WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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FILED
1989 APR 18 [illegible]

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: West Virginia Department of Energy TITLE NUMBER: 38

CITE AUTHORITY: W. Va. Code 22-1-15

RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____
CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW
N/A

AMENDMENT TO AN EXISTING RULE: YES___, NO X

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

TITLE OF RULE BEING AMENDED: N/A

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 2E

TITLE OF RULE BEING ADOPTED: Department of Energy Article 3 Forms

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS June 5, 1989

Roger T. Hall

Roger T. Hall
Energy Administrator III

TITLE 38
PROCEDURAL RULES
DEPARTMENT OF ENERGY
SERIES 2E
DEPARTMENT OF ENERGY ARTICLE 3 FORMS

§38-2E-1. General.

1.1. Scope. -- This regulation is for the purposes of filing all forms required by Chapter 22A, Article 3 of the West Virginia Code.

1.2. Authority. -- W. Va. Code §22-1-15

1.3. Filing Date. --

1.4. Effective Date. --

§38-5E-2. Forms.

2.1. All current forms and copies of any forms currently used under or required by Chapter 22A, Article 3 of the West Virginia Code are included with this series.

PUBLIC HEARING RECORD

PROCEDURAL RULE

DEPARTMENT OF ENERGY ARTICLE 3 FORMS

TITLE 38 SERIES 2E

The Department of Energy held a public hearing on Friday, March 31, 1989, at 4:00 p.m. in the conference room of the Region Six Office in Kanawha City. Presiding at the hearing was George Piper, attorney for the Department.

The hearing record was opened at 4:00 p.m. No persons coming forth with written or oral comments, the hearing record was closed at 4:30 p.m.

Written comments were received from Mr. John McFerrin on March 30, 1989, and responded to by letter of April 18, 1989 (attached).

No changes resulted from the comments received for reasons stated in the attached letter to Mr. McFerrin.

STATE OF WEST VIRGINIA
DEPARTMENT OF ENERGY
1615 WASHINGTON STREET, EAST
CHARLESTON, WEST VIRGINIA 25311
TELEPHONE. 348-3500

GASTON CAPERTON
GOVERNOR

GEORGE E. DIALS
COMMISSIONER

April 18, 1989

Mr. John McFerrin
Mining Committee
West Virginia Highlands Conservancy
1105 Tinder Avenue
Charleston, West Virginia 25302

Dear Mr. McFerrin:

Thank you for your written comments on our proposed procedural rules, Title 38, Series 2E, entitled "Department of Energy Article 3 Forms."

As you are perhaps aware, the subject forms relative to the procedural rules are forms currently being used by the Department of Energy and which have been in use for some time. With the passage of the recently proposed "Surface Mining and Reclamation Regulations (Title 38, Series 2)," these forms will be undergoing substantive revision to comply with many changes in the regulations. As I review your comments with respect to the changes which are required by the regulations, it appears that many, if not all, your comments are addressed by the regulations. Therefore, the new forms which are currently being developed and will be filed as amendments to the procedural rules, will address your comments. It seems counterproductive and costly to modify and reprint the existing forms in the manner you suggest and further modify and reprint new forms in response to regulatory changes.

With your permission, I am forwarding a copy of your comments to Mr. Mark Scott, Director of Mines and Minerals, to be considered in redrafting the forms in response to our regulatory reform effort.

I trust that the above-described action meets with your approval, and we would welcome further comments from you during the public comment period which will be provided when the revised forms are submitted as proposed amendments to the procedural rule.

Sincerely yours,

Roger T. Hall

Roger T. Hall
Energy Administrator III

RTH:cc

Mining Committee
West Virginia Highlands
Conservancy
1105 Tinder Ave.
Charleston, WV 25302
March 30, 1989

Roger Hall
West Virginia Department of Energy
1615 Washington Street, E.
Charleston, WV 25302

Dear Mr. Hall,

Thank you for the opportunity to comment upon the forms which the Department of Energy proposed. Please consider these comments as submitted by the West Virginia Highlands Conservancy.

These comments address the Surface Mining Application form (DMM-4). Specific comments are directed at specific portions of that form.

1. Question 1. This question assumes that the Department of Energy will issue a permit to entities which may not be legal persons under West Virginia law. The difficulty with this is that if the Department issues a permit to an entity which is not a legal person, then there is no one which the Department can take legal action against should the Department find it necessary to seek an injunction, etc. The sounder approach would be to issue permits only to natural persons such as individuals or corporate persons. In this way, if the Department should ever find it necessary to bring legal action, there would be a proper defendant.

Of course, this would not prevent unincorporated entities from mining. We could still have, for example, Mr. A and Mr. B, doing business as the Good News Coal Company. But the permit needs to be issued to Mr. A and Mr. B so that if there should be problems there would be some entity which could legally be a defendant in an enforcement action.

Since the proposed application proposes applicants which are not subject to suit, you should alter it to make only suable entities eligible for a permit.

2. Question 16. In this question, the Department has an opportunity to address a wide-spread scam that is, at a minimum, dishonest and may be illegal. As you know, companies routinely apply for permits that go to within five feet of the property line so as to be able to claim that there are no contiguous owners and, as a result, that there is no obligation to notify anyone.

Such a ruse is a transparent attempt to evade the intent of the law that the persons most likely to be affected by the mine be informed. The Department could deal with this by changing question 16 so that it required listing of all property owners within 100 feet of the operation to be listed and notified. This would make it much more difficult to use this method of dancing around the law requiring notification.

This also would assist the Department in determining the Cumulative Hydrologic Impact of anticipated mining in the area. If the applicant owns contiguous property, then that should put the Department on notice that there may be anticipated mining which the Department must consider. Applicants should not be able to avoid this scrutiny by leaving tiny unpermitted areas between the proposed operation and other land which it owns.

3. Question 17A. This question should require that the documents be attached. It is all too common that the applicant bases a right to conduct some parts of the operation on bogus authority. While it has been my experience that companies have at least some authority to conduct parts of the operation where the coal is extracted, such things as rights of way for access roads, etc. are often done on authority that could charitably be described as dubious. Mandating that the applicant supply the documents which show a right to mine could help eliminate this problem.

4. Question 17B. Any question about pending court litigation should contain a requirement that, if the answer is yes, the court, case number, etc. be listed.

5. Question 20. This question does not reflect the regulation. The regulation gives an exemption from the 100 foot buffer around public roads at the point where a haul road intersects with the access road. The question, as written, exempts the haulageways at all points. An operator could propose a haulageway that runs parallel to a public road and within 100 feet of that road. Wile this would be prohibited, this question would lead an operator to believe that the prohibition against mining within 100 feet of the public road does not apply to any haulageway or any part of a haulageway.

6. Question 25. This question assumes that the operator can know weather changes before they occur. Section 6B.9(a)(7) allows for waivers based on "site conditions or weather changes". This question assumes that the operator can predict those site conditions or weather changes at the application stage and apply for a waiver at that time. this is ridiculous. The waiver anticipated by Section 6B.9 should be limited to conditions or weather encountered during mining. We should not make it available during the application process. The proposed application form offers the opportunity to have a wholesale waiver of this requirement without any unanticipated, site-specific condition.

7. Question 30. This question needs to include a requirement that the applicant for an permit which includes underground mining show the extent of the underground mining. If applicants do this, then any person whose property will be undermined will be able to determine this from the application. Should that person have an questions about the adequacy of the subsidence control plan, etc. then that person will be able to raise those concerns to the Department at the time of the permit issuance.

For example, an applicant might not know of the existence of a house in an area it intends to undermine. Because of this (presumably good faith) ignorance, it would not include the house in its survey, etc. By requiring the company to identify in the application where it intends to mine underground, neighboring property owners would have the opportunity to call omissions to the Department's attention.

Question 44(d). This question invites applicants to seek waiver of the 100 foot buffer zone around streams. The possibly of waiver only exists for extreme situations when there is no other alternative. By placing this in the application, the Department invites the industry to consider the extreme situation (when a waiver is authorized) as the normal and seek a waiver in every case.

In addition to these comments upon specific questions, I would like to note that the application, as a whole, fails to require any of the planning that the Act anticipates. Over and over it does no more than ask an applicant whether it intends to follow the law. It does not, however, require any information on how the applicant plans to go about following the law. By taking such an approach, the Department almost assures that mining will be done with no advance planning.

Thank you for your attention to these comments. Please keep me informed on the progress of this rulemaking.

Sincerely,

John McFerrin