WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #7

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1990 JUL 10 AM 10:41

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AN EMERGENCY RULE

AGENCY: Department of Commerce, Labor, and Environmental Resources, Division of Natural Resources. TITLE NUMBER: 47

CITE AUTHORITY: West Virginia Code §20-5H-6.

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X, NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 36

TITLE OF RULE BEING AMENDED: "Underground Storage Tank Regulations"

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

TITLE OF RULE BEING FILED AS AN EMERGENCY: ___

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Use Additional Sheets If Necessary.

J. Edward Hamrick III
Director

MEMORANDUM OF CONSENT

TO: J. Edward Hamrick III, Director
Division of Natural Resources

FROM: John M. Ranson, Secretary
Department of Commerce, Labor,
and Environmental Resources

SUBJECT: Approval of Regulatory Proposal

RE: "Underground Storage Tank Regulations"

I have reviewed the proposed rule and authorize its filing in accordance with the provisions of the West Virginia Administrative Procedures Act.

John M. Ranson
John M. Ranson
Secretary

7/5/90
Date

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Underground Storage Tank Regulations.

Type of Rule: _X_ Legislative ___ Interpretive ___ Procedural

Agency: Department of Commerce, Labor and Environmental Resources Division of Natural Resources.

Address: Building 3, State Capitol Complex, Charleston, West Virginia 25305

1. Effect of Proposed Rule	Increase $	ANNUAL Decrease $	Current $	FISCAL YEAR Next $	Thereafter $
Personal Services					
Current Expense			NO CHANGE		
Repairs and Alterations					
Equipment					
Other					

2. Explanation of Above Estimates:

This rule will revise an existing rule for the purpose of clarifying and correcting various errors found throughout the existing rule. The existing rule became effective on May 1, 1990. No new administrative expenditures are anticipated for the Division as a result of these revisions.

3. Objectives of These Rules:

These rules revise existing rules adopted from federal regulations that establish technical requirements for underground storage tanks containing certain regulated substances, particularly petroleum.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government: No impact

B. 1. Economic Impact on Political Subdivisions: No impact
2. Economic Impact on Specific Industries: No impact

3. Economic Impact on Specific Groups of Citizens: No impact

C. Economic Impact on Citizens/Public at Large: No impact

Date: June 22, 1990

J. Edward Hamrick III
Director

DATE: July 10, 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Department of Commerce, Labor and Environmental Resources, Division of Natural Resources.

EMERGENCY RULE TITLE: Underground Storage Tank Regulations

1. Emergency rule was filed on: July 10, 1990.

2. Statutory authority for promulgating the emergency rule:

   West Virginia Code, Chapter 20, Article 5H, Section 6

3. Proposed legislative rule was filed on: July 10, 1990

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

   Amends a current legislative rule.

5. Has the same or similar emergency rule previously been filed and expired?

   No.

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety, or welfare.

   See discussion under Item 8.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute, or federal regulation and time limit established therein.

   Not Applicable

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

The current legislative rule entitled "Underground Storage Tank Regulations" effective May 1, 1990 is incomplete and various cites throughout the regulation are incorrect. (1) The current legislative rule refers to an Appendix I (notification form) which must be completed by owners or operators of underground storage tanks. Appendix I is not included in the current set of regulations. (2) Various cites throughout the regulation refer to sections in the state regulation when, in fact, the correct cites are to sections found throughout the federal regulations. (3) The notification requirements were modified in the emergency rule by clarifying which owners or operators are required to notify. (4) A section entitled "Certification Requirements" was added because in Section 2.1.2 of the current state regulations, certification of tank installation is deleted from the "incorporation by reference" of the federal regulations and refers to Section 3 of the state regulations. Section 3 of the current state regulations is reserved, therefore the State has no certification requirements for the installation of tanks.

The above discrepancies and shortcomings have been corrected and/or clarified in the emergency rule filed on July 10, 1990.

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

EMERGENCY RULE

TITLE 47
LEGISLATIVE RULES
DIVISION OF NATURAL RESOURCES

SERIES 36
UNDERGROUND STORAGE TANK REGULATIONS

§47-36-1. General.

1.1. Scope and Purpose. -- This legislative rule establishes regulations to govern the construction, installation, upgrading, use, maintenance, and closure of underground storage tanks in this State.

1.2. Authority. -- W. Va. Code §20-5H-6.

1.3. Filing Date. -- July 10, 1990.

1.4. Effective Date. -- July 10, 1990.

§47-36-2. Adoption of Federal Regulations.

2.1. The director hereby adopts and incorporates by reference the provisions contained in 40 C.F.R. Part 280 as published in the Code of Federal Regulations on the date in which these regulations were proposed (December 16, 1988), with the following modifications:

2.1.1. The definition of "Implementing Agency" that appears in 40 C.F.R. §280.12 shall be deleted and replaced by "'Implementing Agency' means the West Virginia ~~Department~~ Division of Natural Resources."

2.1.2. The provisions contained in 40 C.F.R. §280.20(e) shall be deleted and replaced by Section 3 of these regulations.

2.1.3. The provisions contained in 40 C.F.R. §280.22 shall be deleted and replaced by Section 4 of these regulations.

2.1.4. The phrase "section 9005 of Subtitle I of the Resource Conservation and Recovery Act, as amended" that appears in 40 C.F.R. §280.34 shall be deleted and replaced by the phrase "W. Va. Code §20-5H-13."

2.1.5. The provisions contained in 40 C.F.R. §280.34(a)(1) shall be deleted and replaced by "(1) Notification in accordance with the provisions of Section 4 of these regulations."

2.1.6. The phrase "section 3005(u) of the Resource

Conservation and Recovery Act, as amended" that appears in 40 C.F.R. §280.60 shall be deleted and replaced by the phrase "W. Va. Code §20-5H-14."

2.1.7. The provisions contained in Appendices II and III of 40 C.F.R. Part 280 shall be deleted.

§47-36-3. Certification Requirements. ~~(Reserved).~~

3.1. Certification of Installation. All owners or operators of underground storage tanks must ensure that one or more of the methods of certifying tank installation, as described under Section XI of Appendix I of these regulations (excluding items B and E), is used to demonstrate compliance with 40 C.F.R. §280.20(d).

§47-36-4. Notification Requirements.

4.1. Except as provided in Section 4.1.1, 4.1.2, or 4.1.3 of these regulations, the owner or operator of an underground storage tank system that was in the ground prior to ~~the effective date of these regulations~~ May 1, 1990 must submit a notice of the existence of such tank system to the director by completing ~~Sections I through VI of~~ the form prescribed in Appendix I of these regulations.

4.1.1. The owner or operator of an underground storage tank system that was in the ground prior to ~~the effective date of these regulations~~ May 1, 1990 is exempt from the notification requirements of Section 4.1 of these regulations if notice was previously given to the director in accordance with the provisions of the federal Hazardous and Solid Waste Amendments of 1984 on the form published in the Federal Register on November 8, 1985 (50 F.R. 46602), unless such notice was given pursuant to Section 103(c) of CERCLA.

4.1.2. The owner or operator of an underground storage tank system that was ~~taken out of operation~~ removed from the ground on or before May 8, 1986 if such system had been taken out of operation prior to January 1, 1974, is exempt from the notification requirements of Section 4.1 of these regulations.

4.1.3. The owner or operator of an underground storage tank that was installed on or before ~~after~~ December 22, 1988 ~~must submit a notice of the existence of that tank to the director by completing~~ need only complete Sections I through ~~VII~~ X of the form prescribed in Appendix I of these regulations. Tank systems installed after December 22, 1988 must comply with the provisions of Section 4.2 of these regulations.

4.2. All owners and operators of UST systems installed after

December 22, 1988 must provide the director, in addition to provide ~~notification to the director in accordance with~~ the provisions of Section 4.1.3 of these regulations, ~~in addition, such owners and operators must certify, in the~~ notification form of compliance with the following requirements:

4.2.1. Installation of tanks and piping ~~in accordance with the provisions of Section 3~~ as certified under Section XI of the form prescribed in Appendix I of these regulations, excluding Items B (Installer certified or licensed by the implementing agency) and E (Manufacturer's installation checklists have been completed) under Section 1 (Installation) of Part XI (Certification of Compliance).

4.2.2. Cathodic protection of steel tanks and piping in accordance with the provisions of 40 C.F.R. ~~Sections~~ §§ 280.20(a) and 280.20(b) ~~of these regulations~~.

4.2.3. Financial responsibility in accordance with the provisions of 40 C.F.R. Subpart H ~~of these regulations~~.

4.2.4. Release detection in accordance with the provisions of ~~Sections~~ 40 C.F.R. §§280.41 and 280.42 ~~of these regulations~~.

4.3. All owners and operators of new UST systems must ensure that the installer certifies, in the notification form, that the methods used to install the tanks and piping comply with the requirements ~~in Section~~ of 40 C.F.R. §280.20(d) ~~of these regulations~~.

4.4. An owner or operator who is required to submit notices under Section 4 of these regulations may provide notice for several tanks by using one notification form, but an owner of tanks located at more than one place of operation must file a separate notification form for each separate place of operation.

4.5. ~~Beginning~~ After June 10, 1988, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under Section 4 of these regulations. The following notice may be used to comply with this requirement:

"NOTICE: Owners of certain underground storage tanks in West Virginia are required by law to notify the director of the ~~Department~~ Division of Natural Resources of the existence of their tanks. Notifications for tanks brought into use after May, 8, 1986 must be made within thirty (30) days. Consult the ~~Department's~~ Division's Underground Storage Tank Regulations (47 C.S.R. 36) to determine if you must provide this notification."

EMERGENCY RULE

4.6. Except as provided in Section 4.6.1 of these regulations, the owner or operator must report changes in the status of any underground storage tank system by completing ~~Sections I through VI of~~ the form prescribed in Appendix I of these regulations and then submitting that form to the director
by December 31 of the year in which the change of status occurred.

4.6.1. A new owner of an underground storage tank must provide notification of the transfer of ownership of that tank by completing ~~Sections I through VI of~~ the form prescribed in Appendix I of these regulations and then submitting that form to the director within thirty (30) days of the transfer.

APPENDIX I

OMB NO. 2050-0068, Approval Expires 9/30/91
EPA form 7530-1 (Revised 9/89)

Notification for Underground Storage Tanks

State Agency Name and Address

STATE USE ONLY

ID NUMBER

DATE RECEIVED

A. Date Entered Into Computer _____
B. Data Entry Clerk Initials _____
C. Owner Was Contacted to Clarify Responses. Comments

TYPE OF NOTIFICATION

☐ A. NEW FACILITY ☐ B. AMENDED ☐ C. CLOSURE

____ No. of tanks at facility ____ No. of continuation sheets attached

INSTRUCTIONS

Please type or print in ink all items except "signature" in section VIII. This form must be completed for each location containing underground storage tanks. If more than five (5) tanks are owned at this location, photocopy the following sheets, and staple continuation sheets to the form.

GENERAL INFORMATION

Notification is required by Federal law for all underground tanks that have been used to store regulated substances since January 1, 1974 that are in the ground as of May 8, 1986, or that are brought into use after May 8, 1986. The information requested is required by Section 9002 of the Resource Conservation and Recovery Act, (RCRA), as amended.

The primary purpose of this notification program is to locate and evaluate underground tanks that store or have stored petroleum or hazardous substances. It is expected that the information you provide will be based on reasonably available records, or in the absence of such records, your knowledge, belief, or recollection.

Who Must Notify? Section 9002 of RCRA, as amended, requires that, unless exempted, owners of underground tanks that store regulated substances must notify designated State or local agencies of the existence of their tanks. Owner means—

a) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances, and

b) in the case of any underground storage tank in use before November 8, 1984, but no longer is use on that date, any person who owned such tank immediately before the discontinuation of its use.

c) if the State agency so requires, any facility that has undergone any changes to facility information or tank system status (only amended tank information needs to be included).

What Tanks Are Included? Underground storage tank is defined as any one or combination of tanks that (1) is used to contain an accumulation of "regulated substances," and (2) whose volume (including connected underground piping) is 10% or more beneath the ground. Some examples are underground tanks storing: 1. Gasoline, used oil, or diesel fuel, and 2. industrial solvents, pesticides, herbicides or fumigants.

What Tanks Are Excluded? Tanks removed from the ground before January 1, 1974 are not subject to notification. Other tanks excluded from notification are:

1. farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;

2. tanks used for storing heating oil for consumpave use on the premises where stored;

3. septic tanks;

4. pipeline facilities (including gathering lines) regulated under the Natural Gas Pipeline Safety Act of 1968, or the Hazardous Liquid Pipeline Safety Act of 1979, or which is an intrastate pipeline facility regulated under State laws;

5. surface impoundments, pits, ponds, or lagoons;

6. storm water or waste water collection systems;

7. flow-through process tanks;

8. liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;

9. storage tanks situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situate upon or above the surface of the floor.

What Substances Are Covered? The notification requirements apply to under ground storage tanks that contain regulated substances. This includes any substance defined as hazardous in section 101 (14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), with the exception of those substances regulated as hazardous waste under Subtitle C of RCRA. It also includes petroleum, e.g., crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute).

Where To Notify? Send completed forms to:

Waste Management Section
Division of Natural Resources
1356 Hansford Street
Charleston, WV 25301

When To Notify? 1. Owners of underground storage tanks in use or that have been taken out of operation after January 1, 1974, but still in the ground, must notify by May 8, 1986. 2. Owners who bring underground storage tanks into use after May 8, 1986, must notify within 30 days of bringing the tanks into use. 3. If the State requires notification of any amendments to facility send information to State agency immediately.

Penalties: Any owner who knowingly fails to notify or submits false information shall be subject to a civil penalty not to exceed $10,000 for each tank for which notification is not given or for which false information is submitted.

I. OWNERSHIP OF TANK(S)

Owner Name (Corporation, Individual, Public Agency, or Other Entity)

Street Address

City State Zip Code

County

Phone Number (Include Area Code)

II. LOCATION OF TANK(S)

If required by State, give the geographic location of tanks by degrees, minutes, and seconds. Examples Lat. 42, 36, 12 N Long. 85, 24, 17W

Latitude _____ Longitude _____

(If same as Section I, mark box here ☐)

Facility Name or Company Site Identifier, as applicable

Street Address (P.O. Box not acceptable)

City State Zip code

County Municipality

III. TYPE OF OWNER	IV. INDIAN LANDS	
☐ Federal Government ☐ Commercial ☐ State Government ☐ Private ☐ Local Government	Tanks are located on land within an Indian Reservation or on other trust lands. ☐ Tanks are owned by native American nation, tribe, or individual. ☐	Tribe or Nation: _____

V. TYPE OF FACILITY

Select the Appropriate Facility Description

____ Gas Station	____ Railroad	____ Trucking/Transport
____ Petroleum Distributor	____ Federal - Non-Military	____ Utilities
____ Air Taxi (Airline)	____ Federal - Military	____ Residential
____ Aircraft Owner	____ Industrial	____ Farm
____ Auto Dealership	____ Contractor	____ Other (Explain) _____

VI. CONTACT PERSON IN CHARGE OF TANKS

Name	Job Title	Address	Phone Number (Include Area Code)

VII. FINANCIAL RESPONSIBILITY

I have met the financial responsibility requirements in accordance with 40 CFR Subpart H ☐

Check All that Apply

☐ Self Insurance	☐ Guarantee	☐ State Funds
☐ Commercial Insurance	☐ Surety Bond	☐ Trust Fund
☐ Risk Retention Group	☐ Letter of Credit	☐ Other Method Allowed Specify _____

VIII. CERTIFICATION (Read and sign after completing all sections)

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.

Name and official title of owner or owner's authorized representative (Print)	Signature	Date Signed

EPA estimates public reporting burden for this form to average 30 minutes per response including time for reviewing instructions, gathering and maintaining the data needed and completing and reviewing the form. Send comments regarding this burden estimate to Chief, Information Policy Branch PM-223, U.S. Environmental Protection Agency, 401 M Street, Washington D.C. 20460, marked "Attention Desk Officer for EPA." This form amends the previous notification form as printed in 40 CFR Part 280, Appendix I. Previous editions of this notification form may be used while supplies last.

APPENDIX I continued

IX. DESCRIPTION OF UNDERGROUND STORAGE TANKS (Complete for each tank at this location.)					
Tank Identification Number	Tank No.____	Tank No. ____	Tank No. ____	Tank No. ____	Tank No. ____
1. Status of Tank (mark only one) Currently in Use					
Temporarily Out of Use (Remember to fill out section X.)					
Permanently Out of Use (Remember to fill out section X.)					
Amendment of Information					
2. Date of Installation (mo./year)					
3. Estimated Total Capacity (gallons)					
4. Material of Construction (Mark all that apply)					
Asphalt Coated or Bare Steel					
Cathodically Protected Steel					
Epoxy Coated Steel					
Composite (Steel with Fiberglass)					
Fiberglass Reinforced Plastic					
Lined Interior					
Double Walled					
Polyethylene Tank Jacket					
Concrete					
Excavation Liner					
Unknown					
Other, Please specify					
Has tank been repaired?					
5. Piping (Material) (Mark all that apply) Bare Steel					
Galvanized Steel					
Fiberglass Reinforced Plastic					
Copper					
Cathodically Protected					
Double Walled					
Secondary Containment					
Unknown					
Other, Please specify					
6. Piping (Type) (Mark all that apply)					
Suction: no valve at tank					
Suction: valve at tank					
Pressure					
Gravity Feed					
Has piping been repaired?					

APPENDIX I continued

Tank Identification Number	Tank No.____	Tank No.____	Tank No. ____	Tank No. ____	Tank No. ____
7. Substance Currently or Last Stored In Greatest Quantity by Volume					
Gasoline					
Diesel					
Gasohol					
Kerosene					
Heating Oil					
Used Oil					
Other, Please specify					
Hazardous Substance CERCLA name and/or, CAS number					
Mixture of Substances Please specify					
X. TANKS OUT OF USE, OR CHANGE IN SERVICE					
1. Closing of Tank					
A. Estimated date last used (mo./day/year)					
B. Estimate date tank closed (mo./day/year)					
C. Tank was removed from ground					
D. Tank was closed in ground					
E. Tank filled with inert material					
Describe					
F. Change in service					
2. Site Assessment Completed					
Evidence of a leak detected					

XI. CERTIFICATION OF COMPLIANCE (COMPLETE FOR ALL NEW AND UPGRADED TANKS AT THIS LOCATION)

Tank Identification Number	Tank No. ____	Tank No. ____	Tank No. ____	Tank No. ____	Tank No. ____
1. Installation					
A. Installer certified by tank and piping manufacturers					
B. Installer certified or licensed by the implementing agency					
C. Installation inspected by a registered engineer					
D. Installation inspected and approved by implementing agency					
E. Manufacturer's installation check-lists have been completed					
F. Another method allowed by State agency. Please specify.					

2. Release Detection (Mark all that apply)	TANK	PIPING	TANK	PIPING	TANK	PIPING	TANK	PIPING	TANK	PIPING
A. Manual tank gauging										
B. Tank tightness testing										
C. Inventory controls										
D. Automatic tank gauging										
E. Vapor monitoring										
F. Groundwater monitoring										
G. Interstitial monitoring double walled tank/piping										
H. Interstitial monitoring/secondary containment										
I. Automatic line leak detectors										
J. Line tightness testing										
K. Other method allowed by Implementing Agency. Please specify.										

3. Spill and Overfill Protection					
A. Overfill device installed					
B. Spill device installed					

OATH: I certify the information concerning installation that is provided in section XI is true to the best of my belief and knowledge.

Installer: _____ Name _____ Signature _____ Date

_____ Position _____ Company

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 345-4000
Corporations: 342-8000

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

SHEREE COHEN
Special Assistant

(Plus all the volunteer help we can get)

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug. 14, 1990

August 14, 1990

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Department of Commerce, Labor and Environmental Resources, Division of Natural Resources

RULE: Amendments, Series 36; Underground Storage Tank Regulations

DATE FILED AS AN EMERGENCY RULE: July 10, 1990

NO. 31-90

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

KEN HECHLER
Secretary of State

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

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STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

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Special Assistant

(Plus all the volunteer help we can get)

DECISION EMERGENCY RULE DECISION (ERD 31-90)

AGENCY: West Virginia Department of Commerce, Labor and Environmental Resources, Division of Natural Resources
RULE: Amendments, Series 36, Underground Storage Tank Regulations
FILED AS AN EMERGENCY RULE: July 10, 1990

par. 1 The Division of Natural Resources (DNR) has filed emergency amendments to the above 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(a)].

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 ERD 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 DNR has filed this emergency rule with supporting documents with the Secretary of State on July 10, 1990, and with the LRMRC on July 10, 1990.

par. 7 It is the determination of the Secretary of State that the DNR 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 §20-5H-6 reads in part:

§20-5H-6. Promulgation of rules, regulations and standards by director.

(a) The director has overall responsibility for the promulgation of rules and regulations under this article. In promulgating and revising such rules and regulations the director shall comply with the provisions of §29A-1-1 et seq. of this code. Such rules and regulations shall be no more stringent than the rules and regulations promulgated by the United States environmental protection agency pursuant to Subtitle I.
(b) The director shall promulgate rules and regulations applicable to owners or operators of underground storage tanks or other affected persons, as appropriate, as follows:

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

The current legislative rule entitled "Underground Storage Tank Regulations: effective May 1, 1990 is incomplete and various cites throughout the regulation are incorrect. (1) The current legislative rule refers to an Appendix I (notification form) which must be completed by owners or operators of underground storage tanks. Appendix I is not included in the current set of regulations. (2) Various cites throughout the regulation refer to sections in the state regulation when, in fact, the correct cites are to sections found throughout the federal regulations. (3) The notification requirements were modified in the emergency rule by clarifying which owners or operators are required to notify. (4) A section entitled "Certification

Requirements" was added because in Section 2.1.2 of the current state regulations, certification of tank installation is deleted from the "incorporation by reference" of the federal regulations and refers to Section 3 of the state regulations. Section 3 of the current state regulations is reserved, therefore the State has no certification requirements for the installation of tanks.

The above discrepancies and shortcomings have been corrected and/or clarified in the emergency rule filed on July 10, 1990.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency to "prevent substantial harm to public interest."

par. 14 This decision shall be cited as Emergency Rule Decision 31-90 or ERD 31-90 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Natural Resources, the Attorney General and the Legislative Rule Making Review Committee.

KEN HECHLER
SECRETARY OF STATE

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug. 14, 1990
ADMINISTRATIVE LAW DIVISION

Entered