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WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee OFFICE WEST VIRGINIA
SECRETARY OF STATE

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January 07, 2002

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NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Joe Manchin, Secretary of State, State Register
TO: Rita Pauley
DEP-Mining & Reclamation, Office of
1356 Hansford Street
Charleston, WV 25301
FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Surface Mining Reclamation Rule, 38CSR2**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative rule
 - (a) as originally filed
 - (b) as modified by the agency
2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached.
3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.
4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.
5. Recommends that the Legislative rule be withdrawn; a statement of reasons for such recommendation is attached.

SCANNED

ANALYSIS OF PROPOSED LEGISLATIVE RULE

FILED

Agency: DEP- Office of Surface Mining
Subject: Surface Mining Reclamation Rule
CSR Cite: 38CSR2
Counsel: JAA

2001 DEC 28 P 12:47

OFFICE WEST VIRGINIA
SECRETARY OF STATE

PERTINENT DATES

Filed for public comment: June 8, 2001
Public comment period ended: July 11, 2001
Filed following public comment period: July 24, 2001
Filed LRMRC: July 24, 2001
Filed as emergency: n/a

Fiscal Impact: None.

ABSTRACT

Brief Summary

Several revisions have been made to this rule as a result of federal objections to the state program specified in the Federal Register. Most of these changes are from the federal program review of state statute changes made pursuant to HB4223 enacted during the 2000 RS, which establishes alternative post mining land uses such as homesteading and includes a review and consideration of the site's post mining economic development potential, and changes requirements on post mining land uses for commercial forestry.

Also attached to the rule is a "733 letter" which is formal notice to the state to make certain program modifications or lose state primacy of the program. Over the last several years the federal Office of Surface Mining Reclamation and Enforcement has objected to the state bonding system as being inadequate to cover reclamation costs for abandoned and forfeited mine sites. The 733 letter requires the state to sufficiently fund these reclamation activities. The Legislature enacted SB 5003 during the 5th Ex. Session this fall, to increase the coal severance tax to fund the Special Reclamation Fund in lieu of increased bonding on individual permits. No changes were made to the rule in response to the 733 letter.

Section Summary

The Office of Surface Mining Reclamation and Enforcement recommended several language changes relating to the commercial forestry post mining land use and water impoundments and these are made throughout the rule.

Section 10.4.a.1.d. provides that the aggregate premining total prime farmland acreage may not be decreased from the premining prime farmland use total contained in the permit area. Any waterbodies constructed during mining must be located in the prime farmland area.

Section 11.5 which provides for Open Acre Limit Bonding has been deleted. This provision is no longer being used by the DEP.

Section 11.6 provides for site specific bonding. The bonding maximum limit of not more than \$5,000.00 an acre has been changed to \$20,000.00. Several other revisions make to the bonding portion of the rule put in place a site specific bonding system that require further information of the permittee regarding a "worse case" scenario on reclamation costs.

All of existing Section 11.6.c. which provides criteria for bonding have been deleted in favor of site specific bonding.

Section 11.6.d. is amended to include coal refuse disposal sites and coal prep plants are required to be bonded at least \$1,000.00 per acre. Section 11.6.d.1. provides methods for estimating the cost of reclamation. The current factors set out in

rule for determining reclamation costs for the purpose of establishing bonding amounts have been deleted.

Misnumbered new 11.6 (on page 130 of the rule) requires a demolition bond to cover the estimated cost of removing structures and support facilities associated with the mine site.

Table 1, Surface Mines Bond calculation table has been deleted.

Section 17, Small Operator Assistance Program provides assistance to small operators to do analysis of hydrologic consequences of a mining activity. This section is being amended to require applicants to provide additional information on assistance applications which include anticipated coal production and associated methods and plans for mining activities.

New Section 25 establishes an permit exemption process for quarries that intend to extract coal incidental to extraction of another mineral. A application process is established, which requires submission of detailed information relating to the quarry and other requirements to qualify for the exemption. Coal production may not exceed 16 2/3% of the total mineral removed from the quarry. Requirements relating to stockpiling of coal, reporting to the agency, and enforcement are also provided.

AUTHORITY

Statutory authority: W.Va. Code, §22-3-4 which provides:

(a) The director shall administer the provisions of this article relating to surface-mining operations. The director has within his or her jurisdiction and supervision all lands and areas of the state, mined or susceptible of being mined, for the removal of coal and all other lands and areas of the state deforested, burned over, barren or otherwise denuded, unproductive and subject to

soil erosion and waste. Included within such lands and areas are lands seared and denuded by chemical operations and processes, abandoned coal mining areas, swamp lands, lands and areas subject to flowage easements and backwaters from river locks and dams, and river, stream, lake and pond shore areas subject to soil erosion and waste. The jurisdiction and supervision exercised by the director shall be consistent with other provisions of this chapter.

(b) The director has the authority to:

(1) Promulgate rules, in accordance with the provisions of chapter twenty-nine-a of this code, to implement the provisions of this article....

And,

W.Va. Code §22-3-12, which provides:

(a) Notwithstanding the provisions of section eleven of this article, the secretary may establish and implement a site-specific bonding system in accordance with the provisions of this section.

(b) A legislative rule proposed or promulgated pursuant to this section must provide, at a minimum, for the following:

(1) The penal amount of a bond shall be not less than one thousand dollars nor more than five thousand dollars per acre or fraction thereof.

(2) Every bond, subject to the limitations of subdivision (1) of this subsection, shall reflect the relative potential cost of reclamation associated with the activities proposed to be permitted, which would not otherwise be reflected by bonds calculated by merely applying a specific dollar amount per acre for the permit.

section shall be constructed so that when the findings of fact by the division of environmental protection with respect to the proposed mining activity and the particular permit applicant coincide with the particular factors or criteria to be considered and analyzed under the rule, the rule will direct a conclusion as to the amount of the bond to be required, subject to rebuttal and refutation of the findings by the applicant. To the extent practicable, the rule shall limit subjectivity and discretion by the secretary and the division in fixing the amount of the bond.

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

Yes. W.Va. 22-3-12 provides that bond not exceed \$5,000.00 per acre. This rule proposes to change it to \$20,000.00 per acre.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

(3) Every bond, subject to the provisions of subdivision (1) of this subsection, shall also reflect an analysis under the legislative rule of various factors, as applicable, which affect the cost of reclamation, including, but not limited to: (A) The general category of mining, whether surface or underground; (B) mining techniques and methods proposed to be utilized; (C) support facilities, fixtures, improvements and equipment; (D) topography and geology; and (E) the potential for degrading or improving water quality.

(c) A legislative rule proposed or promulgated pursuant to the provisions of this section may, in addition to the requirements of subsection (b) of this section, provide for a consideration of other factors determined to be relevant by the secretary. For example, the rule may provide for the following:

(1) A consideration as to whether the bond relates to a new permit application, a renewal of an existing permit, an application for an incidental boundary revision or the reactivation of an inactive permit;

(2) A consideration of factors which may result in environmental enhancement, as in a case where remining may improve water quality or reduce or eliminate existing highwalls, or a permitted operation may create or improve wetlands; or

(3) An analysis of various factors related to the specific permit applicant, including, but not limited to: (A) The prior mining experience of the applicant with the activities sought to be permitted; and (B) the history of the applicant as it relates to prior compliance with statutory and regulatory requirements designed to protect, maintain or enhance the environment in this or any other state.

(d) It is the intent of the Legislature that a legislative rule proposed or promulgated pursuant to the provisions of this

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has technical changes to suggest.