutually beneficial to discuss several items before subsequent policy and explanatory memoranda are finalized and disseminated to the mining community.

As it relates to HB 4351, our concerns fall into the following four (4) primary areas:

1. Pattern of Conduct: We believe this program should be implemented through administrative rules so that everyone knows how the program works and when or how a company becomes a candidate or eligible for the “Pattern” program. Just as important is how a company qualifies or becomes eligible to be removed from the “Pattern” program. As proposed by draft policy, the program is too vague and subjective. The notion of who qualifies and what sanctions should be implemented rests solely on the opinion of the mine inspector as opposed to be guided by established standards and criteria that have been fully vetted by mine safety professionals. There seems to be some similarities between this program and the federal Pattern of Violation Program. To ensure fairness and consistency in its application we believe the program should embodied in a set of lawfully promulgated rules.

2. Family Witnesses: In enacting HB 4351, The Legislature determined that families’ of accident victims should be afforded a representative of their choosing during certain accident investigations. The Board of Coal Mine Health & Safety and WV OMHST were jointly charged with developing recommendations or names of entities that could serve this purpose. Based on the draft materials to accommodate this unprecedented requirement, it appears that WVOMHST has proceeded on the premise that this new section of law would require two representatives to fulfill this need. It was abundantly clear throughout the deliberations on this point that there would be one (1) family witness of choice who, additionally would have the appropriate training in grief management or other counseling experiences.

3. Expanded Duties of Mine Superintendents: During the legislative session, there was considerable discussion among the interested parties and Legislative representatives over the new section of law expanding the requirements for mine superintendents to acknowledge recordings in the fire boss books. It was originally proposed that mine superintendents would actually “countersign” fire-boss books. This provision was subsequently revised to require that they periodically obtain copies of the reports and “acknowledge” they have reviewed them. It was also contemplated that a second, or new book for this purpose would be prescribed for this purpose.

4. Increased Penalties: This section of law raises the maximum penalty from \$3000 to \$5000. The change to this section was not intended to raise penalties across the board. All evidence behind this change to state law only references an increase in the “Maximum” penalty. My understanding is that rules are being drafted that would effectively raise all penalties, including the minimum penalty by approximately 60%

Additionally, we have also become of OMHST draft rules purporting to establish requirements and standards for collecting, transmitting and analyzing rock dust samples and a new rule for Coal Mine Electricians. Is it possible to receive copies of these draft rules and all pertinent background information in advance of our meeting.

Thank you for your attention to this matter and please let me know when your schedule permits you to meet to discuss these items.

Sincerely,

Chris Hamilton



Chris R. Hamilton, Senior Vice President
West Virginia Coal Association
P.O. Box 3923, Charleston, WV 25339
Telephone: (304) 342-4153
Fax: (304) 342-7651
Web Site: www.wvcoal.com

Judy Cooper

FILE

From: Holst, LindaGail X <LindaGail.X.Holst@wv.gov>
Sent: Thursday, August 30, 2012 5:43 PM
To: Judy Cooper
Subject: FW: Comments to Title 56, Series 17 Proposed Emergency/Legislative Rules Governing Organization and Implementation Procedures for Control of Coal Dust, Rock Dust Standards.

2012 AUG 31 AM 9:34

OFFICE OF THE
SECRETARY OF STATE

From: Watts, Joel L
Sent: Thursday, August 30, 2012 5:20 PM
To: Holst, LindaGail X
Subject: Fwd: Comments to Title 56, Series 17 Proposed Emergency/Legislative Rules Governing Organization and Implementation Procedures for Control of Coal Dust, Rock Dust Standards.

Sent from my iPhone

Begin forwarded message:

From: Chris Hamilton <CHamilton@wvcoal.com>
Date: August 30, 2012 4:03:29 PM EDT
To: Chris Hamilton <CHamilton@wvcoal.com>, "White, Eugene E" <Eugene.E.White@wv.gov>, "Phillips, Cecil A" <Cecil.A.Phillips@wv.gov>, "Watts, Joel L" <Joel.L.Watts@wv.gov>
Subject: RE: RE: Comments to Title 56, Series 17 Proposed Emergency/Legislative Rules Governing Organization and Implementation Procedures for Control of Coal Dust, Rock Dust Standards.

Gentleman, I would also like to request an extension of the comment period or a public hearing on this rule "before" its takes effect!

Thank You



Chris R. Hamilton, Senior Vice President
West Virginia Coal Association
P.O. Box 3923, Charleston, WV 25339
Telephone: (304) 342-4153
Fax: (304) 342-7651
Web Site: www.wvcoal.com

From: Chris Hamilton
Sent: Thursday, August 30, 2012 3:56 PM
To: White, Eugene E; Phillips, Cecil A; 'Watts, Joel L'
Subject: RE: Comments to Title 56, Series 17 Proposed Emergency/Legislative Rules Governing Organization and Implementation Procedures for Control of Coal Dust, Rock Dust Standards.

August 30, 2012

Director C.A. Phillips
WV Office of Miners' Health, Safety and Training
7 Players Club Drive
Charleston, WV 25311

RE: Comments to Title 56, Series 17 Proposed Emergency/Legislative Rules
Governing Organization and Implementation Procedures for Control of Coal Dust,
Rock Dust Standards.

Dear Director Phillips:

Please accept the following comments on behalf of the West Virginia Coal
Association to the above set of proposed "emergency/legislative rules.

1. Initially, we question the underlying need or desirability of the proposed rule changes and new provisions of law contained therein. Particularly, as it relates to their immediate implementation through the emergency procedure which extends to rules and immediate rule implementation necessitated by an emergency situation. Rest assured that no emergency situation exists to support such action for the subject rules. The increased percentage of rock dust (from 65% to 80%) required in underground coal mines has been in effect for nearly two and a half years since April 2010. MSHA has heretofore collected and analyzed all mine rock dust samples taken from West Virginia underground mines. Notwithstanding this rule and the new administrative functions of the state that are created by this rule, MSHA will continue to collect and analyze samples from instate mining operations.

2. We additionally observe for the record that these changes were not presented to, discussed with nor reviewed by the State Board of Coal Mine Health & Safety. In fact, the Board of Coal Mine Health & Safety was asked by Governor Manchin to examine the overall issue of rock dusting at coal mines and to determine the adequacy of existing protocols and procedures. This work is underway in conjunction with the West Virginia Mine Safety Task Force. We would generally conclude that proposed rules, none-the-less, the "Emergency" rules are premature until these entities can reconcile their work and underlying research.

3. We also question whether the proposed standards and procedures and administrative requirements conflict with corresponding provisions of federal law enforced by MSHA. Mine safety professionals within the industry with responsibility over rock dust sampling inform of several provisions of the subject rules are in conflict with federal requirements. As previously stated, the federal mining agency has heretofore collected and analyzed all mine rock dust samples taken from West Virginia underground mines. Notwithstanding this rule and the

new administrative functions of the state created by this rule, MSHA will continue to collect and analyze samples from instate mining operations. We question whether this dual enforcement scheme under two different sets of procedures and standards will ultimately result in two separate enforcement and compliance programs for instate coal producers to reconcile and comply. This will likely result in confusion and could serve to frustrate compliance programs.

4. Lastly, we note for the record that the agency has neglected to analyze the fiscal impact of these proposed requirements on the mining industry and is in conflict of the State's Administrative Procedures Act under Chapter 29a of the Code of West Virginia. We submit for your consideration, that the fiscal impact will be significant in both the outlay of new capital and in dedicating additional resources towards compliance demands necessitated by this rule-making. For the reasons contained herein, we respectfully ask that these rules be held in abeyance until such time these issues can be resolved. We look forward towards working with you and your staff and the Board of Coal Mine Health & Safety on a new rock dust sample and analysis program.

Sincerely,

Chris Hamilton



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West Virginia Coal Association
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Web Site: www.wvcoal.com

Judy Cooper

From: Holst, LindaGail X <LindaGail.X.Holst@wv.gov>
Sent: Thursday, August 30, 2012 5:42 PM
To: Judy Cooper
Subject: FW: Comments to Title 56, Series 17 Proposed Emergency/Legislative Rules Governing Organization and Implementation Procedures for Control of Coal Dust, Rock Dust Standards.

FILED
2012 AUG 31 AM 9:34
WEST VIRGINIA
SECRETARY OF STATE

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Sent: Thursday, August 30, 2012 5:20 PM
To: Holst, LindaGail X
Subject: Fwd: Comments to Title 56, Series 17 Proposed Emergency/Legislative Rules Governing Organization and Implementation Procedures for Control of Coal Dust, Rock Dust Standards.

Sent from my iPhone

Begin forwarded message:

From: Chris Hamilton <CHamilton@wvcoal.com>
Date: August 30, 2012 3:56:11 PM EDT
To: "White, Eugene E" <Eugene.E.White@wv.gov>, "Phillips, Cecil A" <Cecil.A.Phillips@wv.gov>, "Watts, Joel L" <Joel.L.Watts@wv.gov>
Subject: RE: Comments to Title 56, Series 17 Proposed Emergency/Legislative Rules Governing Organization and Implementation Procedures for Control of Coal Dust, Rock Dust Standards.

August 30, 2012

Director C.A. Phillips
WV Office of Miners' Health, Safety and Training
7 Players Club Drive
Charleston, WV 25311

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working with you and your staff and the Board of Coal Mine Health & Safety on a new rock dust sample and analysis program.

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Chris Hamilton



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Web Site: www.wvcoal.com

Judy Cooper

FILED

From: Watts, Joel L <Joel.L.Watts@wv.gov>
Sent: Thursday, August 30, 2012 6:53 PM
To: Judy Cooper
Subject: Joel Watts (As Administrator) Comment Re: 56.12, 56.17

2012 AUG 31 AM 9: 34

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Ms. Cooper,

I would like to submit an additional comment regarding the filing of rules by the Director of OMHST (56.12, 56.17)

I suggest the Director's emergency rules were improperly filed in accordance with 22A-1-18. I note that the Board of Coal Mine Health and Safety refers to this rule in the expectation the director will cause any and all proposed rules to be delivered to the mines, miners, and/or miner representatives. I do not believe that filing the emergency rules in the State register meets this expectations.

Not only is their no emergency (given that both MSHA and the OMHST currently inspect the mines for rock dust violations), but they were filed improperly, not just in bypassing the Board, but so too in bypassing any and all stakeholders against the intent of the Legislature.

Joel L. Watts
Administrator
Board of Coal Mine Health and Safety
304.957.2306



State of West Virginia
Earl Ray Tomblin, Governor

WV Office of Miners' Health, Safety & Training
C. A. Phillips, Director
#7 Players Club Rd., Suite 2 • Charleston, West Virginia • 25311-2126
Telephone 304-558-1425 • Fax 304-558-1282
www.wvminesafety.org

**NOTICE OF EMERGENCY MEETING OF THE
WEST VIRGINIA BOARD OF COAL MINE HEALTH AND SAFETY**

CALLED BY THE DIRECTOR PURSUANT TO W. VA. CODE § 22A-6-3(d)

DATE OF MEETING: SEPTEMBER 10, 2012

TIME OF MEETING: 11:00 A.M.

**LOCATION OF MEETING: CONFERENCE ROOM
COUNTRY INN & SUITES
105 ALEX LANE
CHARLESTON, WV 25304**

AGENDA

An emergency situation exists regarding the status of two emergency rules filed by the Office of Miners' Health, Safety and Training with the Secretary of State. Those two emergency rules are an amendment to Title 56 Series 12 of the Code of State Rules "Rules Governing Assessing Health and Safety Violation Penalties" and Title 56 Series 17 "Rules Governing Organization and Implementation Procedures for Control of Coal Dust, Rock Dust Standards." On or before September 11, 2012, the Secretary of State must either approve or disapprove these rules as emergency rules.

AGENDA ITEM NO. 1 – To discuss and determine the West Virginia Board of Coal Mine Health and Safety's position regarding the emergency rules.

AGENDA ITEM NO. 2 – To discuss the issuance and determine the validity of two letters written by Joel Watts, Administrator, on Board letterhead addressed and submitted to Secretary Tennant and Secretary Burdette (copies attached) purporting to provide the Board's position on the emergency status of these two rules.

Issued by:

Handwritten signature of C. A. Phillips in black ink.

C. A. Phillips, Director
On September 7, 2012



WEST VIRGINIA BOARD OF COAL MINE HEALTH AND SAFETY

1615 Washington Street, E. • Charleston, West Virginia 25311 • Telephone 304-558-1425 • Fax 304-558-0062

FILED
2012 AUG 30 PM 5:00
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

30 August 2012

Secretary Tennant,

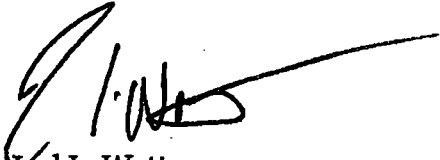
I am writing in a dual capacity. First, I am the Health and Safety Administrator for the West Virginia Board of Coal Mine Health and Safety; second, I am an *ex officio* member of the West Virginia Mine Safety Technology Task Force.

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Second, while certainly these rules could be the subject of regular legislative rules, it is unclear that these rules constitute an actual emergency under 29A-3-15. With respect to rock-dusting, the Director currently has authority in absence of a rule to conduct rock dust examinations. MSHA has similar authority and is conducting rock dust examinations. In regards to 56.12, the Director cites 22A-1-21(a)(1). In 22A-1-(a)(2), a legislative rule is required, but not an emergency rule. Recently passed legislation does not provide the Director with the ability to promulgate emergency rules under this section. The fact that no emergency rules are required or authorized and because no emergency situation exists, should disqualify these rules as an emergency.

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Joel L. Watts
Health and Safety Administrator
Board of Coal Mine Health and Safety



WEST VIRGINIA BOARD OF COAL MINE HEALTH AND SAFETY

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FILED
2012 AUG 31 AM 10:20
OFFICE WEST VIRGINIA
SECRETARY OF STATE

30 August 2012

Secretary Burdett,

I write as Health and Safety Administrator for the Board of Coal Mine Health and Safety as well as an *ex officio* member of the Mine Safety Technology Task Force, two essential bodies that were recently overlooked.

Coal mine health and safety is vitally important to each and every Board or Task Force member, as well as myself. Because of this, I am writing to request that the emergency rules filed by Director Phillips of OMHST be rescinded. As one who has only served these august bodies, I foresee significant issues if these rules are implement, both for the State and the safety of the coal miners we cherish.

Mr. Secretary, I believe that it is unjust and out of the due process for the Director to bypass the Board, a rule-making body with more authority than the Director in regards to making rules, and issue rules, especially in one instance where no such rule is required. I am speaking of 56.12 and 56.17. While a legislative rule is required for 56.12, this does not qualify as an emergency situation. 56.17 is a different matter.

Rock dusting is a concern of both the Coal Board and the Task Force. Since April 2010, after the tragedy at Upper Big Branch, both the Coal Board and the Task Force have met to examine the best course in dealing with insuring the safety of our miners. We have advocated for different positions, but always felt that all the stake-holders would very shortly reach an agreement benefiting the safety of the workforce without becoming too unwieldy. It seems that in the rush to put a rule, a rule not required by Statute, in place, the Director forewent the expertise of the Coal Board and the Task Force. He also failed to take advantage of the place he has on both bodies.

He is an *ex officio* member of both bodies, but at no time did he formally introduce to us the rules he intended to file. What is more troubling is that as an *ex officio* member of the Coal Board, the Director and only the Director has the authority to call an emergency meeting of the body (22A-6-3(d)). At no time has my office received such a request. The Coal Board has the unique ability to, upon an emergency, meet only with sufficient notice, dispense with the required comment period, and pass rules effectively immediately. We have done this before.

One last issue that I must discuss. If a Board proposes a rule, the Director is ordered to post the rule in accordance with 22A-1-18 (cf. 22A-6-4(c)(4)). 22A-1-18 expressly commands the Director to publically notice all stake-holders. Mr. Secretary, I do not believe that simply posting a notice in the State Register fulfills either the word of law or the spirit of the law.

To this end, I am requesting Director Phillip reconsider the promulgation of 56.12 and 56.17 until such time as the Board of Coal Mine Health and Safety can duly examine them.

Thank you,

Joel L. Watts
Health and Safety Administrator
Board of Coal Mine Health and Safety

CC: Secretary of State, Natalie Tennant