

OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA



Betty Ireland
Secretary of State

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

October 11, 2005

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Office of Mining and Reclamation

RULE: 38CSR2, Amendments, West Virginia Surface Mining Rule

DATE FILED AS AN EMERGENCY RULE: September 21, 2005

DECISION NO. 10-05

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.


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Secretary of State

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EMERGENCY RULE DECISION
(ERD 10-05)

AGENCY: Office of Mining and Reclamation
RULE: 38CSR2, Amendments, West Virginia Surface Mining Rule
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- par. 1 The Office of Mining and Reclamation (OMR) has filed the above amendment 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 OMR filed this emergency rule with supporting documents with the Secretary of State September 21, 2005 and with the LRMRC September 21, 2005.
- par. 7 It is the determination of the Secretary of State that the OMR 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 §22-3-4 reads:

§22-3-4. Reclamation; duties and functions of director.

(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, swamplands, 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: Provided, That the director shall give notice by publication of the public hearing required in article three, chapter twenty-nine-a of this code: Provided, however, That any forms, handbooks or similar materials having the effect of a rule as defined in article three, chapter twenty-nine-a of this code were issued, developed or distributed by the director pursuant to or as a result of a rule are subject to the provisions of article three, chapter twenty-nine-a of this code;

(2) Make investigations or inspections necessary to ensure complete compliance with the provisions of this code;

(3) Conduct hearings or appoint persons to conduct hearings under provisions of this article or rules adopted by the director; and for the purpose of any investigation or hearing hereunder, the director or his or her designated representative, may administer oaths or affirmations, subpoena witnesses, compel their attendance, take evidence and require production of any books, papers, correspondence, memoranda, agreements, or other documents or records relevant or material to the inquiry;

(4) Enforce the provisions of this article as provided herein; and

(5) Appoint such advisory committees as may be of assistance to the director in the development of programs and policies: Provided, That such advisory committees shall, in each instance, include members representative of the general public.

(c) (1) After the director has adopted the rules required by this article, any person may petition the director to initiate a proceeding for the issuance, amendment or appeal of a rule under this article.

(2) The petition shall be filed with the director and shall set forth the facts which support the issuance, amendment or appeal of a rule under this article.

(3) The director may hold a public hearing or may conduct such investigation or proceeding as he or she considers appropriate in order to determine whether the petition should be granted or denied.

(4) Within ninety days after filing of a petition described in subdivision (1) of this subsection, the director shall either grant or deny the petition. If the director grants the petition, he or she shall promptly commence an appropriate proceeding in accordance with the provisions of chapter twenty-nine-a of this code. If the director denies the petition, he or she shall notify the petitioner in writing setting forth the reasons for the denial.

par. 9 It is the determination of the Secretary of State that the OMR 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 OMR are as follows:

The current rule requires that after July 1, 2001, a surety must be recognized by the Treasurer of the State as holding a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds (otherwise referred to as being "T-Listed").

This standard was adopted by the Department of Environmental Protection ("DEP") to address concerns about the financial solvency of sureties providing reclamation bonds in West Virginia. The DEP did not have the necessary resources or expertise to regularly and timely monitor the financial condition of sureties doing business in West Virginia. A surety that is T-Listed is required to provide on a regular basis financial information to the Department of Treasury, which reviews this information & provides its findings to state regulatory agencies. While this information provided by the Department of Treasury has been helpful, this restriction has prevented sureties that are not T-Listed, that are otherwise in good financial condition, from providing reclamation bonds in West Virginia. This, along with other reasons, has adversely impacted the market for reclamation bonds in West Virginia. Further, since a surety must have at least two years experience providing surety bonds before it can be T-Listed, a new insurance company or an existing insurance company that has not previously issued surety bonds cannot offer surety bonds in West Virginia.

The proposed amendment to 11.3.a not only addresses the concerns of DEP by providing to DEP an alternative source of reliable financial information about the surety, but also allows sureties that are in good financial condition but are not T-Listed to provide surety bonds in West Virginia.

An "emergency" under the State Administrative Procedures Act exists because there is presently a great demand for reclamation bonds from the coal industry in West Virginia that is not being met by the number of sureties currently offering surety bonds in West Virginia (see attached Affidavit of Bill Raney, President of West Virginia Coal Association). As a result, alternative more expensive means are being used to comply with bonding requirements. Among other things, this has greatly restricted the availability of capital for the development of new coal mines and the creation of new jobs. At a time when coal is so important to West Virginia's economy, this dearth of surety bonds is having a significant negative impact on West Virginia's coal industry. The proposed amendment to 38CSR2 is thus necessary "to prevent substantial harm to the public interest."

The passage of this amendment, along with the willingness of the office of the West Virginia Insurance Commissioner to provide financial updates to DEP on a regular

basis (at least quarterly) will allow West Virginia to address West Virginia's problems and West Virginia's economy.

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). . . "to prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 10-05 or ERD 10-05 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Office of Mining and Reclamation, the Attorney General and the Legislative Rule Making Review Committee.

BETTY IRELAND
Secretary of State

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