

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

Do Not Mark In This Box

2008 APR -3 PM 2:27

Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: Department of Commerce, Division of Natural Resources TITLE NUMBER: 58

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 58CSR35

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

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) HB4255

SECTION 64-10-3(d), PASSED ON March 7, 2008

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: May 1, 2008


Authorized Signature

58CSR35

FILED
2008 APR -3 PM 2:26

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

**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 "fairly necessary" common law 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.

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. -- May 1, 2008

58-35-2 Definitions.

For the purposes of this part the following terms, respectively, shall mean:

2.1. Director. The Director of the Division of Natural Resources, or his or her designee;

2.2. Manual. The West Virginia Erosion and Sediment Control Field Manual of the West Virginia Office of Oil and Gas, Department of Environmental Protection, as authorized by W. Va. Code §22-6-6(d).

2.3. Operations. All functions, work, and activities in connection with drilling, exploration, development, or processing of oil or gas resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the rules in this series.

2.4. Operator. A person conducting or proposing to conduct operations.

2.5. Person. Any individual, partnership, corporation, association, or other legal entity.

2.6. Plan. The erosion and sediment control plan submitted with an operator's permit application to the West Virginia Office of Oil and Gas, West Virginia Department of Environmental Protection, as part of the permitting process.

§58-35-3. Publication Notice.

3.1 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:

3.1.a. The name of the state forest;

3.1.b. The county where the proposed drilling or other work will take place;

3.1.c. The name and address of the operator; and

3.1.d. The name and address of the mineral owner.

3.1.e. If the mineral owner is not the State:

3.1.e.1. The book and page where the most recent deed conveying or reserving the mineral interest lease is recorded;

3.1.e.2. The book and page where the lease granting the right to do the well work is recorded; or

3.1.e.3. The book and page where the latest transfer of the lease is recorded, if any.

3.1.f. The target formation name and depth;

3.1.g. 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;

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

3.1.i. The locations of proposed possible new access roads shown on a topographical map.

3.2. 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;

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

3.4. 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;

3.5. 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

3.6. 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.

§58-35-4. Notice of New Road Construction.

4.1. 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:

4.1.a. A topographical map showing the proposed road location;

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

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

4.3. 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

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

§58-35-5. Notice of Maintenance.

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

5.1.a. The maintenance to be done;

5.1.b. The equipment to be used;

5.1.c. The name of the entity or individual doing the maintenance;

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

5.1.e. The plan or the instructions given to the persons operating the machinery and supervising the operation of the machinery;

5.1.f. The date the maintenance will begin. If that date changes, the Director shall be contacted regarding the date of the rescheduled maintenance; and

5.1.g. The number of hours or days the expected maintenance will take place.

5.2. The notice may be given:

5.2.a. By fax, sent and received at least five (5) days prior to entry;

5.2.b. By hand delivery, received at least five (5) days prior to entry;

5.2.c. By email or similar electronic communication, the receipt of which is acknowledged by the Director five (5) days prior to entry into the forest; or

5.2.d. By actual telephone communication with the person to receive the notice or their agent authorized to receive these communications (not an answering machine).

5.3. The cell phone number of at least one person who will be present during the maintenance must be provided to the Director, but shall not be disseminated to the public;

5.4 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;

5.5. The provisions of this section do not apply in the event of an emergency affecting public safety or health or an emergency threatening imminent danger to a forest, but notice shall be provided to the Director as soon as feasible.

58-35-6. Planning and Waivers.

6.1. The permit application, including the erosion and sediment control plan, submitted to the West Virginia Office of Oil and Gas, West Virginia Department of Environmental Protection, as part of the permitting process conducted by the operator shall comply with the provisions of this rule, and shall form the basic plan from which the provisions of this rule shall be implemented.

6.2. The Director may request a meeting for the purpose of discussing the plan and any modifications to the plan, which shall be in writing, as permitted by these rules, and the following shall be considered:

6.2.a. In addition to the features to identify in Manual, Section 1.A.5, the Director shall identify the following and request any appropriate modifications that have not already been made in order to avoid damage to state forest resources or interference with state forest uses:

6.2.a.1. Trails;

6.2.a.2. Archeological sites;

6.2.a.3. Picnic and other developed facilities;

6.2.a.4. Overlooks and their viewsheds;

6.2.a.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;

6.2.a.6. Any reference streams designated or used by other agencies; and

6.2.a.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.

6.2.b. In addition to the identification of significant features set out in Manual, 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 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 a qualified botanist determines is likely to succeed.

6.2.c. 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 be requested by the Director.

6.2.d.. In determining surface water control in Manual, Section 1.A.7, the Director must 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, considering that cuts may cause groundwater to come on the road or site increasing flow and requiring extra controls.

6.2.e. 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.

6.2.f. In determining revegetation needs and other requirements, these guidelines recognizes that state forests are unique lands for biological study, preservation, and recreation.

6.2.g. If the operator fails to meet with the Director within a time deemed reasonable by the Director to discuss the plan, the Director may order that the operator suspend operations.

6.3. The operator may request a meeting with the Director for the purpose of discussing the plan and any waivers to the plan as permitted by these rules. At any time, the operator may file a written request with the Director for the approval of a waiver of a requirement as permitted by this rule. A request for a waiver shall include:

6.3.a. The name and legal mailing address of the operators (and claimants if they are not the operators) and their lessees, assigns, or designees; and

6.3.b. Information sufficient to describe or identify the basis for the requested waiver including the type of operations proposed and how they would be conducted.

6.4. The Director shall analyze the request, considering the economics of the operation along with the other factors in determining the reasonableness of the request, and notify the operator the request was approved or disapproved within twenty-four hours for an operations waiver and ten days for a planning waiver.

6.5 Written modifications, waiver requests, waiver approvals and waiver denials shall be posted on the website of the Division of Natural Resources.

6.6. Waivers granted by the Director as permitted by this rule shall be documented in writing and distributed to the state forest superintendent and the operator in the field.

58-35-7. Inspections and penalties.

7.1. The Division of Natural Resources shall periodically inspect operations to determine if the operator is complying with these rules and an approved plan of operations.

7.2. Violations of this rule shall result in penalties and fines being assessed pursuant to W.Va. Code §20-7-9.

58-35-8. Requirements for environmental protection.

All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on the State Forest surface resources, including the following requirements:

8.1. Roads. Road construction shall conform to the guidelines contained in Appendix A to this rule.

8.2. Reclamation. Reclamation shall conform to the guidelines contained in Appendix B to this rule.

58-35-9 Maintenance.

9.1. Existing and new access roads and well sites are to be maintained throughout the life of the well. 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.

9.2. Maintenance shall conform to the guidelines contained in Appendix C to this rule.

58-35-10 Suspension of operations as a result of inclement weather.

The Director may require that operations other than actual drilling be suspended during periods of inclement weather.

58-35-11 Access.

11.1. Gates that are locked and closed to the public shall remain locked at all times.

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

11.2.a. Any state property lost or damaged;

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

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

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

APPENDIX A
Road Construction Guidelines.

1. The maximum grade limitation, Manual, 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.
 - A. Final center line gradients not exceeding 15% are permissible for distances up to 200 feet.
 - B. The 10% gradient may be exceeded for the purpose of installing broad based dips as provided elsewhere in this rule.
 - C. The Director may waive these requirements if necessary to allow the use of a pre-existing road or in the case of exceptional environmental concerns.
2. The stacking and piling of timber shall be done pursuant to directions by the Director.
3. 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 unless waived by the Director in consultation with the Department of Environmental Protection.
4. Regarding the requirements for road surface stabilization in Manual, 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.
 - A. The exception set out immediately above applies only to water bars and cross drains, and to temporary vegetation of roads and sites.
 - B. Additional structures or practices may be required by the Director during actual drilling operations as set out in these guidelines.
 - C. Road stabilization with gravel and/or fiber mats is required on slopes greater than 10% on existing roads. This requirement is not necessary if the average center line slope of a section is less than 10%, but slopes up to 14% may be used to allow for properly constructed broad-based dips.
 - D. Road stabilization with gravel and/or fiber mats is required where the road will remain wet at times other than after rainfall.

- E. Where roads will be or become muddy or rutted during actual drilling operations, particularly during wet seasons, the Director may require one or more of the following during actual drilling operations that are consistent with the planned use of the road and provide the least permanent disruption to the forest:
 - i. Graveling with limestone or graveling with sandstone on roads that will generally be open to public access;
 - ii. Graveling with sandstone on roads that will generally be gated to the public; and
 - iii. Siltfencing and straw bales and other sediment and runoff controls along affected roadways and sites.
- 5. Care must be taken to increase drainage ditch capacities in Manual, 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.
- 6. The clearing of trees and brush specified in Manual, Section II.A.2.b(2) shall be minimized.
- 7. Cross drains and water bars described in Manual, Section II.A.3 shall not be used where a broad based dip described in Manual, Section II.A.4 can be installed.
- 8. 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

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

APPENDIX B
Reclamation Guidelines.

1. General:

- A. Bulldozer tracking up and down slopes as provided in Manual, Section III.A.6, is not permitted for seed bed preparation unless approved by the Director. Where tracking is used for compaction of slopes before preparation of seed bed, the seed bed must be prepared with respreading of banked topsoil and discing as provided in Section 2 this appendix.
- B. The regrading required by Manual, Section III B.1, need not be done if the current grade is acceptable and vegetation is occurring.
- C. Native trees on side slopes shall be considered for planting or replanting.
- D. Reclamation for disturbed areas created due to well maintenance and work-over shall be reclaimed in accordance with the Manual and this rule.

2. Revegetation.

- A. The adjustment and modification of the standards in the Manual, Section IV.A.1, must have the prior and documented approval of the Director in addition to the Office of Oil and Gas before they are applied to state forest property.
- B. Seed bed preparation as provided Manual, 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.
- C. The seed mixtures for temporary seeding in Manual, Section IV.C.1 are approved for use in the state forests. 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 planted by hand or hydroseeding, it should be disced under during restoration and reseeded with the recommended permanent mix. KY31 fescue is prohibited.
- D. 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 by hand or hydroseeding:

i. 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)

Planting Notes:

1. Preferred planting dates are March 15 through June 1 and August 15 through November 15. Planting outside of these dates may result in an unsuccessful planting.
2. Unless soil samples are taken and analyzed, 10-20-20 fertilizer and lime should be applied at 400 lbs and 3 tons per acre respectively.
3. To ensure appropriate soil moisture, straw mulch should be blown on at 1.5-2 tons per acre.
4. Because this mix requires little mowing, the cost savings can be redirected towards the addition of lime in later years.

ii. Monongahela National Forest, Native Mix for Rights-of-Way; and

Common Name	Scientific Name	Rate (lb/acre)	Percent
-------------	-----------------	----------------	---------

Little Bluestem	<i>Schizachyrium scoparium/Andropogon scoparius</i>		20%
Canada Wild Rye	<i>Elymus canadensis</i>		35%
Switch Grass	<i>Panicum virgatum</i>		20%
Partridge Pea	<i>Chamaecrista fasciculata/Cassia fasciculata</i>		25%
		Apply above mix: 15 lbs per acre	
Oats (Nurse Crop for Spring- September 1)	<i>Avena sativa</i>		
Annual Ryegrass (Nurse crop if planting after September 1)	<i>Lolium multiflorum</i>		
		Apply one (1) nurse crop: 30 lbs per acre	
		TOTAL SEEDING: 45 lbs per acre	

- iii. Cut banks, fill banks, and level areas that are abandoned from future use may be reclaimed with tree plantings.
- iv. The use of native plants for revegetation may be required by the Director of the Division of Natural Resources, if in his opinion, seed mixtures are affective, readily available, and cost effective compared to the non-native mixes specifically shown herein.

E. Straw, not hay, may only be used.

APPENDIX C
Maintenance Guidelines.

1. The seed mixtures in the previous section on revegetation must be used rather than those described in Manual, Section V.B.2.
2. Where ruts develop in the road for any reason, blading the road level to fill in the ruts is not acceptable maintenance practice, particularly when vegetation is scraped unless waived by the Director. 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.
3. Where road slope is such that vegetation cannot be maintained or ruts persist, rock, and if necessary, fiber matting must be used.
4. 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.
5. Where locations in the road do not dry up after rains, the road must be maintained by adding rock and/or fiber matting.