

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

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

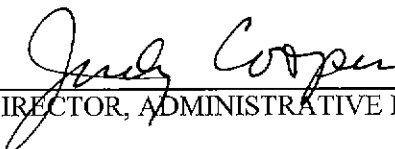
EXPIRATION OF FILING OF LEGISLATIVE RULE

AGENCY: Mining & Reclamation TITLE NUMBER: 38

SERIES NUMBER OF RULE: 2A

TITLE OF RULE: Mining & Restoration for Sandstone, Limestone & Sand

THE ABOVE RULE EXPIRED March 11, 2000 FAILED TO THE PASS THE
2000 LEGISLATURE OR DISALLOWED IN HB 4223



DIRECTOR, ADMINISTRATIVE LAW DIVISION

§§64-3-1. Division of environmental protection.

. ""

(v) The legislative rule filed in the state register on the sixth day of August, one thousand nine hundred ninety-nine, authorized under the authority of section two, article four, chapter twenty-two, of this code, modified by the division of environmental protection to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-fifth day of January, two thousand, relating to the division of environmental protection (mining and restoration for sandstone, limestone and sand, 38 CSR 2A), is disallowed and not authorized.



FILED

JAN 13 2 15 PM '00

WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

State Capitol - Room MB-49
Charleston, West Virginia 25305
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Senator Mike Ross, Co-Chairman
Delegate Mark Hunt, Co-Chairman
Debra A. Graham, Counsel

Joseph A. Altizer, Associate Counsel
Rita Pauley, Associate Counsel
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December 12, 1999

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Carrie Chambers
DEP
10 McJunkin Road
Nitro, WV 25143

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Rules for Mining and Restoration for Sandstone, Limestone and Sand,
38CSR2A**

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

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

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ANALYSIS OF PROPOSED LEGISLATIVE RULE

Agency: Division of Environmental Protection

Subject: Rules for Mining and Restoration for Sandstone,
Limestone and Sand

CSR Cite: 38CSR2A (new)

Counsel: JAA

PERTINENT DATES

Filed for public comment: June 17, 1999
Public comment period ended: July 20, 1999
Filed following public comment period: August 6, 1999
Filed LRMRC: August 6, 1999
Filed as emergency: n/a

Fiscal Impact: None.

ABSTRACT

Brief Summary

This is a new rule proposed to regulate limestone, sandstone and sand. The proposed rule establishes requirements for road construction, blasting, drainage control, methods of operation, excess spoil disposal, revegetation, mapping, transfer of permits, permit renewals and revisions, and land restoration requirements. The rule distinguishes between "reclamation" and "restoration" and requires only restoration of disturbed areas. "Restoration" is defined as "establishing a stable, usable condition to all disturbed areas of the permit," while "reclamation" is defined as "complete backfilling to original approximate contour of the land. Including the elimination of highwalls and spoil peaks." Prior proposals of this rule by the agency have been withdrawn because of industry objections.

Except for the restoration/reclamation distinction, this rule is similar to the proposed rule for quarry operations which mine sandstone, limestone and sand, as contained in 38CSR2B.

Section Summary

Section 1 provides that the scope of this rule is to regulate the mining of limestone, sandstone and sand.

Section 2 provides definitions.

Section 3 establishes requirements for haulageways and transportation facilities. Each permit must provide a plan designed to minimize adverse impacts to the environment and private and public property. Grading specifications for slopes, ditching and culvert openings are provided. Protections for natural drainage ways and streams are required. Specific drainage requirements based on gradation are established for haulageways. All primary roads and roads designed for transport of mineral or soil outside the permit operation must be certified upon completion.

Section 4 provides blasting standards. A certified blaster must be used to oversee blasting activities at each quarry which conducts blasting. Each permit applicant anticipating blasting as part of the proposed quarry operation shall include a blasting plan with the permit application. Written notice must be given to all residents within half a mile ten days prior to beginning mining, notifying residents that blasting will occur. A record of all blasting must be maintained. Seismograph and air blast records must also be maintained. Blasting procedures and safety precautions are established. The operator is required to notify all owners and residents of manmade dwellings or structures within one-half mile that they are eligible to receive a free preblast survey from the Division of Environmental Protection [DEP.] The DEP may prohibit blasting where it is unsafe.

Section 5 establishes requirements for quarry drainage systems. Each quarry mining application shall provide a plan for drainage which is to include the location of drainage ways, location of sediment control structures, and plans for use of natural drainage ways. All water discharges from the permitted area must meet the NPDES discharge and monitoring requirements of the Clean Water Act. This section also provides specific requirements for constructed drainways, sediment control, protection of water quality, seeding of the drainage system, and replacement of lost water supplies of surrounding residences which were damaged or lost as a result of quarrying activities. The sediment control structures must comply with a technical handbook published by the DEP.

Section 6 provides methods of operation for sandstone, limestone and sand quarries. All topsoil shall be removed in a separate layer to be used for cover of exposed areas and preserved and utilized to promote post mining land uses. Requirements for the use of materials such as topsoil are provided. This section also provides that permittees must handle toxic materials appropriately, maintain surface areas slope and grades to control runoff, operate the facility to prevent removal of topsoil until mining is to be undertaken, and follow all other permit requirements. Prior approval of the use and plan for water impoundments is also required.

Section 7 provides requirements for management of excess spoil. Specific requirements for location of disposal sites, certification of the proper construction of disposal site, and construction criteria for the site are provided. Construction criteria include construction grades, materials allowed to be deposited in the fill, types of allowable drainage systems and inspection schedules during and after construction of the fill.

Section 8 provides revegetation standards for evaluating vegetative cover for quarry operations. The purpose of establishing revegetative cover is to protect topsoil, provide economic benefits and restore aesthetic appeal. Seeding and planting requirements should be reflective of local conditions and must be undertaken within appropriate time periods and should be done to reflect appropriate soil conditions to assure the best chemical makeup of soils beneficial to the local area. The permittee must develop a planting plan and conduct appropriate soil conditions tests. Specific plant material selection criteria, planting procedures and fertilizer application standards are provided. Seed application and other cover procedures are set out. This section also establishes standards for evaluating vegetative cover.

Section 9 establishes mapping and marker requirements for quarry operations and professional requirements for persons doing site maps. Map scales, color coding or aspects of maps, on site marking of permitted area are required.

Section 10 provides conditions for transfers of permits. All applicants must file a public notice legal advertisement and allow thirty days for written public comment. The Director may authorize the transfer of the permit upon a finding that the applicant will conduct mining operations in compliance with this rule.

Section 11 creates public notice requirements for permit renewals, permit revisions, and incidental boundary revisions. Any

person who may be adversely affected by the issuance of a new permit or significant revision of an existing permit may request a public hearing. Permittees seeking permit renewals shall show proof of insurance. Mining and restoration plans must be followed. Areas permitted, disturbed and properly stabilized do not have to be reaffected to meet the new requirements of this rule. Each permit revision must be approved by the director. Significant revisions to permits require public notice prior to approval, while insignificant permit revisions do not. Specific criteria for determining what constitutes incremental boundary revision to the permitted site are also provided. The director may require public comment on the impacts of these boundary revisions.

Section 12 provides that receipt of a coal mining permit does not waive any quarry operation from any provisions of this rule that apply to that operation.

Five tables are attached as appendices to the rule which provide specific quarry lands planting criteria. Table One provides seeding mixtures for the use of hay, pasture or other herbaceous cover; Table Two provides woodland planting mixtures for nursery grow seedlings; Table Three provides approved mixtures for herbaceous and woody species for direct seeding; Table Four establishes approved mixtures for waterways, diversions for drainage structures, haulageways, highwall access, etc; and Table Five provides specifications for annual and biennial cover crops for temporary cover.

AUTHORITY

Statutory authority: WVC **§22-4-2**. Definitions; contains the following provision:

Unless the context in which used clearly requires a different meaning, as used in this article:...

(k) "Surface mining" means all activity for the recovery of minerals, and all plants and equipment used in processing said minerals: Provided, That the bonding and reclamation provisions of this article do not apply to surface mining of limestone, sandstone and sand: Provided, however, That the surface mining of limestone, sandstone and

sand is subject to separate rules to be promulgated by the director.

And, WVC §22-4-3 which provides:

Except as otherwise provided in this article, the director shall administer all of the laws of this state relating to surface mining and shall exercise all of the powers and perform all of the duties by law vested in and imposed upon him or her in relation to said operations.

ANALYSIS

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

No. This question was raised in public comments regarding the authority of the agency to propose a rule which establishes reclamation requirements on limestone, sandstone and sand quarry operations. The commentator stated that the limitation of WVC §22-4-2(k)provisos prohibits the DEP from proposing any reclamation and bonding requirements to limestone, sandstone and sand quarry operations. This section states: "Provided, That: the bonding and reclamation requirements of this article do not apply to surface mining of limestone, sandstone and sand: Provided however: That the surface mining of limestone, sandstone and sand is subject to separate rules promulgated by the director." Counsel does not agree with the commentator's analysis. Provisos provide exceptions from a stated rule or requirement in a statute, and do not modify or limit each other unless expressly so stated. The second proviso says that the "director shall promulgate rules" provides no limitations on what the rules shall contain. The first proviso's only impact is to prohibit application of reclamation and bonding requirements contained in article four from applying to limestone, sandstone and sand, and does prohibit the director from developing separate rules which place these requirements on limestone, sandstone and sand quarries.

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

Yes.

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

No.

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

Yes.

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

Yes.

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

No.

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

Yes.

VIII. OTHER.

Counsel has technical modifications to recommend.