

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
KEN HECHLER  
**ADMINISTRATIVE LAW DIVISION**

Form #7

Do Not Mark In this Box

FILED  
1988 JUL 15

**NOTICE OF AN EMERGENCY RULE**

AGENCY: West Virginia Department of Energy TITLE NUMBER: 38

CITE AUTHORITY: W. Va. Code 22-1-15, 22A-3-4 & 29A

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X, NO     

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 2

TITLE OF RULE BEING AMENDED: West Virginia Surface Mining  
Reclamation Regulations

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: NA

TITLE OF RULE BEING FILED AS AN EMERGENCY: NA

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See attached statement

Use Additional Sheets If Necessary.

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help we can get)

## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

Charleston 25305

THE ATTACHED EMERGENCY RULE FOR SERIES 2  
WAS IN EFFECT FROM JULY 15, 1988 UNTIL  
JULY 26, 1988. IT REPRESENTS TWO EMERGENCY RULES  
IN EFFECT AT THE SAME TIME.

A handwritten signature in dark ink, appearing to read "R. O. Hartman", with a long, sweeping horizontal stroke extending to the right.

RICH O. HARTMAN, DIR

WEST VIRGINIA DEPARTMENT OF ENERGY

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1988 JUL 13 10 32

SURFACE MINING RECLAMATION REGULATIONS

SENT 1 1988

EMERGENCY RULES

Title 38 Series 2

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FACTS AND CIRCUMSTANCES CONSTITUTING AN EMERGENCY

Under the federal Surface Mining Act of 1977 (PL 95-87), individual states were given the option of either: (1) relinquishing their authority to carry out a mining and reclamation program to the federal Office of Surface Mining Reclamation and Enforcement (OSMRE), or (2) applying to OSMRE for state primacy to carry out a state program.

West Virginia applied for and received primacy in January of 1981. However, this grant of primacy was a conditional approval pending correction of a number of perceived deficiencies in the program. The State of West Virginia, through a long series of amendments to the program, satisfied the majority of the conditions; however, on July 11, 1985, OSMRE advised the State that a number of conditions on the program remained and needed to be resolved through statutory, regulatory, or policy amendments.

On February 10, 1986, the State advised OSMRE that the Legislature did not adopt the proposed amendments, and the conditions could not be satisfied. Subsequently, on June 30, 1986, the State requested an extension on the conditions to April 15, 1987, to allow an opportunity to again seek legislative approval of the necessary statutory and regulatory changes. Approval of the extension was granted on November 10, 1986. On April 6, 1987, the State advised OSMRE that it was again unsuccessful in obtaining legislative action. On June 19, 1987, OSMRE advised that at least the regulatory conditions must be satisfied through emergency rulemaking. The State did not file emergency rules to satisfy the conditions, but did file a rule package which would completely overhaul the State's mining and reclamation regulations and incorporated into that package the necessary rules to satisfy the conditions. This package failed to gain legislative approval in the 1988 legislative session, which effectively left the conditions unresolved.

OSMRE is now insisting that the conditions be satisfied through the emergency rulemaking procedure. Failure to do so could force OSMRE into a position of initiating action to take over all or part of the State's program, resulting in the loss of federal matching money and loss of total funding of the State's Abandoned Mine Land Reclamation program. Therefore, the State has no alternative to filing the emergency regulations contained herein.

The above described events and circumstances comprise sufficient justification for emergency rulemaking.

\*10-TITLE 38  
LEGISLATIVE RULES  
DEPARTMENT OF ENERGY  
SERIES 2  
WEST VIRGINIA SURFACE MINING  
RECLAMATION REGULATIONS

FILED  
JUL 13 1973

--Ed.--Note:--The-Department-of-Energy-inherited-this-rule-from-the  
Department-of-Natural-Resources-when-this-program-was-transferred  
from-BNR-to-DOE.--Where-reference-is-to-BNR-please-read-DOE.

38-2-1. General.

1.1. These regulations establish general and specific rules for general permit requirements, transportation facilities, drainage systems, blasting, post mining land use, fish and wildlife considerations, revegetation, prime farmlands, bonding, prospecting, additional permit requirements and performance standards for surface mining operations, additional permit requirements and performance standards for surface effects of underground mining operations, subsidence control, additional permit requirements and performance standards for facilities incidental to coal mining, additional permit requirements and performance standards for coal removal incidental to development, NPDES transfer, exemptions, additional permit requirements and small operators assistance program, notice of citizen's suits, citizens' inspections, designation of areas unsuitable for coal mining inspections, enforcement, open meetings and Reclamation Board of Review appeals.

1.2. Applicability. These rules and regulations shall apply to all surface coal mining and reclamation operations in this state as specified in accordance with Chapter 22A 20, Article 36.

(a) For all existing operations which have submitted permanent program modifications and/or addenda for existing permits or applications for permanent program permits, these regulations shall apply upon notification from the Commissioner of their applicability. ~~Such notification shall occur within forty-five (45) days of the effective date of these regulations.~~ Within thirty (30) days of the receipt of that notification, the permittee shall acknowledge, in writing, to the Commissioner the applicability of these regulations to his operation. Such acknowledgement shall be deemed sufficient to make the permit or application complete for any new permit requirements contained in these regulations and shall become a part of the permit.

(b) These regulations apply immediately to all existing operations not covered in (a).

(c) For applications for new operations which have received an SMA number within thirty (30) days of the effective date of these regulations, the applicant shall acknowledge the applicability of these regulations to his proposed operation, in writing, to the Commissioner prior to issuance of the permit. Such acknowledgement shall be deemed sufficient to make the application complete for any new permit requirements contained in these regulations and shall become a part of the permit.

(d) Permits issued after the effective date of these regulations for existing or new operations not covered in (a) or (c) shall incorporate all of the requirements of these regulations. These requirements shall be addressed in the application.

(e) All existing and new operations shall comply with the notice requirements of 4C.7 and 7C.1 within seventy-five (75) days of the applicability of these regulations as specified in (a), or (b) of this subsection. Such notice shall be deemed sufficient to allow continued operation during the period specified in these regulations for prenotification (thirty (30) days for right to a preblast survey and six (6) months for the extension of underground workings). Operations continuing beyond those time periods must be in full compliance with these regulations.

1.3. Authority. WV Code 22-1-15, 22A-3-4, and 29A.

1.4. Filing Date.

1.5. Effective Date.

38-2-2. DEFINITIONS: As used in these regulations, unless used in a context that clearly requires a different meaning, the term:

2.1. Abandoned Coal Waste Disposal Area means any coal refuse disposal area which is not part of an active surface mining operation. This definition does not relieve any operator from his reclamation responsibility for the coal refuse disposal area.

2.2. Acidity means the quantitative capacity of an aqueous medium to donate protons in a reaction with hydroxyl ions.

2.3. Acid Mine Drainage means water discharged from an active, inactive, or abandoned mine and from areas affected by surface mining with a pH of less than six (6.0) in which total acidity exceeds total alkalinity.

2.4. Acid-Producing Coal Seam means seams commonly associated with sulfides or other minerals which create acid mine drainage. Seams commonly associated with such material may include, but are not limited to Waynesburg, Washington, Freeport, Sewickley, Redstone, Pittsburgh, Kittanning, Elk Lick, Peerless, No. 2 Gas, Upper Eagle, No. 5 Block and Stockton Lewiston. However, specific on-site data may, on a case by case basis, demonstrate that these seams are not acid producing in specific areas.

2.5. Acid-Producing Overburden means material which upon appropriate analysis shows the potential for producing acid mine drainage.

2.6. Acid-Test Ratio means the relation of quick assets to current liabilities.

2.7. Act means West Virginia Code, Chapter 2022A, Article 63.

2.8. Active Surface Mining Operation means an operation where land is being disturbed or mineral is being removed and where a Phase 1 Bond Reduction has not been approved unless inactive status has been granted.

2.9. Administratively Complete Application means an application for a permit approval or approval for coal exploration where required, which the Commissioner determines to contain information addressing each application requirement of the regulatory program and to contain all information necessary to initiate processing and public review.

2-9.2.10. Asset Ratio means the relation of total assets to total liabilities.

2-10.2.11. Auger Mining means a method of mining coal at a cliff or highwall by drilling or cutting holes into an exposed coal seam.

2-11.2.12. Buffer Zone means an undisturbed border along or around an intermittent or perennial stream.

2-12.2.13. Bearing Capacity means a measure of the ability of a foundation material to carry loads imposed by an embankment or other structure as determined by standard engineering evaluations.

2-13.2.14. Best Technology Currently Available means equipment, devices, systems, methods or techniques which will (a) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable State or Federal laws; and (b) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife, and related environmental values and achieve enhancement of those resources where practicable.

2-14.2.15. Capital Assets means those assets such as land, buildings and equipment held for use in the production or sale of other assets or services.

2-15.2.16. Cash means (a) all cash items except cash (1) restricted by an agreement, or (2) described as earmarked for a particular purpose; and (b) short-term investment such as stocks, bonds, notes, and certificates of deposit, where the intent and ability to sell them in the near future is established by the operator.

2-16.2.17 Cemetery means any area of land where human bodies are interred.

2-17.2.18 Channel Protection means any measures taken to prevent or control erosion, scour, or other destructive processes in channels such as diversion ditches and spillways.

2-18.2.19. Coal Processing Plant means a collection of facilities where run-of-the-mine coal is subjected to cleaning, concentrating or other processing or preparation in order to separate coal from its impurities. The processing plant may consist of, but is not limited to, the following: loading facilities; storage and stockpile facilities; sheds, shops and other buildings; water treatment and water storage facilities; settling basins and impoundments; coal processing and other waste disposal areas; roads, railroads and other transportation facilities.



2-19.2.20. Coal Refuse Disposal Area means a deposit of coal processing waste or underground development waste.

2-20.2.21. Coal Processing Waste means materials which are separated and wasted from the product coal during the physical or chemical processing, cleaning or concentrating.

2.22 Coal Remining Operation means a coal mining operation which was permitted after February 4, 1987, on a site where previous coal mining was conducted before the effective date (August 3, 1977) of the Surface Mining and Reclamation Act of 1977.

2-21.2.23. Coarse Coal Refuse means coal processing waste predominantly within a size range greater than the number twenty-eight (#28) sieve size.

2-22.2.24. Collateral Bond means an indemnity agreement in sum certain deposited with the Director executed by the permittee and supported by one or more of the following:

(1) The deposit of cash in one or more federally insured accounts, payable only to the ~~director~~Commissioner upon demand;

(2) Negotiable bonds of the United States, a State, or a municipality, endorsed to the order of, and in the possession of, the ~~director~~Commissioner;

(3) Negotiable certificates of deposit, payable only to the ~~director~~Commissioner, and in his possession;

(4) An irrevocable letter of credit of any bank organized or authorized to transact business in the State of West Virginia, payable only upon presentation by the ~~director~~Commissioner;

(5) A perfected, first-lien security interest in real or personal property, in favor of the ~~director~~Commissioner; or

(6) Investment-grade rated securities, having the highest rating issued by a nationally recognized securities rating service, endorsed to the order of, and in the possession of, the ~~director~~Commissioner, excluding all issues of the type traded on a commodity exchange such as contracts for future delivery of goods.

2-23.2.25. Combined Coal Refuse means a mixture of coarse coal refuse and dewatered fine coal refuse.

2-24.2.26 Combustible Materials means organic materials that are capable of burning by fire or through oxidation,

accompanied by the evolution of heat and a significant temperature rise.

2.27 Commissioner means the Commissioner of the Department of Energy or his authorized agent.

2-25.2.28 Common size Comparative Balance Sheet means item amounts from a number of the permittee's or applicant's successive yearly balance sheets arranged side by side in a single statement followed by common size percentages whereby: (1) the asset total is assigned a value of one hundred percent (100%); (2) the total of liabilities and owner equity is also assigned a value of one hundred percent (100%); and (3) each individual asset, liability, and owner equity item is shown as a fraction of one of the one hundred percent (100%) totals.

2-26.2.29. Common size Comparative Income Statement means an operator's income statement amounts for a number of successive yearly periods arranged side by side in a single statement followed by common size percentages whereby net sales are assigned a one hundred percent (100%) value, and then each statement item is shown as a percentage of net sales.

2-27.2.30. Community or Institutional Building means any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

2-28.2.31. Compaction means the densification of a soil or soil-like material by means of mechanical manipulation.

2-29.2.32. Complete Application means an application which contains all required maps, plans, designs and other application materials excluding bond.

2-30.2.33 Completion of Reclamation means that the total bond has been released after approval of the final inspection report provided for in these regulations.

2.34. Cumulative Impact means the hydrologic impact that results from the cumulation of flows from all coal mining sites to common channels or aquifers in a cumulative impact area. Individual mines within a given cumulative impact area may be in full compliance with effluent standards and all other regulatory requirements, but as a result of the comingling of their off-site flows, there is a cumulative impact. The Act does not prohibit cumulative impacts but does emphasize that they be minimized.

When the magnitude of cumulative impact exceeds threshold limits or ranges as predetermined by the Department, they constitute material damage.

2.35. Cumulative Impact Area means the area within which impacts on surface and groundwater systems resulting from the proposed operation may interact with the impacts of all existing or anticipated mining throughout the lives of:

(a) the proposed operation;

(b) all existing operations;

(c) any operation for which a permit application has been submitted to the Commissioner; and

(d) all operations required to meet diligent development requirements for leased Federal coal for which there is actual mine development information available.

2-31.2.36. Construction Pore Pressures means water pressures generated in foundation soils or embankments due to compression by loads imposed by construction of an embankment or other structure.

2-32.2.37 Current Assets means cash and assets that are reasonably expected to be realized in cash or sold or consumed within one year or within the normal operation cycle of the business.

2-33.2.38. Current Liabilities means debts or other obligations that must be paid or liquidated within a short period of time, usually a year. This shall also include dividends payable on preferred stock within one year.

2-34.2.39. Current Ratio means the relation of current assets to current liabilities.

2-35.2.40. Density means the weight of soil or soil-like solids per unit of total volume of soil or similar mass.

2-36.2.41 Design Storm means predicted precipitation of given intensity, frequency and duration based on United States Weather Bureau data.

~~-----2-37---Director-and/or-His-Authorized-Agent-means-the director-of-the-department-of-natural-resources,-deputy directors,-the-chief-of-the-division-of-reclamation,-the assistant-chiefs-of-the-division-of-reclamation,-all-duly authorized-surface-mining-reclamation-supervisors,-inspectors-and inspectors-in-training-~~

2-38.2.42. Downslope means the land surface between the projected outcrop of the lowest coal seam being mined or any mining related construction and the valley floor.

2-39.2.43. Embankment means a man made deposit of earth or waste materials, usually exhibiting at least one sloping face.

2-40.2.44. Embankment Stability means the degree of safety relative to a structural failure of the embankment.

2-41.2.45. Emergency Spillway means a hydraulic structure designed to discharge water in excess of that which an impoundment is designed to store or which cannot be passed through a principal spillway.

2-42.2.46. Excess Spoil means spoil material disposed of in a location other than the mined-out area.

2-43.2.47. Existing Coal Refuse Area means a refuse disposal area that is part of an active surface mining operation.

2-44.2.48. Existing Structure means a structure or facility used with or to facilitate surface coal mining and reclamation operations for which construction began prior to January 18, 1981.

2-45.2.49. Face-Up means the result of an excavation where a vertical or near vertical highwall is created that exposes the overburden and/or the mineral face.

2-46.2.50. Fine Coal Refuse means coal processing waste predominantly within a size range less than the number twenty-eight (#28) sieve which may be disposed of in a slurry form or in a dewatered or treated state.

2-47.2.51. Foundation means soil, bedrock, or other earth material on or against which an embankment or other structure is placed.

2-48.2.52. Fragile lands means geographic areas containing natural, ecologic, scientific or esthetic resources that could be irreparably damaged or destroyed by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, national natural landmark sites, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, areas of recreational value due to high environmental quality, and buffer zones adjacent to the boundaries of areas where surface coal

mining operations are prohibited under Section 22(d) of the Act and Section 13 of these regulations.

2-49.2.53. Freeboard means (a) the vertical distance between the lowest point of the crest of the embankment and the reservoir water surface or (b) the vertical distance between the top of a ditch or channel and the water surface during the design flow.

2-50.2.54. Gravity Discharge means, with respect to underground mining activities, mine drainage that flows freely down gradient in an open channel. Mine drainage that occurs as a result of flooding a mine to the level of the discharge is not gravity discharge.

2-51.2.55. Growing Season means one (1) year.

2-52.2.56. Groundwater means subsurface water in the zone of saturation.

2.57. Handbook means the Technical Handbook of Standards and Specifications for Mining Operations in West Virginia prepared by the ~~Director~~ Commissioner of the West Virginia Department of Natural-Resources Energy.

2-53.2.58. Haulageway or Access Road means any road constructed, improved, maintained or used by the operator with the exception of state maintained roads.

2-54.2.59. Hazard Potential means a classification rating assigned to a structure based on engineering evaluations and judgment predicting the damage to human life, property and environment should a failure of the structure occur.

2-55.2.60. Highwall means the face of exposed overburden or coal in an open cut of a surface mining operation or for entry to an underground mining operation.

2-56.2.61. Historic Lands means important historical, cultural and scientific areas that could be irreparably damaged or destroyed by surface mining operations. Examples of historic lands include sites that have been listed on the national register of historic places, national historic landmarks and sites for which historic designation is pending.

2.62. Hydrologic Balance means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation and changes in ground and surface water levels and storage.

2.63. Hydrological Isolated Operation means a surface mining operation where hydrologic impacts are negligible or are dissipated before reaching points in the system where they are additive to hydrologic impacts of other surface mining operations.

2-58.2.64. Hydrologic Regime means the entire state of water movement in a given area.

2-59.2.65. Impoundment means a closed basin constructed for the retention of water, sediment or waste.

2.66. Incidental Boundary Revision means:

(a) an extension of the permit area that is necessary for reasons unforeseen at the time the original permit application was prepared and which is necessary for the continuance of that permitted operation; or

(b) the deletion of bonded acreage which is double-bonded by a valid permit and for which full liability is assumed in writing by the successive permittee.

2-60.2.67. Infiltration means the flow or movement of water through the surface of soil or soil like material into the ground.

2-61.2.68. Intermittent Stream means a stream or portion of a stream that flows continuously for at least one (1) month of the calendar year as a result of groundwater discharge or surface runoff.

2-62.2.69. Inspection shall mean a visual review of prospecting, surface or other mining operations to insure complete compliance with any applicable law, rule, regulation or permit conditions under jurisdiction of the ~~director~~ Commissioner.

2-63.2.70. Irreparable Damage to the Environment means any damage to the environment that cannot be corrected by actions of the operator.

2-64.2.71. Leachate means a liquid that has percolated through soil, rock or waste and has extracted dissolved or suspended materials.

2-65.2.72. Lightly Buffered Stream means any stream or its tributaries that contains less than fifteen (15) PPM methyl orange alkalinity (to pH 4.5) and a conductivity of less than fifty (50) micro MHO.

2-66.2.73. Liquefaction means a phenomenon wherein a saturated granular soil or soil like material loses strength and flows in a manner resembling a liquid.

2-67.2.74. Liquidity Ratio means the relation of cash to current liabilities.

2-68.2.75. Mine means the shaft, slopes, drifts or inclines connected with excavations penetrating coal seams or strata and the surface structures or equipment connected therewith which contributes directly or indirectly to the mining, preparation or handling of coal.

2-69.2.76. Mineral Face means the exposed vertical cross-section of the natural coal seam or mineral deposit.

2-70.2.77. Natural Drainway means any natural water course which may carry water to the tributaries and rivers of the watershed.

2-71.2.78. Natural Hazard Lands means geographic areas in which natural conditions exist which pose or, as a result of surface coal mining operations, may pose a threat to the health, safety or welfare of people, property or the environment, including areas subject to landslides, cave-ins, severe wind or soil erosion, frequent flooding and areas of unstable geology.

2-72.2.79. Net profit means the bottom line of the income statement after taxes, including taxes based on income, adjustments, all extraordinary income and expense, but before preferred and common stock dividends.

2-73.2.80. Net worth means preferred and common stock, all surplus accounts, and retained earnings.

2-74.2.81. Occupied Dwelling means any building that is currently being used on a regular or temporary basis for human habitation.

2-75.2.82. Outer Spoil or Outer Slope means a disturbed area extending from the outer point of the bench to the extreme lower limit of the disturbed land.

2-76.2.83. Overburden means material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil.

2-77.2.84. Peak Runoff means the maximum flow at a specified location resulting from a design storm.

2-78.2.85. Perennial Stream means a stream or portion of a stream that flows continuously.

2-79.2.86. Principal shareholder means any person who is the record or beneficial owner of ten percent (10%) or more of any class of voting stock.

2-80.2.87. Piping means a process of internal erosion which occurs when water transports soil or soil like materials through unprotected exits, developing unseen channels or pipes through an embankment or its foundation.

2-81.2.88. Pit means that part of the surface mining operation from which the mineral is being actively removed or where the mineral has been removed and the area has not been backfilled.

2-82.2.89. Potential Hazard means the existence of any condition or practice or any violation of a permit or other requirements of the Act in an operating or an abandoned refused area which might reasonably be expected to cause physical harm to persons, property, or the environment inside or outside the permit area.

2-83.2.90. Preinspection means a preliminary survey and a field review by the ~~director~~ Commissioner or his authorized agent of a preplan and the proposed area to be disturbed.

2-84.2.91. Preplan means the total application submitted to the ~~director~~ Commissioner including the application forms, mining and reclamation plan, drainage plan, blasting plan, planting plan, maps, drawings, data, cross-sections, bonds and other information as may be required to obtain a permit.

2.92. Pre-Existing Discharge means any discharge at the time of permit application.

2-85.2.93. Principal Spillway means the hydraulic structure designed to discharge water stored between normal pool and the emergency spillway invert elevations.

2-86.2.94. Probable Maximum Precipitation means the depth-duration-area rainfall for a particular area that represents the maximizing of the most critical meteorological conditions that are considered possible.

2-87.2.95. Public Building means any structure that is owned by a public agency or used primarily for public business or meetings.



2-88.2.96. Quick Assets means cash and current assets that can be quickly turned into cash.

2.97. Reasonably available spoil means spoil and suitable coal mine waste material generated by the remining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to public safety or significant damage to the environment.

2-89.2.98. Recharge Capacity means the ability of the soils and underlying materials to allow precipitation to infiltrate and reach the zone of saturation.

2-90.2.99. Reclamation means the process of converting disturbed land to a stable form for productive use.

2-91.2.100. Renewable Resource Lands means geographical areas which contribute significantly to the long range productivity of a water supply, or food or fiber products.

2-92.2.101. Retained Earnings means stockholder's equity that has arisen from retained assets from earnings in the business. This shall include only earnings from normal operations and not gains from such transactions as the sale of plant assets or investments.

2-93.2.102. Return On Investment means the relation of net profit for the last yearly period to ending net worth.

2-94.2.103. Safety Factor means the Ratio of the available shear strength to the developed shear stress, or the ratio of the sum of the resisting forces to the sum of the loading or driving forces, as determined by accepted engineering practices.

2-95.2.104. Sediment means solid material, both mineral and organic, that is in suspension, is being transported or has been moved from its site of origin by air, water gravity or ice and has come to rest on the earth's surface.

2-96.2.105. Sediment Control Structure means a structure designed, constructed and maintained in accordance with Section 4B.5 of these regulations.

2-97.2.106. Self-Bond means an indemnity agreement in a sum certain payable to the ~~director~~ Commissioner, executed by the permittee and by each individual and business organization capable of influencing or controlling the investment or financial practices of the permitted by virtue of his authority as an officer or ownership of all or a significant part of the permittee, and supported by agreements granting the

~~Director~~Commissioner a security interest in real or personal property pledged to secure performance by the permittee.

2-98.2.107. Significant Aquifer means a zone, stratum or group of strata that can store and transmit water in sufficient quantities for a specific use.

2-99.2.108. Slope Protection means any measures taken to control erosion on slopes.

2-100.2.109. Slope Stability means the degree of safety relative to the development of a landslide in the slope, as defined by one or more standard engineering methods of analysis.

2-101.2.110. Spoil means overburden that has been removed during surface coal mining operations.

2-102.2.111. Stabilize means to control movement of soil, spoil piles or areas of disturbed earth by modifying physical or chemical properties.

2-103.2.112. Standard Engineering means sound engineering practice based upon the technology currently available to the engineering profession.

2-104.2.113. Stoniness means a characteristic of earth, overburden or spoil reflecting its relative proportion of sizable aggregate content as opposed to its sand, silt, clay or rock fragment content.

2-105.2.114. Structure means, but is not limited to, gas lines, water lines, towers, airports and dams. This shall not include operational facilities of the surface mining operation for purposes of Section 4C.5(f).

2-106.2.115. Strength Parameters mean those engineering values obtained from standard engineering shear strength tests of soil or soil like material.

2-107.2.116. Sub-Drainage System means a designed and constructed system provided for the conveyance of subsurface water.

2-108.2.117. Subsidence means a sinking, collapsing or cracking of a portion of the earth's surface caused by voids beneath the surface created by mining.

2-109.2.118. Substantial Legal and Financial Commitments in a Surface Coal Mining Operation means that significant investments and legal commitments have been made in activities and facilities such as power plants, railroads, coal handling,

preparation, extraction or storage facilities and other capital-intensive activities on the basis of a long term coal contract.

2-110.2.119. Substantially Disturb means, for purposes of prospecting, to impact significantly upon land, air or water resources by such activities as blasting, mechanical excavation, drilling or augering coal or water exploratory holes or wells, construction of roads and other access routes, and the placement of structures, excavated earth or other debris on the surface of land.

2-111.2.120. Successor in Interest means any person who succeeds to rights granted under a permit by transfer, assignment or sale of those rights.

2-112.2.121. Surety Bond means an indemnity agreement in a sum certain payable to the ~~director~~Commissioner executed by the permittee which is supported by the performance guarantee of a corporation licensed to do business as a surety in the State of West Virginia.

2-113.2.122. Surface Water means water on the surface of the earth.

2-114.2.123. Topsoil means the A-horizon soil layer of the three major soil horizons.

2-115.2.124. Toxic-Forming Materials means earth materials or wastes which, if acted upon by air, water, weathering or microbiological processes, are likely to produce chemical or physical conditions in soils, air or water that are detrimental to the environment.

2-116.2.125. Transfer, Assignment or Sale of Rights means a change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the ~~director~~Commissioner.

2-117.2.126. Toxic Mine Drainage means water that is discharged from active or abandoned mines or other areas affected by surface mining or prospecting operations which contains a substance which through chemical action or physical effects, is likely to kill, injure or impair biota commonly present in the area that might be exposed to it.

2-118.2.127. Underground Development Waste means waste rock mixtures of coal, shale, claystone, siltstone or other related materials that are brought to the surface for disposal.

2-119.2.128. Valid Existing Rights exists, except for haulroads, in each case in which a person demonstrates that the

limitation provided for in Section 22(d) of the Act would result in the unconstitutional taking of that person's rights. For haulroads, valid existing rights means a road or recorded right-of-way or easement for a road which was in existence prior to August 3, 1977. A person possesses valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation as a whole economically viable. Valid existing rights shall also be found for an area where a person can demonstrate that an SMA number had been issued prior to the time when the structure, road, cemetery or other activity listed in Section 22(d) of the Act came into existence.

2-120.2.129. Valley or Head-of-Hollow Fill means a fill structure consisting of any material, other than organic material, placed in a valley where side slopes of the existing hollow measured at the steepest point are greater than twenty (20) degrees or the average slope of the profile of the hollow from the toe of the fill to the top of the fill is greater than ten (10) degrees.

2-121.2.130. Woodlands means commercial woodlands where the post-mining land use would be a commercial product where flat or gently rolling land is essential for operation and mechanical harvesting.

2-122.2.131. Working Capital means the excess of the operator's current assets over its current liabilities.

2-123.2.132. Zone of Saturation means the zone below the piezometric surface in which all voids are filled with groundwater. Piezometric surface means the surface to which the water from a given aquifer will rise under its full head.

38-2-3A. Permit Application.

3A.1. General Requirements for Format and Contents - Applications for permits to conduct surface mining operations shall be filed in the format required by the ~~director~~Commissioner.

(a) All technical data submitted in the application shall be accompanied by the names of persons or organizations that collected and analyzed the data, dates of the collection and analysis of the data and description of the methodology used to collect and analyze the data. Any referenced materials not included in the application shall be readily available to the ~~director~~Commissioner.

(b) If the application is for a period in excess of the normal five (5) years, the application shall:

1. Be complete for the specified longer term;
2. Show that the specified longer term is reasonably needed to allow the applicant to obtain necessary financing of equipment and the opening of the operation and that the need is confirmed in writing by the applicant's proposed source of financing; and
3. Such permits shall be reviewed by mid-term or every five (5) years, whichever is more frequent.

(c) The application shall contain the telephone numbers of the applicant, operator or applicants resident agent.

38-2-3B. Advertisement.

3B.1. Surface Mine Application Number. Prior to the publication of the advertisement for a surface mining permit, the applicant shall submit a an administratively complete surface mining permit application and obtain a surface mining permit application (SMA) file number. Each such SMA number shall be valid for three-hundred-sixty-(360)-days one year.

3B.2. Contents of Advertisements.

(a) The surface mining application (SMA) file number shall be made a part of the advertisement.

(b) A clear and accurate location map shall be made a part of the advertisement. A map of a scale and detail found in the West Virginia General Highway Map will be the minimum standard for acceptance. The map size will be at a minimum two inches (2") x two inches (2"). Longitude and latitude lines and north

arrow shall be indicated on the map and such lines will cross at or near the center of the proposed permit area.

(c) At a minimum, the advertisement shall contain:

1. The name and business address of the applicant;
2. A narrative description which clearly describes the location of the proposed permit area to include the name of the coal seam to be mined and the receiving stream;
3. The location where a copy of the application is available for public review;
4. The name and address of the regulatory authority where written comments or requests for informal conferences on the application may be submitted;
5. The type of operation; and
6. Surface and mineral ownership of the tract to be permitted.

(d) The advertisement and publication dates shall be certified and notarized by the publishing newspaper. The certificate of publication shall be made a part of the permit application.

(e) If an applicant seeks a permit to mine within one hundred feet (100') of the outside right-of-way of a state maintained road or to relocate a state maintained road, the advertisement may include a concise statement describing the road and, if applicable, the particular part to be relocated, where the relocation is to occur, the duration of the relocation and that a public hearing can be requested. If mining within one hundred feet (100') of a public road is proposed and not addressed in this advertisement, a separate public notice, with an opportunity for a public hearing, must be provided for prior to permit issuance.

(f) If an alternative land use is proposed, an indication of the premining land use and the proposed postmining land use.

(g) If an experimental practice is proposed, a statement indicating such and identifying regulatory provisions for which a variance is requested.

3B.3. Availability of comments. The ~~director~~Commissioner shall file a copy of comments for public review at the same office where the permit is filed.

3B.4. Readvertisement:

(a) When a Surface Mine Application (SMA), which has been advertised once a week for four successive weeks has been determined by the Commissioner to have had a limited number of minor changes which do not significantly affect the method of operation, the reclamation plan and/or the original advertisement, then he shall cause a new advertisement to be published one (1) time with a ten (10)-day public comment period in accordance with 3B.2(a), (b), and (c) of these regulations.

(b) Permits which are being renewed or significantly revised must be advertised in accordance with 3B.2 of the regulations and with Section 22A-3-9(a)(6) of the Code of West Virginia.

3B.5. Renotification - A renotification letter shall be sent to all commenters of a surface mine application (SMA) when a determination has been made by the Commissioner that readvertisement is required under regulation 3B.4.

38-2-3C. Maps.

3C.1. Scale for Maps. Except as otherwise noted in these rules and regulations, the scale required for all maps shall be as follows:

(a) The preferred scale of maps proposed from United States Geological Survey topographic maps on 7.5 minute quadrangle shall be enlarged to five hundred foot (500') to the inch;

(b) The preferred scale for maps associated with facilities subject to Sections 7 and 8 of these regulations shall be two hundred foot (200') to the inch; and

(c) Lesser scales may be used where improved clarity and accuracy are necessary.

3C.2. Map Size. All maps and plans shall be submitted on print paper, thirty inches (30") by forty-two inches (42") or less. If supplementary maps or plans are attached, match lines shall be used.

3C.3. Color Code. A color code shall be used in preparing all maps to indicate critical features of the permit area as follows:

(a) Red shall indicate mineral to be removed;

(b) Blue shall indicate water and drainage patterns;

(c) Green shall indicate areas regraded;

(d) Yellow shall indicate all other areas within the permit boundary; and

(e) Purple shall be used to outline adjacent mining permits.

#### 38-2-3D. Insurance.

The minimum amount of insurance coverage for bodily injury shall be three hundred thousand dollars (\$300,000) for each occurrence and five hundred thousand dollars (\$500,000) aggregate; and minimum insurance for property damage shall be three hundred thousand dollars (\$300,000) for each occurrence and five hundred thousand dollars (\$500,000) aggregate with no exclusion for landslides and water loss; provided, that blasting insurance will continue as long as blasting activities occur. Provided further, that the policy shall include a rider requiring the insurer notify the ~~Director~~Commissioner whenever substantive changes are made in the policy including any termination or failure to renew.

#### 38-2-3E. Approved Persons.

3E.1. Function. Any person may upon approval by the ~~Director~~Commissioner, unless otherwise provided in the Act and these regulations, prepare, sign or certify all permit applications, maps, plans and design specifications or other similar materials necessary to complete an application and preplan. Provided however, that for purposes of Sections 9(0)(13)~~10(a)(13)~~ and 1213(b)(10) of the Act an approved person shall be a registered professional engineer or licensed land surveyor who may be assisted by experts in related fields such as geology, land surveying and landscape architecture.

3E.2. Qualifications. The ~~Director~~Commissioner's approval shall be in writing and shall be based on the following:

(a) A resume of the persons prior experience and training relating to the preparation of permit application materials, provided, that registered professional engineers, registered mining or civil engineers and licensed land surveyors currently registered or licensed in the State of West Virginia shall in lieu of a resume submit a copy of their registration; and

(b) Any person seeking an approval must demonstrate that he possesses adequate knowledge of the Act and rules and regulations promulgated thereunder and possess such other skills and qualifications as may be necessary to complete an application and preplan by successfully passing an examination administered by



the ~~Director~~ Commissioner. Those persons who have been approved to date need not make said demonstration. Such examinations will be given upon request by the person seeking approval.

### 38-2-3F. Compliance Information.

3F.1. Past Violations. In addition to the compliance and permit information required by the Act, each application shall contain a listing of any current or previous permits or pending applications in the United States and a list of all violation notices received by the applicant or any subsidiary, affiliate or persons controlled by or under common control with the applicant in connection with any surface coal mining operation during the three (3) year period proceeding the application date, for a violation of any provision of the Act, or of any law, rule or regulation of the United States, or of any state law, rule or regulation enacted pursuant to federal law, rule or regulation pertaining to air, water, or environmental protection. ~~Listing of each violation notice received by the applicant in connection with any surface coal mining operation during the three (3) year period before the application date for violations of any environmental law, rule or regulation of any state and of regulation enacted pursuant to federal law pertaining to air or water environmental protection.~~

3F.2. Determination by the ~~Director~~ Commissioner. If the ~~Director~~ Commissioner determines, from either the schedule submitted as part of the application or from other available information, that any surface mining operation owned or controlled by the applicant is currently in violation of any law, rule or regulation of the United States, or of any state law, rule or regulation enacted pursuant to federal law, rule or regulation pertaining to air or water environmental protection, or of any provision of the Act, the ~~Director~~ Commissioner shall require the applicant, before the issuance of the permit, to either:

(a) Submit to the ~~Director~~ Commissioner proof which is satisfactory to the regulatory authority, department or agency which has jurisdiction over such violation, that the violation:

1. Has been corrected; or
2. Is in the process of being corrected.

(b) Establish to the ~~Director~~ Commissioner reviewing such application that the applicant has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of that violation. If the administrative or judicial hearing authority either denies a stay applied for in the appeal or affirms the violation, then any

surface coal mining operations being conducted under a permit issued according to this paragraph shall be immediately terminated, unless and until the provisions of the above paragraph are satisfied.

3F.3. Identification Number. The name of the proposed mine and the Mine Safety and Health Administration identification number for the surface or underground mine, if issued, shall be included in the application.

3F.4. Federal Fees. The applicant shall submit proof that all Federal Reclamation fees are paid.

### 38-2-3G. Operation Plans, Maps and Cross-sections.

3G.1. Operation Plans. In addition to other plans required by the Act, the application shall contain plans describing:

(a) How the applicant will case, seal or otherwise manage augerholes, boreholes, shafts, wells and open holes;

(b) How the applicant will remove, store and redistribute topsoil, subsoil and other materials or topsoil substitutes as provided for in the Topsoil Performance Standards of Sections 6, 7, and 8; and

(c) How the applicant will handle acid forming and toxic forming materials and materials constituting a fire hazard.

3G.2. Maps. The preplan map shall be developed in accordance with the requirements of Sections 22A-3-920-6-10(a) (12) and (13) and 22A-3-1020-6-11 of the Act and Subsection 3C of these regulations and shall include the following:

(a) The location and current use of all structures within one thousand feet (1000') of the proposed permit area;

(b) Each state maintained road located in or within one hundred feet (100') of the proposed permit area;

(c) The boundaries of any public park and locations of historic lands within or adjacent to the permit area;

(d) Each cemetery located in or within one hundred feet (100') of the proposed permit area;

(e) Any portion of a unit of the National System of Trails or the Wild and Scenic River System, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act which is located within or adjacent to the proposed permit area;

(f) The location of all existing structures to be used for surface mining operations which are to be exempt from design standards;

(g) The date on which the map was prepared, a north arrow, quadrangle name and location map;

(h) Where the natural slope of the land below the coal outcrop is less than twenty (20) degrees and downslope placement of overburden or spoil is proposed, the map shall indicate percent slope of the land at two hundred foot (200') intervals along the cropline;

(i) The location of sampling points for the collection of base line data and monitoring sites to be used during operation;

(j) The location of each facility to be used to protect or enhance fish and wildlife and related environmental values;

(k) Extent of proposed auger operations;

(l) Surface and mineral owners and property lines within and contiguous to the permit area;

(m) Location of water supply intakes for current users of surface water; and

(n) Location and identification of sub areas if incremental bonding is to be used.

(o) The areal distribution of aquifers for the proposed permit and adjacent areas.

(p) The location and depth of all oil and gas wells within the proposed permit area must be shown for both surface and underground mines.

3G.3. Cross-sections. The application shall contain cross-sections which accurately depict:

(a) the existing premining surface configuration and the final surface configuration that will be achieved as proposed in the reclamation plan and/or as required by these regulations; and

(b) vertical distribution of aquifers with seasonal differences in head shown if available for the proposed permit area.

38-2-3H. General Environmental Resources Information.

3H.1. The application shall contain a description of any historic lands shown on the preplan map within or adjacent to the proposed permit area. A statement as to the timing and sequence of mining and a description of the measures to be used to minimize or prevent adverse impacts in relation to such historical lands shall be included in the application.

3H.2. Existing Structures and Facilities. The applicant shall submit necessary plans and specifications for the modification of any existing structures or facilities which do not meet the performance standards contained in these regulations.

3H.3. Experimental Practices. All experimental practices shall have the prior approval of the director of OSM before the beginning of operation and permits including such shall be reviewed at least every two and one-half (2 1/2) years from date of issuance.

#### 38-2-3I. Endangered Species.

The applicant shall describe all control measures, management techniques and monitoring methods to be used to protect or enhance threatened or endangered species of plants or animals listed by the Secretary of the Interior under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) and their critical habitats if they are to be affected by the proposed activities.

#### 38-2-3J. Occupied Dwellings.

Where the proposed surface coal mining operation would be conducted within three hundred feet (300') (measured horizontally) of any occupied dwelling, the applicant shall submit with the application a written waiver from the owner of the dwelling or a demonstration of valid existing rights; provided, that if a waiver was obtained prior to August 3, 1977, a new waiver need not be obtained; provided further, that valid waivers shall remain in any subsequent transfer, sale or reassignment of the permit.

#### 38-2-3K. Verification of Application.

An application for a permit shall contain a notarized signature by a principal officer verifying that the information contained in the application is true and correct to the best of the official's information and belief.

#### 38-2-3L. Transfer, Assignment or Sale of Permit Rights and Obtaining Approval.

3L.1. Requirements. The ~~direeter~~Commissioner shall not grant approval of the transfer, assignment or sale of the rights granted under any permit unless and until the following conditions are met:

(a) It shall be affirmatively demonstrated to the ~~direeter~~Commissioner that a bond in the full amount of that required for the permit will be kept in full force and effect before, during and after the transfer, assignment or sale of the permit rights; and

(b) The application shall set forth on forms prescribed by the ~~direeter~~Commissioner and verified in accordance with 3K, the information required in the following sections of the Act: 910(a)(1) through 910(a)(6) and 910(a)(9), 910(d), 910(f), 11(a)(10), and 18(b)(5).

3L.2. Findings. If the ~~direeter~~Commissioner finds, based on the information set forth in 3L.1. and other information made available to him, that the person to whom the permit rights are being assigned, transferred or sold will conduct mining operations in accordance with the purpose and intent of the Act, these regulations and the terms and conditions of the permit, the approval of the assignment, transfer or sale of the permit rights may be granted.

3L.3. Agreement. A permittee who wishes to assign the mining operation through an agreement, contract, job contract, etc., to another party but retain the permit must request prior written approval on forms prescribed by the ~~direeter~~Commissioner. Under this arrangement, the permittee remains subject to all provisions of the Act, these rules and regulations and the terms and conditions of the permit.

3L.4. Successor by Transfer, Assignment or Sale. Any person seeking to succeed by transfer, assignment or sale to the rights granted by a permit issued under the Act shall, prior to the date of such transfer, assignment or sale, comply with the following:

(a) Obtain the performance bond coverage of the original permittee by:

1. Transfer or replacement of the original bond;

2. A written agreement with the original permittee and all subsequent successors in interest (if any) that the bond posted by the original permittee and all successors shall continue in force on all areas affected by the original permittee and all successors and supplementing such previous bonding with such additional bond as may be required by the regulatory authority. If such an agreement is reached, the ~~direeter~~Commissioner may

authorize for each previous successor and the original permittee the release of any remaining amount of bond in excess of that required by the agreement; and

3. Providing sufficient bond to cover the original permit in its entirety from inception to completion of reclamation operations or by such other methods as would provide that reclamation of all areas affected by the original permittee is assured under bonding coverage at least equal to that of the original permittee.

(b) Provide the ~~director~~Commissioner with an application for approval of such proposed transfer, assignment or sale, including:

1. Name and address of the existing permittee and permit number; and

2. Name and address of the person proposing to succeed by such transfer, assignment or sale and the name and address of that person's resident agent.

#### 3L.5. Advertisement.

(a) The person applying for approval of such transfer, assignment or sale of rights granted by a permit shall advertise the filing of the application in a newspaper of general circulation in the locality of the operations involved, indicating the name and address of the applicant, the original permittee, the number and particular geographic location of the permit and the address to which written comments may be sent under this paragraph.

(b) Any person whose interest are or may be adversely affected, including but not limited to, the head of any local, state or federal government agency, may submit written comments on the application for approval to the ~~director~~Commissioner within thirty (30) days of the day of publication.

3L.6. Approval. The ~~director~~Commissioner may, upon the basis of the applicant's compliance with the requirements of paragraphs (1) and (2) of this Subsection, grant written approval for the transfer, sale or assignment of rights under a permit, if he first finds that:

(a) The person seeking approval will conduct the operations covered by the permit in accordance with the requirements of law;

(b) The applicant has submitted a performance bond or other guarantee at least equivalent to the bond or other guarantee of the original permittee; and

(c) The applicant will continue to conduct the operations involved in full compliance with the terms and conditions of the original permit, unless and until a new permit is obtained.

### 38-2-3M. Renewals.

3M.1. Application. Application for renewal shall be on forms prescribed by the ~~direeter~~Commissioner, a renewal application shall be filed for all active or inactive operations except those inactive operations which have been granted Phase I bond release, in accordance with 22-3-23(c)20-6-10(e) of the Act, and shall contain the following:

(a) The name and address of the permittee, location of the permit area including the county, the magisterial district, the nearest post office and the permit number;

(b) A statement that the terms and conditions of the preplan are being satisfactorily met;

(c) A statement that the operation is in compliance with the applicable environmental protection standards of the Act and these rules and regulations;

(d) A statement that the performance bond and insurance policy for the operation will continue in effect;

(e) A progress map of the same size and scale as the proposal map for all operations except those which have received Phase I, II, or III release or those with no disturbance and not started into operation;

(f) A statement that the information set forth in the form and progress map is true and accurate;

(g) A notarized signature of the principal officer of the permittee in accordance with section 3K; and

(h) A copy of the proposed newspaper advertisement and proof of publication in accordance with Section 20 of the Act and Section 3B.2 of these regulations.  
~~a-public-notice-of-permit renewal-and-proof-of-publication-in-accordance-with-Section-20-of the-Act-and-Section-3B.2-of-these-regulations~~

3M.2. Notification. The ~~direeter~~Commissioner shall notify appropriate agencies in accordance with 20-622A-3-20(a) of the Act.

3M.3. Response. Informal conferences shall be available in accordance with Section 20-622A-3-20(b) of the Act and the ~~direeter~~Commissioner shall send copies of his decision to the

applicant, any persons who filed objections or comments to the renewal and to any persons who were parties to any informal conference held on the permit renewal.

3M.4. Time Extension - Extension of sixty (60) days may be granted by the Commissioner for permit renewal which has been submitted within one hundred twenty (120) days of the expiration date of the existing permit, but is logistically impractical to process before the expiration date.

38-2-3N. Revisions.

3N.1. General.

(a) Any revision to a permit will be subject to review and approval by the ~~director~~Commissioner and if deemed to be a significant revision must meet all requirements of the Act and these rules and regulations. A revision will not be deemed to be significant unless it is determined that the environmental impact or the welfare and safety of the public may be altered from that reflected in the approved preplan.

(b) No significant revision to a permit may be implemented by any operator until the written approval of the ~~director~~Commissioner has been granted.

38-2-30. Findings.

30.1. Effect on Public Places. Where the proposed surface coal mining operation will adversely affect any public park or any publicly owned place listed on the national register of historic places, the ~~director~~Commissioner shall transmit to the Federal, State or local agencies with jurisdiction over the park or historic place a copy of the complete permit application and request that the agency approve or disapprove the operations.

30.2. Written Determinations. Along with other written determinations required by the Act and these regulations, the ~~director~~Commissioner shall make a written determination that the proposed surface mining operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, as determined under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)

30.3. Operation(s) Near State Road. Where the proposed mining operation is to be conducted within one hundred feet (100') (measured horizontally) of the outside right-of-way line of any public road (except where mine access roads or haulage roads join such right-of-way line) or where the applicant



proposes to relocate any public road, the ~~direeter~~Commissioner shall:

(a) Require the applicant to obtain necessary permission from the authority with jurisdiction over state maintained roads;

(b) Provide an opportunity for a public hearing at which any member of the public may participate in the locality of the proposed mining operations for the purpose of determining whether the interest of the public and affected landowners will be protected;

(c) If a hearing is held, require the applicant to provide notice in a newspaper of general circulation in the affected locale of a public hearing at least two (2) weeks before the hearing; and

(d) Make a written finding based upon information received at the public hearing within thirty (30) days after completion of the hearing as to whether the interests of the public and affected landowners will be protected from the proposed mining operations.

30.4. Designation of Lands Unsuitable. Upon receipt of a complete application for a surface mining permit, the ~~direeter~~Commissioner shall review the application to determine whether the surface coal mining operation is limited or prohibited under Section 22 of the Act on the lands which would be disturbed by the proposed operation.

(a) If the ~~direeter~~Commissioner is unable to determine whether the proposed operation is located within the boundaries of any of the lands in Section 22(d)(1) of the Act, or closer than the limits provided in Section 22(d)(4) of the Act, the ~~direeter~~Commissioner shall transmit a copy of the relevant portions of the permit application to the appropriate Federal, State or local government agency for a determination or clarification of the relevant boundaries or distances, with a notice to the appropriate agency that it must respond within thirty (30) days of receipt of the request.

(b) Where the proposed operation would include federal lands within the boundaries of any national forest and the applicant seeks a determination that mining is permissible under Section 22(d)(5) of the Act, the applicant shall submit a permit application to the OSM State director.

30.5. Notification. When a permit is issued, the ~~direeter~~Commissioner shall notify each person who files comments or objections to the permit application, each party to the informal conference, and the appropriate local agencies including

the clerk of the county commission in the area of the land to be affected. The ~~direeter~~Commissioner shall also cause to be published at least monthly a listing of all permits issued in the area.

38-2-4A. Haulageways or Access Roads.

4A.1. Location. The approximate center line location of the proposed haulageways or access roads shall be identified on the site by visible markings at one hundred foot (100') intervals, which are in place at the time of preinspection, provided, that preexisting haulageways or access roads shall be exempt from this requirement.

4A.2. Construction. All construction of haulageways or access roads shall be in accordance with the following provisions:

(a) The grading of the haulageway or access roads shall be such that:

1. The overall grade shall not exceed ten percent (10%);
2. The maximum pitch grade shall not exceed fifteen percent (15%) for three hundred feet (300') in each one thousand (1,000') of road construction; and
3. The surface shall pitch toward the ditch line at the minimum rate of one-half inch (1/2") per foot of surface width or crowned at the minimum rate of one-half inch (1/2") per foot of surface width as measured from the center line of the haulageway or access road.

(b) Curves. The grade on switchback curves shall be reduced to less than the approach grade and should not be greater than ten percent (10%);

(c) Cut Slopes. Cut slopes should not be steeper more than 1:1 in soils or 1/4:1 in rock.

(d) Tolerance. All grades referred to in this section shall be subject to a tolerance of two percent (2%). All linear measurements referred to in this section shall be subject to a tolerance of ten percent (10%). All angles referred to in this section shall be measured from the horizontal and shall be subject to a tolerance of five percent (5%).

4A.3. Drainage Design. All drainage designs of haulageways or access roads shall be in accordance with the following provisions:

(a) Ditches. A ditch shall be provided on both sides of a throughcut and on the inside shoulder of a cut fill section, with ditch relief culverts being spaced according to grade. Water shall be intercepted or directed around and away from a switchback. All ditch lines shall be capable of passing the peak

discharge of a one (1) year, twenty-four (24) hour precipitation event. Where super elevation to the inside of a curve will improve the safety of a haulroad such as in the head of a hollow, a ditch line may be located on the outside shoulder of cut fill section; provided, that the ditch line is designed so that it will remain stable and that drainage control in accordance with the Act is also provided for water on the outside of the curve.

(b) Culverts. Ditch relief culverts shall be installed wherever necessary to insure proper drainage of surface water beneath or through the haulageway or access road, according to the following provisions:

1.

Road Grade in Percent      Spacing of Culverts in Feet

0- 5	300-800
6-10	200-300
11-15	100-200

2. The culvert shall cross the haulageway or access road at a thirty (30) degree angle downgrade with a minimum grade of three percent (3%) from inlet to outlet, except in intermittent or perennial streams where the pipe shall be straight and coincide with the normal flow;

3. The inlet end shall be protected by a headwall of stable material as approved by the ~~direeter~~Commissioner and the slope at the outlet end shall be protected with an apron of rock riprap, energy dissipator or other material approved by the ~~direeter~~Commissioner;

4. The culvert shall be covered by compacted fill to a depth of one foot (1') or half the culvert diameter, whichever is greater; and

5. Design of culverts may be submitted where the aforementioned design criteria is not practical or necessary.

(c) Culvert Openings. Culvert openings installed on haulageways or access roads shall not be less than one hundred (100") square inches in area, but, in any event, all culvert openings shall be adequate to carry storm runoff of a peak discharge capacity of a one (1) year, twenty-four (24) hour precipitation event from the contributing watershed and shall receive necessary maintenance to function properly at all times; and

(d) Intermittent or Perennial Stream Crossing. Culverts, bridges or other drainage structures shall be used to cross

intermittent or perennial streams. Consideration shall be given to such factors as weather conditions, season of the year, time period for construction, etc., with regard to using measures to minimize adverse effects to the water quality and stream channel. In no event shall the sediment load of the stream be significantly increased or the water quality be significantly decreased during the construction period. Water control structures shall be designed with a discharge capacity capable of passing the runoff for a ten (10) year, twenty-four (24) hour precipitation event from the contributing watershed; provided, if approved by the ~~direeter~~Commissioner, the capacity of the water control structure itself can be at least equal to or greater than stream channel discharge capacity immediately upstream and downstream of the crossing; provided further, that the structure shall pass at least a one (1) year, twenty-four (24) hour storm.

4A.4. Sediment Control. A sediment storage volume must be provided equal to 0.125 acre/foot for each acre of disturbed area or a lesser value as approved the ~~direeter~~Commissioner. Temporary erosion and sedimentation control measures such as outlined in Chapter 19 of the Handbook shall be implemented during construction until permanent control can be established.

4A.5. Seeding of Slopes. All disturbed area including fill and cut slopes, shall be seeded and mulched immediately after the construction of a haulageway or access road and maintained thereafter as necessary to control erosion.

4A.6. Surfacing. Haulageways or access roads shall not be surfaced with any acid-producing or toxic material and the surface shall be maintained to control or prevent erosion and siltation.

4A.7. Dust Control. All reasonable means shall be employed to control dust from the surface of haulageways or access roads.

4A.8. Removal of Drainage Structures. Bridges, culverts, stream crossings, etc., necessary to provide access to the operation, shall not be removed until reclamation is completed and approved by the ~~direeter~~Commissioner. The same precautions as to water quality are to be taken during removal of drainage structures as those taken during construction and use.

4A.9. Existing Haulageways or Access Roads. Where existing roads are to be used for access or age and it can be demonstrated that reconstruction to meet the above requirements would result in greater environmental harm and the drainage and sediment control requirements of this section can otherwise be met, 4A.2 (a)1 and 2 4A.2 (c); 4A.2 (d) and 4A.3 (b)1 and 2; will not apply.

4A.10. Infrequently Used Access Roads. Access roads constructed for and used only to provide infrequent service to surface facilities such as ventilators, monitoring devices and fans may be exempt from the requirements of the above sections with the exception of 4A.5. and 4A.11.

4A.11. Abandonment of Haulageways or Access Roads. Haulageways or access roads shall be abandoned in accordance with the rules and regulations in addition to the following requirements:

(a) Upon abandonment of haulageways or access roads, every effort shall be made to prevent erosion by the use of culverts, water bars or other devices. Water bars or earth berms shall be installed according to the following table of spacings in terms of percent of haulageway or access road grade, prior to the abandonment.

Percent of Haulageway Spacing of Water Bars in Feet

2	250
5	135
10	80
15	60
20	45
Above 20	25

(b) Upon abandonment of haulageways or access roads, they shall be seeded and mulched immediately in accordance with subsection 4F.

4A.12. Plans, Design Data and Construction Specifications.

(a) A plan view drawn to scale showing haulroad station base line, location of culverts, flow directions, intermittent or perennial streams, and other pertinent data.

(b) A surveyed profile drawn to scale (scale should be no greater than 1"=100' horizontal, 1"=50' vertical) showing but not limited to road surface, location and size of culverts, station, elevations, original ground, and percent grades.

(c) Typical cross-section of haulroad showing culvert, slope of culvert, fill material, original ground, ditches and sediment control devices, if applicable.

(d) Intermittent or perennial stream crossings, submit the following:

1. Structure computation sheet; and

2. Cross-section showing all pertinent information.

(e) Construction specifications should include excavation, selection and placement of materials, vegetative protection against erosion, road surfacing, drainage and sediment control.

4A.13. Other Transportation Facilities. Railroad loops, spurs, sidings, surface conveyor systems, chutes, aerial tramways or other transportation facilities shall be designed, constructed, maintained and abandoned so as to comply with the following:

(a) Control or prevent erosion, siltation and the air pollution attendant to erosion;

(b) Control or prevent damage to fish, wildlife or their habitat and related environmental values;

(c) Control or prevent additional contributions of suspended solids to stream flow or runoff outside the permit area;

(d) Neither cause nor contribute, directly or indirectly, to the violation of state or federal water quality standards applicable to receiving waters; and

(e) Prevent or control damage to public or private property.

The Handbook contains design criteria generally appropriate for environmental protection and safety.

4A.14. Certification. All roads and haulageways for which design criteria have been submitted for technical review and approval shall be certified that construction was in accordance with the approved plan except as noted in the certification after construction and/or installation is complete.

(a) A certification form shall be submitted to the ~~Department of Natural Resources~~, Department of Energy, Division of ~~Reclamation~~ Mines and Minerals which has been signed by a person approved by the ~~director~~ Commissioner prior to coal haulage or general use of such road.

(b) Any minor changes implemented during construction which equals or exceeds the approved system shall be indicated on "As-built" plans showing approved design, amount of minor change, and included as a part of the certification.

38-2-4B. Drainage System.

4B.1. Drainage Plan.

(a) A drainage map shall be included in the application which shall indicate or contain the following:

1. The directional flow of water on and away from the land to be affected;
2. Location of all surface and groundwater base line test sites;
3. Location of all proposed surface and groundwater monitoring sites;
4. Location of all erosion and sedimentation control structures;
5. Component drainage area together with a table showing total acreage and disturbed acreage within each component; and
6. A sediment structure table showing; type of sediment control structure, total contributing drainage area (acres), disturbed acreage controlled by total disturbance in drainage area (acres) and storage capacity (AC FT).

(b) The design shall be in accordance with the Handbook unless otherwise approved.

4B.2. Natural Drainways. Natural drainways in the area of land disturbed by surface mining and prospecting operations shall be kept free of overburden except where overburden placement has been approved. Overburden placement and haulageways across natural drainways shall be constructed so as not to affect the flow of the stream or materially increase the sediment load and concentrations of toxic materials in the stream.

4B.3. Intermittent or Perennial Stream. No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations unless specifically authorized by the ~~direeter~~Commissioner. The ~~direeter~~Commissioner will authorize such operations only upon finding that surface mining activities will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values or materially damage the water quantity or quality of the stream. The area not to be disturbed shall be designated a buffer zone and marked accordingly.

4B.4. Stream Channel Diversion and Diversions. All stream channel diversion and diversions within the permit area shall be designed to be stable, provide protection against flooding and resultant damage to life and property, prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to stream flow



outside the permit area and comply with all local, State, and Federal laws and regulations.

(a) Stream Channel Diversions.

1. Design Capacity

A. The design capacity of channels for temporary and permanent channel diversions shall be at least equal to the capacity of the unmodified stream channel immediately upstream and downstream for the diversion.

B. Temporary and permanent channel diversions designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a ten (10) year, twenty-four (24) hour precipitation event for a temporary channel diversion and a one hundred (100) year, twenty-four (24) hour precipitation event for a permanent channel diversion.

2. Removal of Temporary Diversions. Temporary channel diversions shall be removed when they are no longer needed to achieve the purpose for which they were approved as long as downstream facilities which were being protected are modified or removed.

3. Plans, Design Data and Specifications.

A. A "stream channel design computation sheet" to be completed for each proposed temporary or permanent stream channel diversion.

B. Construction plans showing: (1) A plan view of the area showing center line profiles of existing stream channel and proposed location of the temporary or permanent stream channel (drawn to scale);

(2) Profiles along the center line of the existing and temporary or permanent stream channel showing original ground, proposed and existing stream bottom (drawn to scale);

(3) A cross-section showing original ground limits, bottom width, side slopes, depth of flow, floodplain configuration; and

(4) Show detailed sequence of installation of temporary or permanent stream channel diversion.

C. Construction specifications.

D. Maintenance schedule and procedures for maintenance.

(b) Diversions.

1. Design Capacity. Diversions shall have the capacity to pass safely the peak discharge from the contributing watershed from a ten (10) year, twenty-four (24) hour precipitation event.

2. Plans, Design Data and Specifications. In addition to the "Proposed Drainage Plan", there shall also be submitted the following items concerning diversions:

A. A "Diversion Design Computation Sheet" to be completed for each proposed diversion

B. Construction plans showing:

(1) A surveyed profile along the center line of the diversion showing original ground line and proposed diversion bottom;

(2) Channel cross-section showing the original ground line, bottom width, side slopes, depth of flow, freeboard and other pertinent information drawn to scale;

(3) Type soil in which diversion will be excavated. The soil shall be sampled and classified at intervals five hundred feet (500'); and

(4) Type and design, if applicable, of the outlet proposed for each diversion.

C. Maintenance schedule and procedures for maintenance; and

D. Construction and vegetation specifications.

4B.5. Sediment Control. Sediment control structures shall be constructed in appropriate locations in order to control sedimentation. All runoff from the disturbed area shall pass through a sedimentation pond(s) such as, but not limited to, earth embankment, excavated ponds, gabions, cribs and bench control systems. In addition to the requirements of this subsection all such structures shall be designed, constructed and maintained in accordance with the Handbook unless otherwise approved.

(a) Design and Construction Requirements.

1. All sediment control structures shall be constructed and certified before beginning of any surface mining activities as provided for in paragraph (b) of this subsection.

2. All structures shall be located as near as possible to the disturbed area and out of perennial streams unless the

applicant demonstrates and the ~~direector~~Commissioner finds that there is no other suitable location for such structures.

3. All structures shall have the capacity to store 0.125 Acre/ft. of sediment for each acre of disturbed area in the structures watershed; provided, that consideration may be given for reduced storage volume where the preplan and site conditions reflect controlled placement, concurrent reclamation practices, or use of on site sediment control measures. The disturbed area for which the structure is to be designed will include all land affected by previous surface mining operations that are not presently stabilized and all land that will be disturbed throughout the life of the permit.

4. All discharges from sediment control structures shall not cause a violation of state and federal water quality standards and shall meet effluent limitations.

5. All structures shall be designed, constructed and maintained to prevent short-circuiting.

6. All structures shall be cleaned out when the sediment accumulation reaches sixty percent (60%) of this design capacity. Clean-out elevation shall be indicated on plans submitted for the structure. Sediment removal and disposal shall be done in a manner that minimizes adverse effects on surface and groundwater quality.

7. All structures shall be designed, constructed and maintained to meet the following safety standards:

A. Provide a combination of principal and emergency spillways on embankment structures that will safely discharge a minimum twenty-five (25) year, twenty-four (24) hour precipitation event. The principal spillway requirements may be waived by the ~~direector~~Commissioner if the emergency spillway is designed at a minimum to safely bypass the peak rate of discharge of a twenty-five (25) year, twenty-four (24) hour frequency storm in an open channel constructed of nonerodable material and capable of maintaining sustained flows. If alternate sediment control structures such as excavated ponds or bench control structures are utilized in place of embankment structures, these structures will safely discharge a ten (10) year, twenty-four (24) hour precipitation event. The emergency spillway or exit channel shall at least handle a ten (10) year, twenty-four (24) hour precipitation event;

B. Provide a minimum difference in elevation between principal spillway and emergency spillway of 1.5 feet and a minimum difference in elevation between the maximum design flow elevation

in the emergency spillway and/or exit channel and top of settled embankment of 1.0 foot;

C. Provide proper stabilization and revegetation of the embankment; and

D. Avoid organic matter in the foundation and provide for proper compaction and ensure against excessive settlement by excluding sod, roots, frozen soil or coal processing wastes from the embankment.

8. Sediment control structures which impounds water to an elevation of five feet (5') or more above the upstream toe of the structure and can have a storage volume of twenty (20) acre-feet or more; or impounds water to an elevation of twenty feet (20') or more above the upstream toe of the structure shall be constructed, inspected and abandoned in accordance to 30 CFR 77.216. In addition to those requirements, the following minimum standards shall be adhered to:

A. An appropriate combination of principal and emergency spillways shall be provided to discharge safely the runoff resulting from a one hundred (100) year, six (6) hour precipitation event, or a large event specified by the Department of Natural Resources Department of Energy;

B. The embankment shall be designed and constructed with a static safety factor of at least 1.5 or higher safety factor as designated by the Department of Natural Resources Department of Energy to ensure long-term stability;

C. Appropriate barriers shall be provided to control seepage along the conduits that extend through the embankment, and

D. All inspection reports and approvals shall be provided to the Director of the Department of Natural Resources Department of Energy.

9. Discharge Structures. Discharge from temporary or permanent sediment control structures, diversions, stream channel diversions, etc., shall be controlled by energy dissipators, riprap channels or other devices approved by the Director Commissioner to reduce erosion, to prevent deepening or enlargement of stream channels and to minimize disturbance of the hydrologic balance. Discharge structures shall be designed according to standard engineering procedures.

(b) Certification. A certification form shall be submitted to the Department of Natural Resources, Department of Energy, Division of Reclamation Mines and Minerals, for each component

drainage area system as it is completed and prior to any disturbance in that component drainage area; provided, that if a bench control system is the primary sediment control structure for the operation and the system is constructed progressively with the mining operation, then the system shall be constructed and certified in sections of one thousand (1,000) linear feet (maximum) measured from the active mineral removal area. This certification must include a map showing exact location of certified section.

The certification form shall be certified by a person approved by the ~~direeter~~Commissioner of the ~~Department-of-Natural-Reseurees~~ Department of Energy stating that the erosion and sediment control system(s) is (are) constructed and installed in accordance with the technical aspects of the approved preplan and any modifications thereto, as approved by the ~~Department-of~~ Natural-Reseurees Department of Energy.

Any minor change which equals or exceeds the approved system occurring during construction shall be indicated on "As-built" plans showing approved design, amount of minor change and reference points are to be submitted along with the form.

(c) Inspection. A qualified person designated by the ~~direeter~~Commissioner shall examine the impoundment at least quarterly.

(d) Prior to Phase 1 bond release, all sediment control structures shall be cleaned out so as to meet design storage capacity for all areas not revegetated and stabilized as approved by the ~~direeter~~Commissioner.

(e) Abandonment Procedures. Minimum requirements for abandoning sediment control structures prior to total release of bond are as follows:

1. Excavated Sediment Pond, Dugout Type. There is no required abandonment procedure for excavated ponds unless they have an embankment. If they have an embankment, they shall follow the abandonment procedures outlined in subparagraph 2, below.

2. Embankment type sediment dams, embankment type excavated sediment dams and crib and gabion control structures. Sediment dams and all accumulated sediment above the dam shall be removed from the natural drainway if they are built across it. Dams adjacent to natural drainways shall be abandoned by diverting the entrance channel to the natural drainways, thus preventing any future surface runoff from entering the impoundment.

When sediment dams are removed, the natural drainway shall be returned to its original profile and cross-section as near as practical. An original profile and cross-section view for the channel shall be submitted with the drainage plan. The channel sides and bottom shall be rock riprap. The riprap shall extend up to the top of the channel. The riprap requirement may be waived where the bottom and sides of the channel consist of bedrock. Those structures to be left in place after final release of surface mining shall be considered permanent impoundments and shall be left in accordance with the following requirements:

- A. The request to leave the structure will be made on forms prescribed by the ~~director~~Commissioner;
- B. The request will contain a statement as to the conditions of the impoundment; and
- C. The request will contain a statement signed by the landowner and the operator asserting that the landowner assumes all liability for the structure and will inspect it periodically and maintain it in a safe condition.

3. Bench Control Systems. There is no required abandonment procedure for bench control systems.

4. Revegetation of Disturbed Areas. All are as disturbed during abandonment of a sediment control structure shall be seeded and mulched immediately to stabilize the area.

5. Disposal of Waste Material. Waste material shall be spread over an area designated on the drainage plan in accordance with these specifications.

A. Provisions shall be made for the diversion or safe passage of surface water concentrating on the land side of the spoil bank.

B. The spoil shall be placed so as not to endanger the stability of the stream bank and shall not exceed three feet (3') in height above the natural ground surface, except by special design. Special designs shall be submitted with the drainage plan. The finished surface shall slope away from the edge of the stream or drainway insofar as feasible.

C. Surface of spoil shall not be steeper than two (2) horizontal to one (1) vertical. If the spoil is spread to the edge of the stream bank, the stream side slope of the spoil shall be shaped to join the side slope of the stream bank so loose spoil will not slide or erode into the channel.

38-2-4C.     Blasting.

4C.1.     General Requirements.     Each operator shall comply with all applicable state and federal laws in the use of explosives.     A blaster certified by the ~~Department of Mines~~ Department of Energy shall be responsible for all blasting operations including the transportation, storage and use of explosives within the permit area.     Blasts that use more than five (5) pounds of explosive or blasting agent shall be conducted in accordance with this subsection.

4C.2.     Blasting Plan.     Each application for an operation subject to section 6 of these regulations shall include a blasting plan.     The blasting plan shall explain how the applicant will comply with the requirements of this subsection.

4C.3.     Public Notice of Blasting Operations.     At least ten (10) days, but not more than thirty (30) days, prior to any blasting operations, the operator shall publish on a form prescribed by the ~~Director~~ Commissioner, a blasting schedule in a newspaper of general circulation in the county of the proposed permit area.     Copies of the schedule shall be distributed by certified mail to local governments, public utilities and each resident within one-half (1/2) mile of the permit area, excluding drainage structures, haulroads and access roads unless there will be blasting on or near such structures or roads.     The operator shall republish and redistribute the schedule at least every twelve (12) months and revise and republish the schedule at least ten (10) days, but not more than thirty (30) days, prior to blasting whenever the area covered by the schedule changes or actual time periods for blasting significantly differ from the prior announcement.     The schedule shall contain at a minimum:

- (a) Name, address and telephone number of the operator;
- (b) Identification of the specific areas in which blasting will take place;
- (c) Dates and times when explosives are to be detonated;
- (d) Methods to be used to control access to the blasting area; and
- (e) Types of audible warning and all clear signals to be used before and after blasting.

Surface blasting activities incident to underground coal mining are not subject to the requirements of this paragraph so long as all residents or owners of dwellings or structures located within one-half (1/2) mile of the blasting area is

notified by the operator approximately twenty-four (24) hours prior to any surface blast.

4C.4. Blast Record. The format for the arrangement and the recording of items in the blasting log book is to be on forms approved by the ~~director~~Commissioner. A blasting log book shall be kept current daily and is to be made available at the operation for inspection by the ~~director~~Commissioner and upon written request by the public.

The blasting log shall include any seismograph reports and shall be retained for three (3) years and shall include at a minimum the following data:

(a) Name of permittee, operator or other person conducting the blast;

(b) Location, date and time of blast;

(c) Name, signature and certification number of blaster-in-charge;

(d) Identification of nearest structure not owned or leased by the operator and direction and distance, in feet, to such structures;

(e) Weather conditions;

(f) Type of material blasted;

(g) Number of holes, burden and spacing;

(h) Diameter and depth of holes;

(i) Types of explosives used;

(j) Total weight of explosives used;

(k) Maximum weight of explosives detonated within any eight (8) millisecond period;

(l) Method of firing and type of circuit;

(m) Type and length of stemming;

(n) If mats or other protections were used;

(o) Type of delay detonator used and delay periods used;

(p) Seismograph records shall include but not be limited to:





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help we can get)

## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

Charleston 25305

August 26, 1988

#### NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Energy

RULE: Amendments to Series 2, Surface Mining Reclamation

DATE FILED AS AN EMERGENCY RULE: July 15, 1988; amended  
August 5, 1988

DECISION NO. 14-88

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

KEN HECHLER  
Secretary of State

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE Aug 26, 1988  
ADMINISTRATIVE LAW DIVISION

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## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

Charleston 25305

#### DECISION

#### EMERGENCY RULE DECISION (ERD 14-88)

AGENCY: Department of Energy  
RULE: Amendment to Series 2, Surface Mining Reclamation  
DATE FILED AS AN EMERGENCY RULE: July 15, 1988; amended  
August 5, 1988

- par. 1 The DOE has filed amendments to the above Series 2 as an emergency.
- par. 2 West Virginia 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(a)].
- par. 4 (A) Procedural Compliance: WV 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 ERD 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 DOE has filed this emergency rule with supporting documents with the Secretary of State on July 15 and August 5, 1988 and with the LRMRC on July 15, 1988 and August 5, 1988.

par. 7 It is the determination of the Secretary of State that the DOE has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §22-1-15 reads in part:

*§22-1-15. Commissioner's authority to promulgate rules and regulations.*

*The commissioner shall have the power and authority to propose and promulgate rules and regulations to organize the department and to carry out and implement the provisions of this chapter and chapter twenty-two-a (§22A-1-1 et seq. of this code.*

par. 9 WV Code §22A-3-4 reads in part:

*(b) The commissioner shall have the authority to:*

*(1) Promulgate rules and regulations, in accordance with the provisions of chapter twenty-nine-a (§20A-1-1 et seq.) of this code, to implement the provisions of this article.*

par. 10 It is the determination of the Secretary of State that the DOE has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

*(g) 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. 12 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. 13 The facts and circumstances as presented by the DOE are as follows:

Under the federal Surface Mining Act of 1977 (PL 95-87), individual states were given the option of either: (1) relinquishing their authority to carry out a mining and reclamation program to the federal Office of Surface Mining Reclamation and Enforcement (OSMRE), or (2) applying to OSMRE for state primacy to carry out a state program.

West Virginia applied for and received primacy in January of 1981. However, this grant of primacy was a conditional

approval pending correction of a number of perceived deficiencies in the program. The State of West Virginia, through a long series of amendments to the program, satisfied the majority of the conditions; however, on July 11, 1985, OSMRE advised the State that a number of conditions on the program remained and needed to be resolved through statutory, regulatory, or policy amendments.

On February 10, 1986, the State advised OSMRE that the Legislature did not adopt the proposed amendments, and the conditions could not be satisfied. Subsequently, on June 30, 1986, the State requested an extension on the conditions to April 15, 1987, to allow an opportunity to again seek legislative approval of the necessary statutory and regulatory changes. Approval of the extension was granted on November 10, 1986. On April 6, 1987, the State advised OSMRE that it was again unsuccessful in obtaining legislative action. On June 19, 1987, OSMRE advised that at least the regulatory conditions must be satisfied through emergency rulemaking. The State did not file emergency rules to satisfy the conditions, but did file a rule package which would completely overhaul the State's mining and reclamation regulations and incorporated into that package the necessary rules to satisfy the conditions. This package failed to gain legislative approval in the 1988 legislative session, which effectively left the conditions unresolved.

OSMRE is now insisting that the conditions be satisfied through the emergency rulemaking procedure. Failure to do so could force OSMRE into a position of initiating action to take over all or part of the State's program, resulting in the loss of federal matching money and loss of total funding of the State's Abandoned Mine Land Reclamation program. Therefore, the State has no alternative to filing emergency regulations contained herein.

The above described events and circumstances comprise sufficient justification of emergency rulemaking.

- par. 14 It is the determination of the Secretary of State that this proposal meets the standards for emergency rule.
- par. 15 This decision shall be cited as Emergency Rule Decision 14-88 or ERD 14-88 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the DOE, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER  
SECRETARY OF STATE

Entered \_\_\_\_\_

3

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE Aug 26, 1988  
ADMINISTRATIVE LAW