



**Natalie E. Tennant**  
Secretary of State  
State of West Virginia

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

January 30, 2009

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: OFFICE OF MINERS' HEALTH SAFETY & TRAINING

RULE: AMENDMENT, 56CSR5, RULES & REGULATIONS GOVERNING THE MARKING OF GAS LINES ON MINE PROPERTY IN WEST VIRGINIA

DATE FILED AS AN EMERGENCY RULE: JANUARY 28, 2009

DECISION NO. 2-09

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **APPROVED**. A copy of the complete decision with required findings is available from this office.

NATALIE E. TENNANT  
Secretary of State

EMERGENCY RULE DECISION  
(ERD -09)

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- par. 1 The Office Miners' Health Safety & Training (Office) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Office filed this emergency rule with supporting documents with the Secretary of State January 28, 2009 and with the LRMRC January 28, 2009.
- par. 7 It is the determination of the Secretary of State that the Office has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority – W. Va. Code §22A-1-6 reads:

**§22A-1-6. Director's authority to promulgate rules.**

**The director has the power and authority to propose or promulgate rules to organize the office and to carry out and implement the provisions of this chapter relating to health and safety inspections and enforcement. All rules in effect on the effective date of this article which pertain to the provisions of this chapter as they relate to health and safety inspection and enforcement shall remain in effect until changed or superseded by the director, or as appropriate. Except when specifically exempted by the provisions of this chapter, all rules or changes**

***thereto shall be proposed or promulgated by the director in accordance with the provisions of chapter twenty-nine-a of this code.***

par. 9 It is the determination of the Secretary of State that the Office has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency – W. Va. Code §29A-3-15(f) defines "emergency" as follows:

**(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.**

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Office are as follows:

This rule is promulgated consistent with the powers and duties of the Director of the Office of Miners' Health, Safety and Training with regard to mine safety.

This Rule is promulgated by the Director in response to a Rule promulgated by the Board of Coal Mine Health and Safety ("Board") on the same topic which has been enjoined by an order of the Circuit Court of Kanawha County and a portion of said rule is under challenge in U.S. District Court for the Southern District of W. Va.

#### FACTS

1. A fatal accident resulting from a dozer cutting into an active gas line occurred on Wednesday, February 1, 2006, at the Elk Run Coal Company, Inc., Black Castle No. 4 mine in Boone County, West Virginia.
2. Mr. Paul K. Moss, a fifty eight year old master dozer operator, suffered fatal burn injuries at approximately 2.10 p.m. on February 1, 2006.
3. The bulldozer was positioned parallel to the 16 inch unmarked gas gathering line and facing slightly downhill toward the bench of the Clarion coal seam level at the time of the accident.
4. The lower left corner bit on the bulldozer blade was the direct cause of the rupture in the 16 inch low-pressure, high volume, actively charged gas gathering line.
5. Mining maps and inspection of the accident site revealed that the 16 inch gas gathering line was unmarked for a distance of approximately 2,000 feet in both directions from where the accident occurred.
6. There are hundreds, if not thousands, of miles of unmarked gas pipelines crossing property being actively mined for coal throughout West Virginia.
7. In many instances, coal companies or operators are not aware of the location of these unmarked gas pipelines.

8. Unmarked gas pipelines located on property being actively mined for coal pose a significant danger to the health and safety of coal miners working in close proximity to the unmarked gas lines.

9. The promulgation W. Va. Code §56-5-1, et seq. by the Director will assist in preventing the recurrence of the specific type of fatality that occurred 2006.

10. In order to fulfill his obligations under W. Va. Code §22A-1-1, et seq., and to prevent the reoccurrence of a fatality similar to Fatal 16-2006, the Board of Coal Mine Health and Safety adopted W. Va. Code §36-27-14, which has been enjoined by an order of the Circuit Court of Kanawha County.

11. The currently enjoined rule raises questions as to the Director's enforcement authority which are resolved in the proposed emergency rule and the related rule being propounded by the Department of Environmental Protection which has jurisdiction over oil and gas wells and pipelines.

12. The Board has promulgated an amended version of §36-27-14 that went into effect on January 1, 2009. The Circuit Court of Kanawha County stayed the enforcement of those rules effective January 27, 2009.

13. Absent the filing and approval of this emergency rule and the related Division of Environmental Protection rule there will be no enforceable rule in place to protect coal miner health and safety.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare" and "to prevent substantial harm to the public interest."

par. 14 This decision shall be cited as Emergency Rule Decision 2-09 or ERD 2-09 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Office of Miners' Health Safety & Training, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT  
Secretary of State

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