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December 23, 2009

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

**AGENCY: Mining and Reclamation**

**RULE: Amendment, 38CSR2, West Virginia Surface Mining Reclamation Rule**

**DATE FILED AS AN EMERGENCY RULE: December 16, 2009**

**DECISION NO. 31-09**

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

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**NATALIE E. TENNANT**  
Secretary of State

EMERGENCY RULE DECISION  
(ERD 31-09)

AGENCY: Mining and Reclamation  
RULE: Amendment, 38CSR2, West Virginia Surface Mining Reclamation Rule

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- par. 1 The Division of Mining & Reclamation (Division) has filed the above amendment to an existing rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Division filed this emergency rule with supporting documents with the Secretary of State December 16, 2009 and with the LRMRC December 16, 2009.
- par. 7 It is the determination of the Secretary of State that the Division has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority – W. Va. Code §22-3-2 reads:

***§22-3-2. Legislative findings and purpose; jurisdiction vested in division of environmental protection; authority of director; inter-departmental cooperation.***

***(a) The Legislature finds that it is essential to the economic and social well-being of the citizens of the state of West Virginia to strike a careful balance between the protection of the environment and the economical mining of coal needed to meet energy requirements. Further, the Legislature finds that there is great diversity in terrain, climate, biological,***

*chemical and other physical conditions in parts of this nation where mining is conducted; that the state of West Virginia in particular needs an environmentally sound and economically healthy mining industry; and by reason of the above it may be necessary for the director to promulgate rules which vary from federal regulations as is provided for in sections 101 (f) and 201 (c)(9) of the federal Surface Mining Control and Reclamation Act of 1977, as amended, "Public Law 95-87."*

*Further, the Legislature finds that unregulated surface coal mining operations may result in disturbances of surface and underground areas that burden and adversely affect commerce, public welfare and safety by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural and forestry purposes; by causing erosion and landslides; by contributing to floods; by polluting the water and river and stream beds; by destroying fish, aquatic life and wildlife habitats; by impairing natural beauty; by damaging the property of citizens; by creating hazards dangerous to life and property; and by degrading the quality of life in local communities, all where proper mining and reclamation is not practiced.*

*(b) Therefore, it is the purpose of this article to:*

*(1) Expand the established and effective statewide program to protect the public and the environment from the adverse effects of surface-mining operations;*

*(2) Assure that the rights of surface and mineral owners and other persons with legal interest in the land or appurtenances to land are adequately protected from such operations;*

*(3) Assure that surface-mining operations are not conducted where reclamation as required by this article is not feasible;*

*(4) Assure that surface-mining operations are conducted in a manner to adequately protect the environment;*

*(5) Assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface-mining operations;*

*(6) Assure that adequate procedures are provided for public participation where appropriate under this article;*

*(7) Assure the exercise of the full reach of state common law, statutory and constitutional powers for the protection of the public interest through effective control of surface-mining operations; and*

*(8) Assure that the coal production essential to the nation's energy requirements and to the state's economic and social well-being is provided.*

*(c) In recognition of these findings and purposes, the Legislature hereby vests authority in the director of the division of environmental protection to:*

*(1) Administer and enforce the provisions of this article as it relates to surface mining to accomplish the purposes of this article;*

*(2) Conduct hearings and conferences or appoint persons to conduct them in accordance with this article;*

*(3) Promulgate, administer and enforce rules pursuant to this article;*

*(4) Enter into a cooperative agreement with the secretary of the United States department of the interior to provide for state regulation of surface-mining operations on federal lands within West Virginia consistent with section 523 of the federal Surface mining Control and Reclamation Act of 1977, as amended; and*

***(5) Administer and enforce rules promulgated pursuant to this chapter to accomplish the requirements of programs under the federal Surface Mining Control and Reclamation Act of 1977, as amended.***

***(d) The director of the division of environmental protection and the director of the office of miners' health, safety and training shall cooperate with respect to each agency's programs and records to effect an orderly and harmonious administration of the provisions of this article. The director of the division of environmental protection may avail himself or herself of any services which may be provided by other state agencies in this state and other states or by agencies of the federal government, and may reasonably compensate them for such services. Also, he or she may receive any federal funds, state funds or any other funds, and enter into cooperative agreements, for the reclamation of land affected by surface mining.***

par. 9 It is the determination of the Secretary of State that the Division has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency – W. Va. Code §29A-3-15(f) defines "emergency" as follows:

***(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.***

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Division are as follows:

This emergency rule is being filed to prevent substantial harm to the public interest, in that in order to comply with a deadline set by the Bankruptcy Court for the Eastern District of Kentucky, DEP must complete a trust agreement with Lexington Coal by December 31, 2009. This trust agreement will establish a trust account in the State Treasurer's Office that will provide one hundred percent of the reclamation costs, including future water treatment costs, at Lexington's West Virginia locations. The Attorney General's Office will not approve the establishment of a trust account in this case, but has advised DEP that if the trust account form was specifically set forth in West Virginia rules, then the trust account proposed by Lexington could constitute an acceptable form of bond and be approvable. the establishment of that the establishment of this trust fund will add additional protection to the Special Reclamation Fund in the approximate amount of \$3.4 million, in that the cost to maintain water treatment at these sites in the event of forfeiture will be fully funded. For more information on this transaction, please see the Emergency Rule Questionnaire filed contemporaneously herewith.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "prevent substantial harm to the public interest."

par. 14 This decision shall be cited as Emergency Rule Decision 31-09 or ERD 31-09 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Mining & Reclamation, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT  
Secretary of State

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