

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**
Form #7

Do Not Mark In This Box

Filing Date
FILED

2009 MAY -1 AM 11:49

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Office of Miners' Health, Safety & Training TITLE NUMBER: 56

CITE AUTHORITY: West Virginia Code Sections 22A-1-6 and 22A-1-38

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 14

TITLE OF RULE BEING PROPOSED: Rules and Regulations Governing the Safety of Miners Employed in and Around
River Loadouts

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Use additional sheets if necessary


Authorized Signature

STATEMENT OF CIRCUMSTANCES
AND SUMMARY OF THE EMERGENCY RULE

On December 29, 2008, a West Virginia coal miner fell from a barge and drowned. The Office of Miners' Health, Safety and Training ("OMHST") requested an opinion from the West Virginia Attorney General as to whether it had jurisdiction to investigate accidents occurring on barges moored to mine property. The Attorney General's office issued an advice letter informing the OMHST that it did have jurisdiction to investigate the accident and to also regulate barges when moored to mine property.

Investigation reveals that the miner who was killed was employed at the preparation plant and had received no training in barge work or as a riverman. The accident occurred at approximately 11:00 p.m. and due to him being alone it was approximately two (2) hours before his absence was noticed and a search began. After barges were moved the miner's body surfaced.

The West Virginia Board of Coal Mine Health and Safety is statutorily charged with reviewing reports of fatalities and within one hundred and twenty days of such review to promulgate "such rules as are necessary to prevent the reoccurrence of such fatality." This is a mandatory duty unless "a majority of the quorum (of the Board) present determines that no rules can assist in the prevention of the specific type of fatality." W. Va. Code § 22A-6-4(e).

The Board of Coal Mine Health and Safety received the Director's report of this fatality on February 25, 2009. The Board most recently met on April 22, 2009 and voted not to promulgate a rule regarding the subject of this proposed emergency rule until after litigation is concluded in the case of *Consolidation Coal Co., Inc. v. Solis, et al.*, Case No. 5:09-cv-0035-FPS. This case names the Director and the Board, as well as others as defendants and, in effect, seeks to preclude any regulatory agency other than the United States Occupational Safety and Health Administration from exercising jurisdiction over river coal loadouts. There is no reasonable expectation that the case will be concluded within 120 days of February 24 and without the proposed emergency rule there is no rule in place.

This rule is designed to insure that coal miners who have not received "Riverman" training are not allowed on barges. The rule is also designed to require those coal miners who are trained Rivermen to wear a life jacket while on the barge.

This rule is filed as an emergency because there are no State laws or regulations in effect regulating any type of activity on barges moored to mine property.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules and Regulations Governing the Safety of Miners Employed in and Around River Loadouts
 Type of Rule: Legislative Interpretive Procedural
 Agency: West Virginia Office of Miners' Health, Safety and Training
 Address: 1615 Washington Street, East
Charleston, West Virginia 25311
 Phone Number: (304) 558-1425 Email: blk@wvago.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The fiscal impact is unknown at this time and cannot be determined until fully implemented. Any increase in administrative costs will be minimal and will be absorbed without increasing employees or substantial increases in expenses.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: Rules and Regulations Governing the Safety of Miners Employed in and Around River Loadouts

Rule Title: Rules and Regulations Governing the Safety of Miners
in and Around River Loadouts

- 3. Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

No increases or decreases in revenue at this time.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

None are anticipated.

Date: May 1, 2009

Signature of Agency Head or Authorized Representative





EMERGENCY RULE QUESTIONNAIRE

DATE: May 1, 2009

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Office of Miners' Health, Safety and Training
1615 Washington Street, East
Charleston, West Virginia 25311 (304) 558-1425

EMERGENCY RULE TITLE: Title 56 - Rules and Regulations Governing the Safety
of Miners Employed in and Around River Loadouts

1. Date of filing _____

2. Statutory authority for promulgating emergency rule:
West Virginia Code Sections 22A-1-6 and 22A-1-38

3. Date of filing of proposed legislative rule: _____

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? Adopts new language

5. Has the same or similar emergency rule previously been filed and expired?
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.

-See Attachment, "Facts and Circumstances"

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

N/A

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See attached Facts and Circumstances

FILED

56 CSR 13

2009 MAY -1 AM 11:49

TITLE 56
LEGISLATIVE RULES
OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES ~~13~~ 14
RULES AND REGULATIONS GOVERNING THE SAFETY OF
MINERS EMPLOYED IN AND AROUND RIVER LOADOUTS

§ 56-13-1 General.

1.1 Scope. These rules govern safety of miners in and around river loadouts.

1.2 Authority. W. Va. Code §§ 22A-1-6 and 22A-1-38

1.3 Filing Date. May 1, 2009

1.4 Effective Date. _____

1.5 Applicability. These regulations shall extend to all coal barges moored to any river loadout facility permitted by the Office of Miners' Health, Safety and Training.

1.6 Other law applicable. – All provisions of the mining law of this state, specifically Chapter 22A of the Code, are applicable to river loadouts permitted by the Office of Miners' Health, Safety and Training attached to mining operations, except to the extent that these regulations cover the specific requirement, and except to the extent that the context of a specific provision would render its applicability totally inappropriate to river loadouts attached to mining operations.

§ 56-13-2. Effect of Law and Regulations.

2.1 These regulations shall have the effect of law and violations shall be deemed a violation of law and so cited with the same effect as law. All provisions of Article 1, Chapter 22A of the West Virginia Code relative to enforcement are applicable to the enforcement of these regulations.

§ 56-13-3. Definitions.

3.1 The term "Director" shall mean the Director of the Office of Miners' Health, Safety and Training provided for in Chapter 22A, Article 1, Section 3 of the West Virginia Code.

3.2 The term "moored" refers to a coal barge physically attached to a river loadout facility for the purpose of coal being unloaded, loaded and transported.

3.3 The term "operator" means any firm, corporation, partnership or individual operating any coal mine, or part thereof, or engaged in the construction of any facility associated with a coal mine.

3.4 The term "riverman" means a person employed by an operator to engage in the loading and unloading of coal on a barge at the river loadout facility permitted by the Office of Miners' Health, Safety and Training and moving such barge(s) within the facility.

§ 56-13-4 Training Requirements of Miners Working on River Barges.

4.1 No operator may require or allow a riverman, in the course of his or her employment, to board a barge used for the transport of coal unless the riverman has successfully completed riverman task training which shall include safety training, mandatory use of life jackets while aboard a barge, working lines, handling materials, facing-up, proper use of wire rigging, moving barge to loadout and set-up, gaging during and after loading, precautions to gaging, placing empty barges, securing empty barges, maneuvering of barges, slack in lines, pinch points, communicating with boat operator, avoiding shadows, and transitioning from boat to barge or barge to loadout. All persons covered by this provision shall have such required training and annual re-training recorded on an MSHA 5000-23 form a copy of which shall be maintained at the facility for a period of at least one (1) year.

4.2 No operator shall require or allow a miner to board a barge unless the miner is wearing a life jacket approved by the United States Coast Guard.

4.3 Any other person shall be hazard trained before boarding a barge and shall be accompanied by a trained riverman at all time while aboard the barge.

2009 MAY 29 AM 9:54

May 27, 2009

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Mr. Ronald Wooten, Director,
WV Office of Miners' Health, Safety & Training
1615 Washington Street, East
Charleston, WV 25311

RE: Safety Rules Governing Miners Employed in and around River Loadouts
Title 56, Series 14

Dear Director Wooten:

Please accept the following comments on behalf of the West Virginia Coal Association in response to the above referenced proposed rule. It is our belief that your Office's promulgation of such a substantive safety rule exceeds its statutory authority and infringes upon the exclusive authority of the West Virginia Board of Coal Mine Health and Safety. Under W. Va. Code §22A-1-4(a), your Office's powers and duties are limited to the enforcement of Chapter 22A of the West Virginia Code as it relates to safety inspections and enforcement.

We believe that your Office has some limited authority to promulgate rules. However, W. Va. Code § 22A-1-6 only gives your Office 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." The emergency rule proposed by your Office is a substantive rule regulating activity on barges moored to mine property, and has nothing to do with safety inspections or enforcement. Thus, it goes beyond your Office's limited authority as set forth in W. Va. Code § 22A-1-6

On the other hand, the scope of the Mine Board's statutory authority to promulgate rules affecting mine health and safety is very broad. The Mine Board was established under Chapter 22A, Article VI of the West Virginia Code. Pursuant to W. Va. Code § 22A-6-4, the Board is charged with, *inter alia*, promulgating rules to improve or enhance coal mine health and safety. This authority is so broad it allows the Board to promulgate rules on any subject, so long as the new rules increase miner safety:

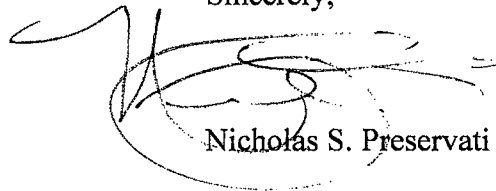
Upon consideration of the latest scientific data in the field, the technical feasibility of standards, and experience gained under this and other safety statutes, such rules may expand protections afforded by this chapter notwithstanding specific language therein, and such rules may deal with subject areas not covered by this chapter to the end of

affording the maximum possible protection to the health and safety of miners.

W. Va. Code § 22A-6-4(c)(1). Not only does the Mine Board have the broad statutory power to “develop and promulgate new rules dealing with coal mine health and safety,” W. Va. Code §22A-6-1(b)(4), it has the very specific statutory power to promulgate rules “necessary to prevent fatal accidents and injuries.” (Emphasis added). W. Va. Code § 22A-6-4(a). Your Office’s proposed rule is admittedly in response to the December 29, 2008 miner fatality. As such, it falls squarely within the province of the Mine Board.

Therefore, we respectfully request that your Office rescind its proposed rule and allow the Mine Board to address this matter in due regard. Also, while we dispute your Office’s authority to promulgate the above referenced rule, we do commend your efforts in ensuring that this State’s miners have a safe and healthy work environment. We look forward to discussing this matter with you further. Should you have any questions or comments regarding this letter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "N. S. Preservati", is written over a circular stamp or seal. The signature is fluid and cursive.

Nicholas S. Preservati

cc: Mr. Bill Raney
Mr. Chris Hamilton
Mr. Joel Watts

THE AMERICAN WATERWAYS OPERATORS

801 North Quincy Street, Suite 200
Arlington, VA 22203
Phone: (703) 841-9300 • Fax: (703) 841-0389

www.americanwaterways.com

Fax

TO: Ronald W. ten **From:** Lynn Muench
Fax: (304) 558-1282 **Pages:** 4
Phone: _____ **Date:** 6/1/09
Re: See below **cc:** _____

Urgent For Review Please Comment Please Reply Please Recycle

● **Comments:**

Attached please find our comments on the ~~Proposed~~ Proposed
Legislative Rule Title 56, Series 14. Thank you.

We will send you the document with the confirmation sheet
attached.



The American Waterways Operators
www.americanwaterways.com

Midcontinent Office
1413 Mississippi Avenue
Suite 108
St. Louis, MO 63104

PHONE: (314) 440-0174
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Lynn M. Muersch
Senior Vice President - Regional Advocacy

June 1, 2009

VIA FACSIMILE

Mr. Ronald L. Wooten
Director
West Virginia Office of Miners' Health, Safety and Training
State of West Virginia
1615 Washington Street
East Charleston, WV 25311

RE: West Virginia Proposed Legislative Rule:
Title 56, Series 14

Dear Mr. Wooten:

The American Waterways Operators (AWO) is the national trade association representing the inland and coastal tugboat, towboat and barge industry. AWO is comprised of more than 300 individual companies, with a geographic scope ranging from New England to Alaska, and throughout the interior river system of the United States, including extensive operations along the Ohio and Kanawha Rivers.

We appreciate the opportunity to express our concerns regarding the Proposed Legislative Rule, Title 56, Series 14, from the West Virginia Office of Miners' Health, Safety and Training. We respectfully submit that this rule is ill-advised and should not be adopted for the following reasons:

- Interstate commerce is an area clearly referenced in the U.S. Constitution as being exclusively subject to federal, as opposed to state, regulation, a fact that has been confirmed on numerous occasions by the U.S. Supreme Court;
- The towing industry and the U.S. Coast Guard already have a partnership in place to proactively address safety issues on vessels;
- The Coast Guard is in the process of promulgating a rule on towing vessel inspection;
- Members of AWO must comply with the Responsible Carrier Program, which already has worker safety components; and,
- Overregulation could impede the towing industry's operations in the state.

The Tugboat, Towboat and Barge Industry Association

Director Wooten
Page 2

The Role of Federalism

First and foremost, the imposition of a state inspection regime runs afoul of the constitutional balance between state and federal areas of responsibility. As the U.S. Supreme Court most recently stated in its 2000 *Intertanko v. Locke* decision, "the Court had little difficulty in finding state vessel requirements were pre-empted by federal laws which governed the certification and standards of operation." In this proposed rule, West Virginia is seeking to have all required training be "recorded on an MSI-A 5000-23 form, a copy of which shall be maintained at the facility for a period of at least one year." By assigning itself as a reviewer of requirements promulgated by the U.S. Department of Labor's Mine Safety and Health Administration, the state risks violating the constitutional standard of federalism, thereby rendering its proposed rule subject to invalidation by federal courts.

Industry-Coast Guard Partnership

The proposal to introduce state inspections appears to presuppose a governmental neglect of the industry that does not exist in practice. In fact, members of industry are committed to the safety of their vessels and the individuals who work aboard them, and have been more than willing to cooperate and collaborate with the appropriate authorities to achieve these goals. For example, AWO has worked with the Coast Guard over the past 15 years, via the Coast Guard-AWO Safety Partnership, to address safety concerns throughout our industry. The Safety Partnership has addressed and produced guidelines on towing vessel crew fatalities, a river crisis action plan, barge inspection consistency, crew endurance management and over 30 other issues.

The issue of crew endurance is of particular relevance to mariner safety, as fatigue has been identified as a significant cause of accidents. AWO first established a working group on fatigue in 1997. As a result of the work of AWO and the Coast Guard in this area over the past decade, member companies have increasingly incorporated scientifically-sound crew endurance management principles into their operations by making changes to the working environment onboard vessels, employing light and noise management, and encouraging crewmembers to adopt a healthier diet and exercise. The industry and the Coast Guard continue to collaborate through the Safety Partnership to refine crew endurance while improving the working environment of the mariners.

Coast Guard Development of Rule on Towing Vessel Inspection

AWO has been a vigorous supporter of the Coast Guard's development of a new towing vessel inspection regime. This process began in 2003 after AWO requested that the Coast Guard make the industry's vessels subject to inspection, a rare request for any industry to make. In response, Congress passed the Coast Guard and Maritime Transportation Act of 2004, a bill that added towing vessels to the list of vessels subject to federal inspection, and authorized the Coast Guard to "establish by regulation a safety management system appropriate for the characteristics, methods, and nature of service of towing vessels." Industry's goals throughout this process have been to create an inspection system that is risk-based and targets the most common causes of towing vessel accidents. As these proactive steps indicate, the industry is committed to

Director Wooten
Page 3

achieving the highest degree of safety for our personnel and our vessels, and is not attempting to avoid compliance with needed standards.

Responsible Carrier Program

The towing industry has been so committed to improving safety, in fact, that it has done a large amount to regulate itself while a Coast Guard-led inspection regime framework is being developed. Members of AWO, for example, are required to comply with the Responsible Carrier Program (RCP), a safety management system that came about after an industry-wide risk assessment in 1994. The RCP is an award-winning program that has been recognized as a safety standard by the Coast Guard and state governments across the country. The governments of Washington and California, for example, have referenced the RCP in their state regulations. Among its features, the RCP requires companies to develop a safety policy, create safety rules in areas including non-skid surfaces and flammable and combustible liquids, and implement a policy for the use of personal protective equipment. Compliance with the RCP and a high degree of responsibility on the part of individual companies have contributed to a decrease in the number of fatalities per year in the industry from 28 in 1997 to 8 in 2007.

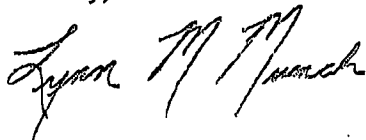
Industry in the State

In addition to its safety record, the towing industry makes a large contribution to the state's economic well-being and its stewardship of the environment. In 2006, for example, the Port of Huntington alone received or shipped 58.3 million tons of coal and 10.4 million tons of petroleum products. The industry positively impacts the condition of roads by moving 70 semi-truckloads of products onto a single barge. With regard to pollution, barges on the Ohio River carry the equivalent of 1,010,250 railroad car loadings of coal every year. This lowers the amount of pollutants put into the air throughout West Virginia by replacing trains with barges, a significant substitute considering that transport by rail emits 39 percent more carbon dioxide than does transport by inland barge. Subjecting vessels to redundant and unnecessary regulations could very well have the effect of discouraging waterborne commerce in the state, thereby depriving West Virginia of a substantial portion of these economic and environmental benefits.

AWO greatly appreciates being able to begin a dialogue with your agency on the industry's commitment to worker safety in West Virginia and throughout the country. Based on the reasons expressed above, however, we believe that approval of this rule should not be granted.

Thank you for the opportunity to comment on this proposed rule. If you would like further information, AWO would be pleased to provide it.

Sincerely,



Lynn M. Muench

May 28, 2009
Beth McIntyre
67300 Country Club Road
St. Clairsville, Ohio

RCVD JUN 01 2009

WV Office of Miners' Health, Safety and Training
1615 Washington Street East
Charleston, WV 25311

Comment on proposed emergency legislative rule, series #14
"Rules and Regulations Governing the Safety of Miners Employed in
and Around River Loadouts"

My comment concerning the above mentioned emergency rule is as follows:

I do, indeed, feel that these proposed rules and regulations governing the safety of miners who work in and around river loadouts become effective immediately. Infact, I find it difficult to comprehend that they were not made effective within days of the circumstances of the emergency rule. No person should be permitted on barges without this vital training.

Perhaps a more complete understanding and awareness of the sudden and unexpected dangers of barge work (especially at night) would have served to prevent the accident that took my husband's life.

Respectfully,



Beth McIntyre

Seth D. McIntyre
108 1/2 Elm Avenue
Moundsville, WV 26041
(304) 845-1182

L. Jill McIntyre
4 Rockledge Drive
Charleston, WV 25302
(304) 550-5440

31 May 2009

Board of Coal Mine Health and Safety
West Virginia Office of Miners'
Health, Safety and Training
1615 Washington St., East
Charleston, WV 25311

RCVD JUN 01 2009

**Re: Rules and Regulations Regarding the Safety of Miners
Employed In and Around River Loadouts
Proposed Rule, Title 56 Series 14**

Dear Sir or Madam:

We write to comment on the above-referenced, proposed rule, which was put out for comment on 1 May 2009. Our father, Mark McIntyre, is the miner who fell from a barge and drowned on 29 December 2008. We have tried to understand as fully as possible the circumstances of his death and would be glad to discuss with the Board of Coal Mine Health and Safety our observations.

We believe that the proposed rule, while addressing some of the means of accident prevention, fails to identify survival and rescue measures such as those endorsed by the United States Coast Guard. While we do not know by what mechanism our father slipped into the river that night, it was many hours before he was located, under a barge and within sight distance of the facility where he was last seen. We submit these suggestions in an effort (a) to make clearer what we believe the Board intended and (b) to include additional, reasonable precautions that we believe could have saved our father's life.

31 May 29, 2009

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- 3.4 The term "riverman" means a person employed or directed by an operator to engage in the loading, unloading, and/or inspecting of coal on a barge at the river loadout facility permitted by the Office of Miners' Health, Safety and Training and moving such barge(s) within the facility.

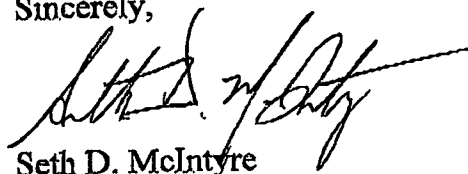
- 4.2 No operator may require or allow any person to board a barge unless that person is:
 - (a) wearing a life jacket approved by the United States Coast Guard; and
 - (b) equipped with, having been trained on the use and purpose of:
 - (1) a water-activated strobe light;
 - (2) a marine whistle with lanyard;
 - (3) an attachable safety knife with a straight 6-8" blade, blunt tip, and serrated edge for cutting and ripping; and
 - (4) a signal mirror with lanyard.

- 4.3 Any person who has not successfully completed riverman task training shall be hazard trained before boarding a barge.

- 4.4 Any person boarding a barge, including a trained riverman, shall be accompanied by a trained riverman at all times while aboard the barge.

We implore the state regulatory authority to impose these commonsense requirements for miner safety in this obviously dangerous setting and thank the Board for its consideration.

Sincerely,



Seth D. McIntyre



L. Jill McIntyre