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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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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

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DATE Aug 26, 1988
ADMINISTRATIVE LAW