



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

Form #7

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FILED

JUN 13 1 45 PM '94

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

7/25/94

NOTICE OF AN EMERGENCY RULE

AGENCY: Mining + Reclamation
WV Div. Environmental Prot. TITLE NUMBER: 38

CITE AUTHORITY: WV Code 22-1-3, 22-1-3a, 22-3-4(b)(1), 22-3-13(b)(15)(D)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: N/A

TITLE OF RULE BEING AMENDED: N/A

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 2C

TITLE OF RULE BEING FILED AS AN EMERGENCY: Standards for Certification of
Blasters - Surface Coal Mines

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

SEE ATTACHED SHEET

4160

Use additional sheets if necessary

Roger T. Hall
Signature



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES

OFFICE OF THE SECRETARY
State Capitol, Room M-146
Charleston, West Virginia 25305-0310
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GASTON CAPERTON
Governor

THOMAS J. GILLOOLY
Acting Cabinet Secretary

June 9, 1994

David C. Callaghan
Director
Division of Environmental Protection
#10 McJunkin Road
Nitro, West Virginia

Re: Proposed Exempt Legislative Rule, Title 38, Series 2C,
Blasters' Certification

Dear Dave:

Pursuant to West Virginia Code Section 5F-2-2(a)(12), I hereby consent to the proposal of the rule specified above.

You may attach a copy of this letter to your filing with the Secretary of State as evidence of my consent.

Sincerely yours,

Thomas J. Gillooly
General Counsel and
Acting Secretary

JUN 13 1 45 PM '94
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

FILED

TJG/ss

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DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

10 McJunkin Road
Nitro, WV 25143-2506

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

Laidley Eli McCoy
Deputy Director

MEMORANDUM

TO: Thomas J. Gillooly
Acting Cabinet Secretary
CLER

FROM: Roger T. Hall ^{RTH}
Special Assistant to Director
DEP

DATE: June 3, 1994

SUBJECT: Draft Rule - Blaster's Certification

Pursuant to Chapter 5F of the West Virginia Code, any new agency rules to be filed with the Secretary of State's Office for public comment and review require the approval of the Secretary of CLER. In that regard, submitted herewith is a draft rule for Blaster Certification (38-CSR-2C).

I respectfully request your approval of the subject rule to be filed as a Legislative rule.

RTH:cc

Attachment

In recent months, the Division of Environmental Protection has encountered cases where illegal blasting has potentially endangered life and property. The prosecution in one case led to the determination that the agency has questionable authority to revoke or suspend the certification of a certified blaster. It should be noted that a similar rule (56-CSR-5) exists giving authority to the Office of Miners' Health Safety and Training authority of West Virginia Code 33-22-1-9. The existing rule continues to cite authority of the Director of Miners' Health, Safety, and Training which leads to further confusion about the Division of Environmental Protection's authority. These factors and others are justification for the proposed emergency rule.

FILED

TITLE 38
EMERGENCY RULE
DIVISION OF ENVIRONMENTAL PROTECTION

JUN 13 1 45 PM '94

SERIES 2C
STANDARDS FOR CERTIFICATION OF BLASTERS - SURFACE

OFFICE OF WEST VIRGINIA
COAL MINING STATE

38.2C.1. General

1.1. Scope - This rule establishes criteria for training and examination procedures for the certification and recertification of persons storing, handling, transporting, or using, explosives on surface mining operations in the State, and provides for administrative, civil, and criminal penalties for persons violating the blasting requirements of Chapter 22, Article 3 of the Code of West Virginia and the rules promulgated thereunder.

1.2. Authority - West Virginia Code 22-1-3, 22-1-3a, 22-3-4(b) (1), 22-3-13(b) (15) (D).

1.3. Filing Date -

1.4. Effective Date -

1.5. Incorporation by Reference - Federal Counterpart Regulations - The federal counterpart regulation is found at 30-CFR-850. Subparts 1 - 15 give general guidance for developing state programs for the training, examination, and certification of blasters, and lists specific criteria for program elements. The regulation leaves the development of procedural criteria to the State.

The Director has determined that the federal counterpart regulation does not provide sufficient criteria in adequate detail to give necessary guidance to the agency, the public, or the regulated industry to justify its incorporation by reference.

Since the Environmental Protection Advisory Council was not yet established at the time of filing this proposed rule, it was not possible to consult with the Council.

1.6. Determination of Stringency - Federal Counterpart Regulations - The general nature of the federal counterpart regulation as discussed in subsection 1.5 of this section does not lend itself well to a direct item by item comparison of content. This rule contains the required

criteria set forth in the federal counterpart regulation. However, this rule expands upon the procedural implementation of the required criteria in a way which is consistent with the federal programmatic requirements. Therefore: the Director has determined that this rule is not construed to be more stringent or less stringent than the federal counterpart regulation.

1.7. Constitutional Takings Determination - The Director has determined, and does state, that this rule does not constitute a constitutional taking of real property.

38.2C.2. Definitions

2.1. "Active Blasting Experience" means experience gained by a person who has worked on a blasting crew, supervised a blasting crew, or worked on a drilling crew which performed blasting operations. Two hundred forty working days constitutes one year of experience.

Experience may only be gained by "first-hand" participation in activities associated with the storing, handling, transportation and use of explosives or the immediate supervision of those activities within surface coal mines, and the surface areas of underground coal mines. Experience should be related to surface mine blasting; **Provided** that other related blasting experience (quarrying operations, etc.,) may be accepted by the Director on a case-by-case basis as qualifying experience.

2.2. "Blast" means any detonation(s) of an explosive(s) being initiated simultaneously by a single energy source.

2.3. "Certified Blaster" means a person who has taken and passed the examination described in subsection 5.2 of this rule, and has been issued a certification card by the Division of Environmental Protection.

2.4. "Certified Examiner/Inspector" means a person employed by the Division of Environmental Protection who administers training or examination to applicants for certification as certified blasters, or who inspects surface mining operations and who has taken and passed the examination described in subsection 5.1 of this rule.

2.5. "Detonation" means a chemical reaction resulting in rapid release of energy.

2.6. "Explosive(s)" means any chemical compound, mixture or device, the primary or common purpose of which is to function by explosion; including, but not limited to,

water gel, slurries, emulsions, dynamites, permissibles, pellet powder, blasting caps, cast primers and boosters, detonating cord, detonating cord delay connectors, and blasting agents.

2.7. "Supervised a Blasting Crew" means that a person assumed responsibility for the conduct of a blasting crew(s) and that the crew(s) reported directly to that person.

2.8. "Surface Mine and Surface Area of Underground Mines" means all areas except underground workings surface mined or being surface mined, including adjacent areas ancillary to the operations, i.e., preparation and processing plants, storage areas, shops, haulageways, roads, and trails, which are covered by the provisions of West Virginia Code 22-3-1 et seq.

2.9. "Worked on a Drilling Crew" means that a person directly participated in the loading, connecting, and preparation of blast holes and detonated blasts.

2.10. "Worked on a Blasting Crew" means that a person has first-hand experience in storing, hauling, transporting, and using explosives.

38.2C.3. Certification of Blasters.

3.1. Requirements for Certification- In every surface mine and surface area of underground mine when blasting operations are being conducted, a certified blaster will be responsible for the storage, handling, transportation, and use of explosives for each and every blast and for conducting such blasting operations in accordance with the blasting plans approved in a permit issued pursuant to West Virginia Code 22-3-1 et seq and rules promulgated thereunder.

3.2. Qualifications for Certification. Each applicant for certification will have had at least one year active blasting experience within the past five (5) years, and have demonstrated a working knowledge of and skills in the storage, handling, transportation, and use of explosives, and a knowledge of all State and Federal laws pertaining thereto, by successfully taking and passing an examination for certification required by Section 5.2 of this rule.

3.3. Application for Certification. Prior to taking an examination for certification, a person must submit an application to take such examination on forms prescribed by the Director. Upon receipt of an application for examination, the Director will, after determining that the

applicant meets the experience requirements of subsection 3.2 of this rule, notify the applicant of the date, time, and location of the scheduled examination.

38.2C.4. Training. The Division of Environmental Protection will administer a training program to assist applicants for blaster certification or recertification in acquiring the knowledge and skills required for certification. The training requirements will include, at a minimum, those subject areas set forth in subparagraph a-k, paragraph 1, subsection 5.1 of this rule, subparagraph a-k, paragraph 1, subsection 5.2 of this rule, and the requirements of Division of Environmental Protection MR-30-TR.

38.2C.5. Examination for Certification of Examiners/Inspectors and Blasters.

5.1. Examinations for Certified Blaster Examiners/Inspectors - All persons employed by the Division of Environmental Protection, whose duties will include, training, examining and certifying blasters and/or inspecting blasting operations will be certified examiners/inspectors. Certification under the provisions of this subsection does not constitute certification under the provisions of subsection 5.2 of this rule; however, certification under subsection 5.2 of this rule would suffice for certification under this subsection. The examination for certified examiner/inspector will at a minimum test the applicant's knowledge of the information presented in the Study Guide for West Virginia Surface Mine Blasters, and will consist of three parts:

5.1.1. Part 1: A written multiple choice examination covering:

- 5.1.1.a.** Types of explosives and their properties, to include selection of appropriate explosives;
- 5.1.1.b.** Blasting equipment and accessories, to include blasting machines;
- 5.1.1.c.** Blast dimensions and calculations, to include geologic and topographic considerations, blast hole design, flyrock control, secondary blasting, and blast plans;
- 5.1.1.d.** Delay systems, to include pattern design, field layout, and initiation systems;
- 5.1.1.e.** Timing;

- 5.1.1.f. Blast vibration and vibration control, to include airblast, monitoring techniques, and use of preblast surveys;
- 5.1.1.g. Loading and detonating, to include priming, scheduling, site control, warning signals, and unpredictable hazards;
- 5.1.1.h. Storage and transportation of explosives;
- 5.1.1.i. Record keeping and reporting;
- 5.1.1.j. Current State and Federal laws and regulations relating to the use, storage, and transportation of explosives; the training and certification of blasting personnel, and blasting signs; and
- 5.1.1.k. Responsibilities of a certified blaster.

5.1.2. Part 2: A written simulation whereby the applicant must correctly and properly complete a blasting log.

5.1.3. Part 3: A hands-on simulation whereby the applicant must demonstrate the ability to properly connect a blast, simulate a selected initiated system, and simulate detonating a blast.

5.1.4. A score of 70 percent (70%) for part 1, and satisfactorily completion of parts 2 and 3 are required for successful passage of the examination. An individual who fails to achieve a passing score may retake the examination subject to the discretion of the Director.

5.2. Examination for Certified Blaster. - The examination for certified blaster will include information presented in the Study Guide for West Virginia Surface Mine Blasters, and will consist of three (3) parts:

5.2.1. Part 1: A written multiple choice examination covering:

- 5.2.1.a. Types of explosives and their properties, to include selection of appropriate explosive(s);
- 5.2.1.b. Blasting equipment and accessories, to include blasting machines;

- 5.2.1.c. Blast dimensions and calculations, to include geologic and topographic considerations, blast hole design, flyrock control, secondary blasting, and blast plans;
- 5.2.1.d. Delay systems, to include pattern design, field layout, and initiation systems;
- 5.2.1.e. Timing;
- 5.2.1.f. Blast vibration and vibration control, to include airblast, monitoring techniques, and use of preblast surveys;
- 5.2.1.g. Loading and detonating, to include priming, scheduling, site control, warning signals, and unpredictable hazards;
- 5.2.1.h. Storage and transportation of explosives;
- 5.2.1.i. Record keeping and reporting;
- 5.2.1.j. Current State and Federal laws and regulations relating to the use, storage, and transportation of explosives; the training and certification of blasting personnel, and blasting signs; and
- 5.2.1.k. Responsibilities of a certified blaster.

5.2.2. **Part 2:** A written simulation whereby the applicant must correctly and properly complete a blasting log.

5.2.3. **Part 3:** A hands-on simulation whereby the applicant must demonstrate the ability to properly connect a blast, simulate a selected initiated system, and simulate detonating a blast.

5.2.4. A score of 80 percent (80%) for part 1, and a "passing grade" on parts 2 and 3, which are graded on a pass/fail basis, are required for successful passage of the examination.

5.3. The Division of Environmental Protection will notify all persons of their scores within 30 days of completing the examination. A person who fails to achieve a passing score of any of the three (3) parts of the examination, may apply after thirty (30) days of receipt of his or her examination results to retake the entire

examination or any portions that the individual failed to pass. -

Any person who fails to pass the exam on the second attempt must certify that he/she has taken or retaken the training course described in subsection 3.4 of this rule prior to applying for another examination.

38.2C.6. Approval of Certification - Upon determination that an applicant for certification has satisfactorily passed the examination, the Director will, within 30 days of the examination date, issue a certification card to the applicant.

38-2C-7. Conditions or Practices Prohibiting Certification - The Director will not issue a blaster certification to persons who:

- 7.1. Are currently addicted to alcohol, narcotics or other dangerous drugs; or
- 7.2. Have exhibited a pattern of conduct inconsistent with the acceptance of responsibility for blasting operations.

38.2C.8. Recertification Requirements for Certified Blaster. -

8.1. A certified blaster must be recertified every three (3) years. Each applicant for recertification must be currently certified and must document that the applicant satisfactorily meets the experience requirements of subsection 3.2 of this rule and has completed the refresher training course as described in subsection 3.4 of this rule within the past twelve (12) months prior to application. The application for recertification must be submitted on forms prescribed by the Director.

8.2. An applicant who does not meet the experience requirements of subsection 3.2 of this rule must take the refresher training course described in subsection 3.4 of this rule and must take and pass the examination required in subsection 5.2 of this rule.

38.2C.9. Presentation of Certificate; Transfer; and Delegation of Authority.

9.1. Upon request by the Director, a certified blaster will exhibit his or her certification card.

9.2. The certified blaster will take all reasonable means to protect his or her certification card from loss or unauthorized duplication, and will immediately report any such loss or duplication to the Division of Environmental Protection.

9.3. Blaster's certifications will not be transferred or assigned.

9.4. Certified blasters will not delegate their authority or responsibility to any individual who is not a certified blaster in accordance with this rule.

38-2C-10. Violations by a Certified Blaster.

10.1. The Director may issue a notice of violation, a cessation order and/or take other action against a certified blaster who is in violation of the provisions of Chapter 22, Article 3, of the Code of West Virginia, rules promulgated thereunder, or any of the following:

10.1.1. Failure to comply with any order issued by the Director.

10.1.2. Illegal use of drugs or narcotics, or any use of alcohol in the workplace.

10.1.3. Violations of federal laws or regulations governing the purchase, use, handling, transportation, storage, or detonation of explosives.

10.1.4. False swearing in order to obtain a blaster's certification card.

10.1.5. Any illegal or improper action taken by a certified blaster which may or has led to injury or death at a blast site.

38.2C.11. Penalties

11.1. Suspension - Upon service of a written notice of violation or a cessation order by the Director to a certified blaster, the Director may also suspend certification. The period of suspension will be conditioned upon the time period for completion of remedial measures to abate the violation as specified in the notice of violation or cessation order, provided, That the Director may also require retraining or reexamination as a condition for reinstatement of certification.

11.2. Revocation - If the remedial action required to abate a notice of violation or a cessation order issued by the Director to a certified blaster is not taken within the specified time period for abatement, the Director may revoke the blaster's certification and require the blaster to relinquish his certification card. Revocation will occur if the certified blaster fails to retrain or fails to take and pass reexamination as a requirement for remedial action as described in subsection 11.1 of this Section.

11.3. Civil and Criminal Penalties. Any certified blaster will be subject to the individual civil and criminal penalties provided for in Section 17, Article 3, Chapter 22 of the Code of West Virginia.

38.2C.12. Hearings and Appeals - Any certified blaster who is served a notice of violation, cessation order, suspension order, revocation order, or civil and criminal sanctions is entitled to the rights of hearings and appeals as provided for in Sections 16 and 17, Article 3, Chapter 22 of the Code of West Virginia.

38.2C.13. Blasting Crew Persons who are not certified and who are assigned to a blasting crew, or assist in the use of explosives, will receive directions and on-the-job training from a certified blaster.

38.2C.14. Reciprocity With Other States - Upon a recommendation by the Division of Environmental Protection, the Director may enter into a reciprocal agreement with other states wherein persons holding a valid certification in the state may apply for certification in West Virginia, and upon approval by the Director, be certified without undergoing the training or examination requirements set forth in this rule.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

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STATE OF WEST VIRGINIA

SECRETARY OF STATE

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WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

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Director, Corporations

(Plus all the volunteer
help we can get)

FAX: (304) 558-0900

DECISION

EMERGENCY RULE DECISION (ERD 10-94)

AGENCY: Environmental Protection, Mining & Reclamation
RULE: New Rule, Series 2C, Standards for Certification of Blasters -
Surface Coal Mines
FILED AS AN EMERGENCY RULE: June 13, 1994

- par. 1 The Environmental Protection, Mining & Reclamation (DEP) has filed the above new rule as an emergency rule.
- 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(b))].
- 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 emergency rule decision is issued or the expiration of the thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The DEP filed this emergency rule with supporting documents with the Secretary of State June 13, 1994 and with the LRMRC June 13, 1994.

par. 7 It is the determination of the Secretary of State that the DEP 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 §22-1-3(a) reads in part:

(a) The director has the power and authority to propose legislative rules for promulgation in accordance with the provisions of §29A-3-1 et seq. of this code to carry out and implement the provisions of this chapter and to carry out and implement any other provision of law relating to offices or functions of the division.

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

par. 10 (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.

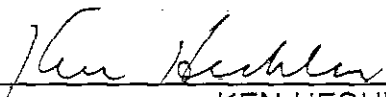
par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the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

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

In recent months, the Division of Environmental Protection has encountered cases where illegal blasting has potentially endangered life and property. The prosecution in one case led to the determination that the agency has questionable authority to revoke or suspend the certification of a certified blaster. It should be noted that a similar rule (56 CSR 5) exists giving authority to the Office of miners' Health Safety and Training authority of WV Code 33-22-1-9. The existing rule continues to cite authority of the Director of Miners' Health, Safety & Training which leads to further confusion about the Division of Environmental Protection's authority. These factors and others are justification for the propose emergency rule.

par. 13 It is the determination of the Secretary of State that this proposal is needed due to the reorganization of DEP and blasting certifications are needed for public protection; therefore this rule qualifies under the definition of an emergency as defined in §29A-3-15(g). . . "public health, safety and welfare"

par. 14 This decision shall be cited as Emergency Rule Decision 10-94 or ERD 10-94 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Environmental Protection, Mining & Reclamation, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
Secretary of State

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SECRETARY OF STATE

JUL 25 3 07 PM '94

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KEN HECHLER
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help we can get)

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STATE OF WEST VIRGINIA

SECRETARY OF STATE

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July 25, 1994

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

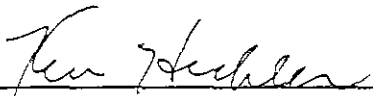
AGENCY: Environmental Protection, Mining & Reclamation

RULE: New Rule, Series 2C, "Standards for Certification of Blasters - Surface Coal Mines"

DATE FILED AS AN EMERGENCY RULE: June 13, 1994

DECISION NO. 10-94

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

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

JUL 25 3 04 PM 1994

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