

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

2007 JUN 28 PM 12:34

SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Division of Natural Resources TITLE NUMBER: 58

RULE TYPE: legislative CITE AUTHORITY: 20-1-7(30); 20-5-22

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 58CSR35

TITLE OF RULE BEING PROPOSED: Rules and Conditions Upon Which Oil And Gas Operators May Access State
Forests

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 27, 2007 AT 12 Noon ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Kenneth K. Caplinger, Acting Chief

Parks and Recreation Section
Division of Natural Resources

Capitol Complex, Bldg. 3, Room 714
1900 Kanawha Boulevard East

Charleston, WV 25305-0662

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules And Conditions Upon Which Oil And Gas Operators May Access State Forests

Type of Rule: Legislative Interpretive Procedural

Agency: Division of Natural Resources, Parks and Recreation Section

Address: Capitol Complex, Bldg. 3, Room 714
1900 Kanawha Boulevard East
Charleston, WV 25305-0662

Phone Number: 558-2764 Email: robertbeanblossom@wvdnr.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The fiscal impact of the proposed emergency rules will have minimal impact upon the agency. It is estimated that it will cost no more than \$2,000 next fiscal year to cover the cost of training and travel for the state forest superintendents.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "--")	Next Increase/Decrease (use "--")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	2,000.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	2,000.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: Rules And Conditions Upon Which Oil And Gas Operators May Access State Fore

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: 6/26/07

Signature of Agency Head or Authorized Representative



58CSR35

**TITLE 58
LEGISLATIVE RULE
DIVISION OF NATURAL RESOURCES**

**SERIES 35
RULES FOR CONDITIONS UPON WHICH OIL AND GAS OPERATORS MAY
ACCESS STATE FORESTS**

SUMMARY

The West Virginia Legislature passed legislation in 2007 for the addition of a new section relating to providing notice of new road construction and road maintenance for access to gas and oil wells in state forests; requiring a public comment period; establishing notice criteria; and requiring the Director of the Division of Natural Resources to propose legislative and emergency rules.

58CSR35

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TITLE 58
LEGISLATIVE RULE
DIVISION OF NATURAL RESOURCES

DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY OF STATE

SERIES 35
RULES FOR CONDITIONS UPON WHICH OIL AND GAS OPERATORS
MAY ACCESS STATE FORESTS

§58-35-1. General.

1.1 Scope. -- This legislative rule governs the access to all state forests by operators seeking to drill for and produce oil and gas. This rule recognizes that the rights of the State as surface owner when the minerals are owned by others are governed by the terms of the severance deeds or leases, and by the common law "fairly necessary" doctrine as tempered by the "contemplation of the parties" doctrine. However, this rule recognizes that state forests are unique publicly owned lands that are an important resource for silvicultural and scientific research; developed and undeveloped outdoor recreation; propagation of forest trees, fish and wildlife; wildlife and fisheries management; aesthetic preservation; hunting and fishing; timber production; and demonstration of state-of-the-art forestry management and therefore should be managed on a multiple-use basis. This uniqueness results in a different result when balancing the operator's and surface owner's rights under the law. This balancing is not limited or otherwise controlled by the laws and rules of the Department of Environmental Protection, and its Office of Oil and Gas in particular. Their purpose, which is separate from the rights the state has as a surface owner upon which this rule is based, is to protect the public interest generally regarding groundwater and other subsurface pollution, waste of oil and gas resources, and soil erosion and sediment control generally.

1.2. Authority. -- W. Va. Code §20-1-7(30) and §20-5-22.

1.3. Filing Date. -- June 27, 2007

1.4. Effective Date. -- _____

§58-35-2. Publication Notice.

2.1 The publication required by W. Va. Code §20-5-22(a) to appear in a qualified newspaper at least sixty (60) days prior to submitting an application for a well work permit shall include:

- 2.1.1. The name of the state forest;
- 2.1.2. The county in which the proposed drilling or other work will take place;
- 2.1.3. The name and address of the operator; and
- 2.1.4. The name and address of the mineral owner.
- 2.1.5. If the mineral owner is not the State:

- 2.1.5.a. The book and page where the most recent deed conveying or reserving the mineral interest lease is recorded;

- 2.1.5.b. The book and page where the lease granting the right to do the well work is recorded; or

- 2.1.5.c. The book and page where the latest transfer of the lease is recorded, if any.

- 2.1.6. The target formation name and depth;

- 2.1.7. The proposed possible well locations shown by G.P.S. coordinates in compliance with requirements of the Office of Oil and Gas G.P.S. locations, on a topographic map, and described in relation to particular topographical features and distances from existing wells;

- 2.1.8. The proposed possible use of existing roads for access to the proposed possible well sites; and

- 2.1.9. The locations of proposed possible new access roads shown on a topographical map.

- 2.2. The notice shall state that the Division of Natural Resources will accept public comments prior to the party's application to the Department of Environmental Protection for a drilling permit and shall give a postal address and an email address where the public may file comments;

- 2.3. A copy of the notice shall be sent to the Director of the Division of Natural Resources, the Division of Forestry, and the state forest superintendent:

- 2.3.1. Director hereinafter referred to shall mean the Director of the Division of Natural Resources;

- 2.4. The Director shall post the notice on the agency's web site, and email notice of the availability of the notice on the web site, and the publication newspaper and date, to every

person or entity that has requested such notice and provided an active email address within fourteen (14) days;

2.5. The notice provided is good for six (6) months. A well work permit may not be issued for well work required to be the subject of a notice pursuant to this subsection more than six (6) months after the date of publication; and

2.6. The provisions of this subsection may not be waived except the provision of the immediately preceding subdivision may be waived by the Director for sixty (60) additional days.

§58-35-3. Notice of New Road Construction.

3.1. The written notice of new oil and gas road construction required by §20-5-22(b) to be provided to the Director, the Division of Forestry, and the state forest superintendent forty-five (45) days before the application for the well work permit is filed shall include:

3.1.1. A topographical map showing the proposed road location;

3.1.2. The proposed soil erosion and sediment control plan for the road required by the Office of Oil and Gas.

3.2. Written notice may be by fax, hand delivery, or first class mail, return receipt requested;

3.3. The Director shall post the notice on the agency's web site and email notice of the availability of the notice on the web site, to every person or entity that has requested such notice and provided an active email address within 14 days; and

3.4. The provisions of this section may not be waived.

§58-35-4. Notice of Maintenance.

4.1. The notice of maintenance of access roads required by §20-5-22(b) to be provided to the Director of the Division of Natural Resources, the Director of the Division of Forestry, and the state forest superintendent shall include:

4.1.1. The maintenance to be done;

4.1.2. The equipment to be used;

4.1.3. The name of the entity or individual doing the maintenance;

4.1.4. The address and telephone number of the entity or individual to be doing the maintenance;

- 4.1.5. The cell phone number of at least one person who will be present to do the maintenance;
 - 4.1.6. The plan or the instructions given to the persons operating the machinery and supervising the operation of the machinery;
 - 4.1.7. The date the maintenance will begin. If that dates changes, five (5) days notice must be given again; and
 - 4.1.8. The number of hours or days the expected maintenance will take place.
- 4.2. The notice may be given:
- 4.2.1. By fax, sent and received at least five (5) days prior to entry;
 - 4.2.2. By hand delivery, received at least five (5) days prior to entry;
 - 4.2.3. By email or similar electronic communication, the receipt of which is acknowledged by the state forest superintendent five (5) days prior to delivery; or
 - 4.2.4. By actual telephone communication with the person to receive the notice or their agent authorized to receive these communications (not an answering machine).
- 4.3. The Director shall post this notice on the agency's web site and email that notice to every person or entity that has requested such notice and provided an active email address within five (5) days;
- 4.4. The provisions of this section may be waived by the Director in the event of an emergency affecting public safety or health or an emergency threatening imminent danger to a forest.

§58-35-5. Conditions for Access.

- 5.1. Further conditions for access to state forests as authorized by W. Va. Code §20-5-22 are set out below. The conditions set out below generally augment or replace those set out in West Virginia Erosion and Sediment Control Field Manual (Manual) of the West Virginia Office of Oil and Gas, Department of Environmental Protection, as authorized by W. Va. Code §22-6-6(d).
- 5.2. Gates that are locked closed to the public shall remain locked at all times.
 - 5.2.1. After well work is completed, all keys that the state forest superintendent may have supplied to the operator or the operators' agents must be returned to the state forest superintendent by the operator. Thereafter, the operator must obtain

the key from the state forest superintendent to get through gates that are closed to the public.

5.2.2. While well work is in progress, the state forest superintendent may sign out keys to named individuals. Those keys may not be duplicated.

5.2.3. During well work when frequent access or access for possible emergency services is an issue, the operator will be expected to have a key holding attendant at the gate to allow vehicles in and out.

5.2.4. The operator shall reimburse the State for any losses or expenses due to failure to keep a gate locked, including without limitation:

5.2.4.a. Any state property lost or damaged;

5.2.4.b. Damage done to land, flora, and fauna as a result of an unlocked gate;

5.2.4.c. Locksmith and metal working for the repair or replacement of locks, keys, and metal working of gates; and

5.2.4.d. All newly constructed roads will be gated by the operator. All gates will be maintained and constructed according to specifications as established by the Director.

5.2.5. Except for bona fide emergencies the construction and maintenance of all wells and roads will be restricted to the period beginning August 1 and ending October 31. The Director may require that operations be suspended during periods of inclement weather.

§58-35-6. Conditions of Access -- Introduction.

6.1. In addition to the authority set out in the introduction to the Manual, from time-to-time, require additional best management practices not discussed there, the Division of Natural Resources may for state forests require additional practices not set out here.

§58-35-7. Conditions for access -- Planning.

7.1. The conditions set out below are in addition to and supplement the provisions of Section 1., Planning, of the Manual.

7.2. The provision in the preamble to Section 1, Planning, regarding the operator meeting with the landowners is mandatory as provided in this rule.

- 7.3. In addition to the features to identify in Section 1.A.5, identify the following in order to avoid damage to state forest resources or interference with state forest uses:
 - 7.3.1. Trails;
 - 7.3.2. Archeological sites;
 - 7.3.3. Picnic and other developed facilities; and
 - 7.3.4. Overlooks and their viewsheds;
 - 7.3.5. Agencies, schools, and research organizations that use the state forest and their current and proposed usages of the forest for research and education that are known to the state forest superintendent;
 - 7.3.6. Any reference streams designated or used by other agencies known to the state forest superintendent; and
 - 7.3.7. The Director may require a well drilling location or new road construction to be moved if the same adversely impacts recreation use, natural resources, or other values.
- 7.4. In addition to the identification of significant features set out in Section I.A.5., the operator must check the Division of Natural Resources list of species that are endangered, threatened, “of concern”, or rare to see if that list identifies any of them as being located in the area proposed to be disturbed. The operator must also check with the state forest superintendent and with any other resources known to the state forest superintendent for known locations of those plant and animal resources. If the Division of Natural Resources listing, information from the state forest superintendent, or if public comments on the proposed locations identifies locations of those species in the area intended to be disturbed, and the plant is identified or the plant community is verified by a qualified biologist then the operator must relocate the land disturbance, or mitigate the loss in another place that an independent botanist determines is likely to succeed.
- 7.5. In determining the need for sediment controls, the Manual is a starting point, but difficult soil and other conditions may require more structures and other work.
- 7.6. In determining surface water control in Section 1.A.7, note surface water flow that will intersect possible road and site locations that will increase water on the road or site and require extra control, and take into consideration that cuts may cause groundwater to come on the road or site increasing flow and requiring extra controls.

- 7.7. In order to reduce the area impacted on roads that will be gated to the public, unless environmental conditions dictate otherwise or unless waived by the Director, roads at 7% slope or less shall be sloped with appropriate drainage control.
- 7.8. In determining revegetation needs and other requirements, this rule recognizes that state forests are unique lands for biological study, preservation, and recreation.

§58-35-8. Conditions for Access -- Construction.

- 8.1. The conditions set out below are in addition to and supplement the provision of Section II, Construction, of the Manual.
- 8.2. The maximum grade limitation, Section II.A.1.a(1), does not apply to state forests. The final center line grade of the road must be 10% or less, with three exceptions set out below. Otherwise, limitations on gradient may not be waived by the Office of Oil and Gas or by the state forest.
 - 8.2.1. Final center line gradients not exceeding 15% are permissible for distances up to 200 feet.
 - 8.2.2. The 10% gradient may be exceeded for the purpose of installing broad based dips as provided elsewhere in this rule.
 - 8.2.3. The Director may waive these requirements if necessary to allow the use of a pre-existing road.
- 8.3. The stacking and piling of timber shall be done pursuant to Section II.A.
- 8.4. The clearing of woody material back from the roadway far enough to allow entrance of sunlight and wind with the goal of assisting in accelerating drying of the road surface which is given consideration in Manual Section II.A.1.b(2) (commonly called daylighting) is prohibited.
- 8.5. Regarding the requirements for road surface stabilization in Section II.A.1.b(3), it is recognized that the second paragraph of the introductory language to Section II of the Manual states that some of the standards for structures may not be used during the actual drilling operations, when a large amount of heavy equipment traffic is occurring, but rather will be utilized during the reclamation phase.
 - 8.5.1. The exception set out immediately above applies only to water bars and cross drains, and to temporary vegetation of roads and sites.
 - 8.5.2. Additional structures or practices may be required by the Director during

actual drilling operations as set out in this rule.

8.5.3. Road stabilization with gravel and fiber mats is required on slopes greater than 10%. This requirement is not necessary if the average center line slope of a section is greater than 10%, but slopes up to 14% are used to allow for properly constructed broad-based dips.

8.5.4. Road stabilization with gravel and fiber mats is required where the road will remain wet at times other than after rainfall.

8.5.5. Where roads will be or become muddy or rutted during actual drilling operations, particularly during wet seasons, the Director can require one or more of the following during actual drilling operations:

8.5.5.a. Graveling with limestone or graveling with sandstone on roads that will generally be open to public access;

8.5.5.b. Graveling with sandstone on roads that will generally be gated to the public; and

8.5.5.c. Siltfencing and straw bales and other sediment and runoff controls along affected roadways and sites.

8.5.5.d. The Director shall require the method that is best consistent with the planned use of the road that provides the least permanent disruption to the forest.

8.6. Care must be taken to increase drainage ditch capacities in Section II.A.2.a(2) for water running off adjacent slopes and water seeping out of side slopes created when the road or site was or is excavated.

8.7. The clearing of trees and brush specified in Section II.A.2.b(2) shall be minimized.

8.8. Cross drains and water bars described in Section II.A.3 shall not be used where a broad based dip described in Section II.A.4 can be installed.

8.9. The minimum spacing of broad based dips shall be 60% of that set out in Table II-5.

8.10. Instead of the spacing of culverts as set out in Table II-7, the following shall apply:

<u>Road Grade Percentage (%)</u>	<u>Culvert Spacing (feet)</u>
2-10	200

12

150

14

100

- 8.11. The spacing of cross drains/water bars, broad-based dips, and culverts set forth in Tables II.4, II.5, and II.7 are starting points. Where water coming from surface run-off, subsurface water brought to the surface by excavation, etc., or where soil conditions or surrounding vegetative conditions will increase the water, or soil, then closer spacing shall be used.
- 8.12. In addition to the requirements of Section II.A.6.b(7), adequate sediment control, and in the case of culvert outlets, riprap, shall be provided at all erosion and sediment control outfalls and culvert outlets.

§58-35-9. Conditions for Access -- Reclamation.

- 9.1. The conditions set out below are in addition to and supplement the provision of Section III, Reclamation, of the Manual.
- 9.2. Bulldozer tracking up and down slopes as provided in Section III.A.6 is not permissible for seed bed preparation. Where tracking is used for compaction of slopes before preparation of seed bed, the seed bed must still be prepared with respreading of banked topsoil, discing, etc., as provided in Conditions for Access -
- Revegetation.
- 9.3. The regrading required by Section III B.1. need not be done if the current grade is acceptable and vegetation is occurring.
- 9.4. Consider planting or replanting native trees on side slopes.
- 9.5. Reclamation for disturbed areas created due to well maintenance, work-over, etc. shall be reclaimed in accordance with the Manual and this rule.

§58-35-10. Conditions for Access -- Revegetation.

- 10.1. The conditions set out below are in addition to and supplement the provision of Section IV., Revegetation, of the Manual.
- 10.2. The adjustment and modification of the standards in the Manual provided in Section IV.1. must have the prior and documented approval of the Director of the Division of Natural Resources in addition to the Office of Oil and Gas before they are applied to state forest property.
- 10.3. Seed bed preparation as provided Section IV.B.2 may be used for temporary seeding. For seed bed preparation for permanent seeding the seed bed must be

loosened by discing on the contour, a root rake or sub-soil tiller. In the alternative, the original top soil may be banked and spread loosely without discing, raking, or tilling if it is not compacted.

10.4. The seed mixtures for temporary seeding in Manual Section IV.C.1 are approved for use in the state forests.

10.4.1. Regardless of vegetative cover, temporary seed mixtures are not best for wildlife and should not be carried through the restoration process. If a temporary seed mix is used, it should be disced under during restoration and reseeded with the recommended permanent mix. Under no circumstances should KY31 fescue be planted.

10.5. Instead of the seed mixtures for permanent seeding in Manual Section IV.C.2.c, one of the following seed mixtures shall be used and verified prior to planting:

10.5.1. Wildlife Seeding Recommendations For Forest Roads;

Seed Name	Rate (lbs/acre)
Red Top	2
Ladino Clover	4*
White Dutch Clover	4*
Mammoth Red Clover	5*
Birdsfoot Trefoil	10*
If using a hydroseeder, add: Switch Grass	2
*Seed must be inoculated with fresh species specific inoculate.	

Nurse Crop (Pick only one)	Rate (lbs/acre)
Oats	10 (Spring)
Winter Wheat	10 (Late Fall)
Rye	10 (Fall)

10.5.3. Cut banks, fill banks, and level areas that are abandoned from future use may in addition be reclaimed with tree plantings.

10.6. Only straw, not hay, may be used.

§58-35-11. Conditions for Access -- Maintenance.

- 11.1. The conditions set out below are in addition to and supplement the provision of Section I, Maintenance, of the Manual.
- 11.2. The requirement in Section V.A.1 that all access roads and well sites are to be maintained throughout the life of the well must be strictly observed. Culverts, road ditches, broad-based dips, and diversion ditches must be maintained in proper working order. Whenever the soil is disturbed on any well road by well-related activity, it will be revegetated and otherwise reclaimed according to the Manual and this rule.
- 11.3. The seed mixtures in the previous section on revegetation will be used rather than those described in Manual, Section V.A.2.
- 11.4. Where ruts develop in the road for any reason, blading the road level to fill in the ruts is not acceptable maintenance practice, particularly where this scrapes off vegetation. Water bars and cross drains need to be maintained, and if previous structures are insufficient, new control features, rock, or fiber mats are to be added.
- 11.5. Where road slope is such that vegetation cannot be maintained or ruts persist, rock, and if necessary, fiber matting must be used.
- 11.6. Where broad-based dips, water bars, and culverts prove to be insufficiently spaced, new structures must be added. Until a culvert can be installed, hardened cross drains may be used temporarily.
- 11.7. Where locations in the road do not dry up after rains, the road must be maintained by adding rock, and if that does not prevent puddling, fiber matting, and rock.