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WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

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SECRETARY OF STATE

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January 07, 2002

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NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Joe Manchin, Secretary of State, State Register

TO: Rita Pauley
DEP-Mining & Reclamation, Office of
1356 Hansford Street
Charleston, WV 25301

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Coal Related Dam Safety Rule, 38CSR4**

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 Recommends that the Legislative rule be withdrawn; a statement of reasons for such recommendation is attached.

ANALYSIS OF PROPOSED LEGISLATIVE RULE

Agency: DEP-Division of Mining and Reclamation

Subject: Coal Related Dam Safety Rule

CSR Cite: 38CSR4

Counsel: JAA

PERTINENT DATES

Filed for public comment: June 8, 2001
Public comment period ended: July 11, 2001
Filed following public comment period: July 24, 2001
Filed LRMRC: July 24, 2001
Filed as emergency: n/a

Fiscal Impact: None.

ABSTRACT

Brief Summary

This new rule establishes requirements for dams constructed as part of a coal production activities. 47CSR34 has historically regulated all dams in the state. Previously, 47CSR34 was modified to exclude coal production related dams from under its requirements. A legislative audit recommended creation of a rule to fully encompass necessary requirements to assure safety of coal production related dams. This rule puts into place standards for these dams.

Section Summary

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Section 1. General.

This rule establishes rules for design, placement, construction, enlargement, repair, removal, and abandonment of dams constructed as part of a coal mining operation.

Section 2. Definitions.

"Dam" is defined as a artificial barrier or obstruction designed to impound or divert water and is 25 feet or more in height and contains more than 50 acre feet of water.

Section 3. Classification of Dams.

Three Classes of Dams, A through C based on the hazard of failure and location of the dam are established. This section provides criteria for analysis of the potential hazard associated with locating a dam in a particular location. Criteria include downstream hazards, dam break analysis, risk assessment, and emergency planning.

Section 4. Certificate of Approval.

A certificate of approval must be received from the Secretary of the Department of Environmental Protection [DEP] prior to construction or repair of a dam. Upon approval, a Class 1 legal advertisement must be published. A public hearing must be held upon receipt of a written request. The Secretary can revoke or suspend approval when it is determined that a dam has become a danger to life and property.

Section 5. Application Procedures.

All applications must be overseen by a professional engineer, and information as is required by this rule must be provided.

Section 6. Plans and Specifications.

This section provides specific content of required design plans. Specifications are to be submitted on construction methods and sequences of activities associated with the dam construction.

Section 7. Design Requirements.

This section provides specific engineering criteria for dams based on hydrological criteria based hazard classifications. Three classes of impoundments, A, B and C are provided based on impoundment size and collection basin area.

Section 8. Subsidence Evaluation.

This section prohibits placing a dam over underground workings unless it has been demonstrated to the Secretary that the area is safe from subsidence. No dam plan will be approved without minimum safe cover demonstrated by drilling of test holes.

Section 9. Breakthrough Potential Evaluation.

When there has been underground mining in the area of the proposed dam, an evaluation of the breakthrough potential must be provided.

Section 10. Geotechnical Considerations.

Investigation of the geology at the dam site must be conducted. Borings, test pits and trenches, as appropriate, must be done and a evaluation must be submitted to the DEP. Analysis of seepage, foundation stability and potential for landslides must be provided.

Section 11. Structural Considerations.

This section provides criteria to be applied when constructing a dam. Construction materials and design specifications shall be designed to meet the design life of the dam. Specifications on concrete and earthen materials to be used and criteria for the embankments are provided.

Section 12. Construction or Modification of a Dam.

Prior to construction or modification of a dam, the applicant must notify the Secretary. In addition to following the approved designed plans, this section provides additional criteria for the operator to follow. Placement of construction materials,

spillways, and other dam related construction designs are specified.

Section 13. Blasting.

Blasting plans must comport with the design plan of the dam and be approved by the Office of Blasting. Seismic monitoring at the dam is required if there is blasting within .8 of a mile of the dam.

Section 14. Storm Water Discharge.

This section requires that the sequence of construction work be designed to maximize the safe discharge of storm water while the dam is being constructed.

Section 15. Erosion and Sediment Control.

Water quality standards must be maintained during dam construction. Structures are to be in place to prevent erosion and sediment discharge.

Section 16. Disposal of Construction Wastes.

All construction material shall be disposed of in a manner approved by the DEP.

Section 17. Dust Control.

Measures to limit dust must be utilized as directed by the DEP.

Section 18. Construction Quality Control.

All operations must be supervised by an engineer. The Secretary may also monitor construction activities. The Secretary may require additional supervision or testing if there is evidence of inadequate construction supervision. Testing of compaction and gradation are required.

Section 19. Breaching of a Dam.

The dam owner must receive a certificate or approval from the Secretary prior to breaching a dam. A breach plan shall provide breach dimensions, breach channel and other procedures to prevent adverse impacts to the area.

Section 20. Removal of a Dam.

A plan must be approved by the Secretary which assures control of sediment, disposed materials and use of other proper construction requirements.

Section 21. Abandonment of a Dam.

This section provides requirements for the abandonment of the dam site. The DEP shall retain jurisdiction for a minimum of five years after abandonment. Annual reports are to be filed for this five year period. At the end of the five years the DEP and the owner shall conduct a joint inspection and determine if further action is needed.

Section 22. Reduction of Dam Height to less than Jurisdiction.

This section provides a process for allowing the dam owner to reduce the size on an impoundment so it no longer is regulated as a dam under this rule. Any such plan must be approved by the Secretary.

Section 23. Enlargement of a Structure ro Jurisdiction.

Any enlargement of an impoundment to dam size must obtain a certificate of approval. The Secretary may waive some application requirements if the Secretary deems them unnecessary.

Section 24. Sale or Transfer of Dam.

No sale or other transfer of ownership of a dam is permitted without prior approval by the DEP.

Section 25. Operation and Maintenance.

This section specifies maintenance activities that must be conducted during the course of operating a dam. Maintenance and repairs must be conducted to maintain dam certification.

Section 26. Inspection, Reporting and Certification Requirements.

During dam construction, all plans and specifications shall be maintained on the construction site. Periodic inspection by the supervising engineer is required.

Section 27. Completion of Construction.

After completion of construction, a joint owner/DEP inspection shall be conducted, and if dam construction is deemed satisfactory, a letter of acceptance will be issued by the Secretary.

Section 28. Inspection of Dams.

The DEP shall conduct annual inspections of the Dam during the course of its operation.

Section 29. Inspections of Dams with Serious Problems.

The Secretary may require more frequent inspections of a dam if a problem arises.

Section 30. Reporting Requirements.

Monthly reports by the supervising engineer, and a final construction report are required. The engineer must certify that the construction is in conformance with approved design specifications.

Section 31. Inspection and Certification Requirements.

During construction, the engineer shall submit certification that the dam complies with design specifications. The certification shall be submitted annually thereafter. Only the engineer or other qualified specialist, under the direction of the engineer may submit certification information to the Secretary.

Section 32. Monitoring Plans.

Monitoring plans are required for Class C dams. For Class A and B dams, the Director may require a monitoring plan.

Section 33. Emergency Warning Plans.

All Class C dams are required to develop an emergency warning plan to protect the public, and a plan for emergency remediation of the dam. These plans must be approved by the Secretary.

Section 34. Emergency Procedures.

If the owner of a dam determines a dangerous condition exist, the owner must notify the DEP. If there is a danger to the public, continuous monitoring may be required.

Section 35. Inspection and Enforcement.

Dams are subject to inspection and enforcement actions under 38CSR2, the WV Surface Mining Reclamation Rule.

Section 36. Application Fee for Certificate of Approval of a Dam.

A fee of \$300 is required for a application for dam certification, dam modification, dam removal or a dam ownership transfer. The annual renewal fee is \$100.00.

AUTHORITY

Statutory authority: W.Va. Code, 22-14-4, which provides:

The director has the following powers and duties:

(a) To control and exercise regulatory jurisdiction over dams as provided for in this article;

(b) To review all applications for a certificate of approval for the placement, construction, enlargement, alteration, repair or removal of any dam;

(c) To grant, modify, amend, revoke, restrict or refuse to grant any certificate of approval if proper or necessary to protect life and property as provided in this article;

(d) To adopt, modify, repeal and enforce rules and issue orders, in such manner as the director may otherwise do, to implement and make effective the powers and duties vested in it by the provisions of this article;

(e) To take any lawful action considered necessary for the effective enforcement of the provisions of this article....

ANALYSIS

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

No.

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 suggest.