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(Plus all the volunteer
help we can get)

August 30, 2000

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE


AGENCY: Office of Mining & Reclamation

RULE: New Rule, Series 3, Rules for Quarrying and Reclamation

DATE FILED AS AN EMERGENCY RULE: July 20, 2000

DECISION NO. 11-00

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.



KEN HECHLER
Secretary of State

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EMERGENCY RULE DECISION (ERD 11-00)

AGENCY: Office of Mining & Reclamation
RULE: New Rule, Series 3, Rules for Quarrying and Reclamation
FILED AS AN EMERGENCY RULE: July 20, 2000

- par. 1 The Office of Mining & Reclamation (OMR) has filed the new 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 OMR filed this emergency rule with supporting documents with the Secretary of State July 20, 2000 and with the LRMRC July 20, 2000.

par. 7 It is the determination of the Secretary of State that the OMR 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 §22-1-3 reads:

(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 any other provision of law relating to offices or functions of the divisions.

(b) The requirements and limitations set forth in this section apply to any rule-making authority granted pursuant to this §§22B-1-1 et seq. and 22C-1-1 et seq. Of this code.

(c) Prior to the proposal of any new rule, the director shall consult with the division of environmental protection advisory council and after such consultation, the director may determine that such a rule should be the same in substance as a counterpart federal regulation. If the director determines that the rule should be the same in substance as a counterpart regulation, then to the greatest degree practicable, such proposed rule shall incorporate by reference the counterpart federal regulation. The director shall file, contemporaneously with the proposed rule, a statement setting forth whether the rule is the same in substance as a counterpart federal regulation. If the director determines that the rule should not be the same in substance as a counterpart federal regulation, then the director shall file contemporaneously with the proposed rule, a statement setting forth the differences between the proposed rule and the counterpart federal regulation. In addition, the director shall file a statement setting forth the results of the consultation with the advisory council.

(d) Whenever any existing rule is modified, amended or replaced, the provisions of subsection (c) of this section apply to the proposal of such modification, amendment or replacement rule.

(e) Notwithstanding the provisions of §29A-3 of this code, at least one public hearing shall be held by the division in conjunction with each rule making prior to the expiration of the public comment period for the proposed rule.

par. 9 It is the determination of the Secretary of State that the OMR 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 OMR are as follows:

The DEP's Office of Mining and Reclamation found it necessary to file the proposed quarry rule as an emergency rule in order to effectively enforce the newly-enacted Quarry and Reclamation Act (HB 4055). The new statute that became effective June 8, 2000 outlines the general requirements for permit review performance standards, and enforcement procedures. However, without approval of the emergency rule, the following specific requirements cannot be established in the regulation of quarry mining until after the proposed rule completes the Legislative process, and the rule is filed as final some time in May 2001.

New Permits – A pre-quarry assessment is required for each new permit. These emergency rules define surface water, ground water, and natural drainways. They also establish monitoring site locations and the water parameters to be sampled. They require notice to governmental agencies with jurisdiction over known protected or endangered species and jurisdiction over historical or archaeological sites. New permits are required to have a drainage control system. They require that the drainage system use the technical handbook, which contains specific engineering criteria as it relates to surface mining. The new permits are required to have haulroads and excess spoil disposal areas designed according to the criteria contained in these rules. They also contain the requirements necessary to conduct public hearings. They establish notification requirements and safety precautions to residents near blasting operations. The bonding requirements for new permits are established.

Permit Modifications, Renewals & Transfers – These emergency rules contain specific requirements for major and minor permit modifications, annual bond adjustments, permit transfers and the consolidation of multiple permits.

Performance Standards – These emergency rules establish procedures for inspection including frequency of inspection, issuance of violations, compliance requirements and the determination of civil penalties.

Bond Releases – The specific requirements for complying with the Act in order to complete reclamation and release of the permit are outlined.

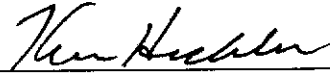
All of the specific requirements outlined in the proposed emergency rules are necessary for the DEP to enforce the new Act. Without these emergency rules, the agency would not be able to issue new permits effectively, monitor compliance or take necessary enforcement action.

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). . . "immediate preservation of public health, safety or welfare" and "prevent substantial harm to the public interest"

par. 14

This decision shall be cited as Emergency Rule Decision 11-00 or ERD 11-00 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Office of Mining & Reclamation, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
Secretary of State

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