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Secretary of State
State of West Virginia

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

January 30, 2009

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: OFFICE OF OIL AND GAS

RULE: AMENDMENT, 35CSR4, OIL AND GAS WELLS AND OTHER WELLS

DATE FILED AS AN EMERGENCY RULE: JANUARY 27, 2009

DECISION NO. 1-09

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **APPROVED**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script that reads "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD -09)

AGENCY: OFFICE OF OIL AND GAS
RULE: AMENDMENT, 35CSR4, OIL AND GAS WELLS AND OTHER WELLS

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par. 1 The Office of Oil and Gas (Office) has filed the above amendments to an existing rule as an emergency rule.

par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].

par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Office filed this emergency rule with supporting documents with the Secretary of State January 27, 2009 and with the LRMRC January 27, 2009.

par. 7 It is the determination of the Secretary of State that the Office has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- W. Va. Code §22-6-2 reads:

§22-6-2. Secretary -- Powers and duties generally; department records open to public; inspectors.(a) The Secretary shall have as his or her duty the supervision of the execution and enforcement of matters related to oil and gas set out in this article and in articles eight and nine of this chapter.

(b) The Secretary is authorized to propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code necessary to effectuate the above stated purposes.

(c) The Secretary shall have full charge of the oil and gas matters set out in this article and in articles eight and nine of this chapter. In addition to all other powers and duties conferred upon him or her, the Secretary shall have the power and duty to:

(1) Supervise and direct the activities of the office of oil and gas and see that the purposes set forth in subsections (a) and (b) of this section are carried out;

(2) Employ a supervising oil and gas inspector and oil and gas inspectors;

(3) Supervise and direct such oil and gas inspectors and supervising inspector in the performance of their duties;

(4) Suspend for good cause any oil and gas inspector or supervising inspector without compensation for a period not exceeding thirty days in any calendar year;

(5) Prepare report forms to be used by oil and gas inspectors or the supervising inspector in making their findings, orders and notices, upon inspections made in accordance with this article and articles seven, eight, nine and ten of this chapter;

(6) Employ a hearing officer and such clerks, stenographers and other employees, as may be necessary to carry out his or her duties and the purposes of the office of oil and gas and fix their compensation;

(7) Hear and determine applications made by owners, well operators and coal operators for the annulment or revision of orders made by oil and gas inspectors or the supervising inspector, and to make inspections, in accordance with the provisions of this article and articles eight and nine of this chapter;

(8) Cause a properly indexed permanent and public record to be kept of all inspections made by the Secretary or by oil and gas inspectors or the supervising inspector;

(9) Conduct such research and studies as the Secretary shall deem necessary to aid in protecting the health and safety of persons employed within or at potential or existing oil or gas production fields within this state, to improve drilling and production methods and to provide for the more efficient protection and preservation of oil and gas-bearing rock strata and property used in connection therewith;

(10) Collect a permit fee of four hundred dollars for each permit application filed other than an application for a deep well or a coalbed methane well; and collect a permit fee of six hundred fifty dollars for each permit application filed for a deep well: Provided, That no permit application fee shall be required when an application is submitted solely for the plugging or replugging of a well, or to modify an existing application for which the operator previously has submitted a permit fee under this section. All application fees required hereunder shall be in lieu of and not in addition to any fees imposed under article eleven of this chapter relating to discharges

of stormwater but shall be in addition to any other fees required by the provisions of this article: Provided, however, That upon a final determination by the United States Environmental Protection Agency regarding the scope of the exemption under section 402(l)(2) of the federal Clean Water Act (33 U.S.C. 1342(l)(2)), which determination requires a "national pollutant discharge elimination system" permit for stormwater discharges from the oil and gas operations described therein, any permit fees for stormwater permits required under article eleven of this chapter for such operations shall not exceed one hundred dollars.

(11) Perform all other duties which are expressly imposed upon the Secretary by the provisions of this chapter;

(12) Perform all duties as the permit issuing authority for the state in all matters pertaining to the exploration, development, production, storage and recovery of this state's oil and gas;

(13) Adopt rules with respect to the issuance, denial, retention, suspension or revocation of permits, authorizations and requirements of this chapter, which rules shall assure that the rules, permits and authorizations issued by the Secretary are adequate to satisfy the purposes of this article and articles seven, eight, nine and ten of this chapter particularly with respect to the consolidation of the various state and federal programs which place permitting requirements on the exploration, development, production, storage and recovery of this state's oil and gas: Provided, That notwithstanding any provisions of this article and articles seven, eight, nine and ten of this chapter to the contrary, the environmental quality board shall have the sole authority pursuant to section three, article three, chapter twenty-two-b to promulgate rules setting standards of water quality applicable to waters of the state; and

(14) Perform such acts as may be necessary or appropriate to secure to this state the benefits of federal legislation establishing programs relating to the exploration, development, production, storage and recovery of this state's oil and gas, which programs are assumable by the state.

(d) The Secretary shall have authority to visit and inspect any well or well site and any other oil or gas facility in this state and may call for the assistance of any oil and gas inspector or inspectors or supervising inspector whenever such assistance is necessary in the inspection of any such well or well site or any other oil or gas facility. Similarly, all oil and gas inspectors and the supervising inspector shall have authority to visit and inspect any well or well site and any other oil or gas facility in this state. Any well operator, coal operator operating coal seams beneath the tract of land, or the coal seam owner or lessee, if any, if said owner or lessee is not yet operating said coal seams beneath said tract of land may request the Secretary to have an immediate inspection made. The operator or owner of every well or well site or any other oil or gas facility shall cooperate with the Secretary, all oil and gas inspectors and the supervising inspector in making inspections or obtaining information.

(e) Oil and gas inspectors shall devote their full time and undivided attention to the performance of their duties, and they shall be responsible for the inspection of all wells or well sites or other oil or gas facilities in their respective districts as often as may be required in the performance of their duties.

(f) All records of the office shall be open to the public.

par. 9 It is the determination of the Secretary of State that the Office has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency – W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Office are as follows:

This rule is promulgated consistent with the powers and duties of the Director of the Office of Miners' Health, Safety and Training with regard to mine safety.

This Rule is promulgated by the Director in response to a Rule promulgated by the Board of Coal Mine Health and Safety ("Board") on the same topic which has been enjoined by an order of the Circuit Court of Kanawha County and a portion of said rule is under challenge in U.S. District Court for the Southern District of W. Va.

FACTS

1. A fatal accident resulting from a dozer cutting into an active gas line occurred on Wednesday, February 1, 2006, at the Elk Run Coal Company, Inc., Black Castle No. 4 mine in Boone County, West Virginia.
2. Mr. Paul K. Moss, a fifty eight year old master dozer operator, suffered fatal burn injuries at approximately 2.10 p.m. on February 1, 2006.
3. The bulldozer was positioned parallel to the 16 inch unmarked gas gathering line and facing slightly downhill toward the bench of the Clarion coal seam level at the time of the accident.

4. The lower left corner bit on the bulldozer blade was the direct cause of the rupture in the 16 inch low-pressure, high volume, actively charged gas gathering line.
5. Mining maps and inspection of the accident site revealed that the 16 inch gas gathering line was unmarked for a distance of approximately 2,000 feet in both directions from where the accident occurred.
6. There are hundreds, if not thousands, of miles of unmarked gas pipelines crossing property being actively mined for coal throughout West Virginia.
7. In many instances, coal companies or operators are not aware of the location of these unmarked gas pipelines.
8. Unmarked gas pipelines located on property being actively mined for coal pose a significant danger to the health and safety of coal miners working in close proximity to the unmarked gas lines.
9. The promulgation W. Va. Code §56-5-1, et seq. by the Director will assist in preventing the recurrence of the specific type of fatality that occurred 2006.
10. In order to fulfill his obligations under W. Va. Code §22A- 1 - 1, et seq., and to prevent the reoccurrence. of a fatality similar to Fatal 16-2006, the Board of Coal Mine Health and Safety adopted W. Va. Code §36-27-14, which has been enjoined by an order of the Circuit Court of Kanawha County.
11. The currently enjoined rule raises questions as to the Director's enforcement authority which are resolved in the proposed emergency rule and the related rule being propounded by the Department of Environmental Protection which has jurisdiction over oil and gas wells and pipelines.
12. The Board has promulgated an amended version of §36-27-14 that went into effect on January 1,2009. The Circuit Court of Kanawha County stayed the enforcement of those rules effective January 27,2009.
13. Absent the filing and approval of this emergency rule and the related Division of Environmental Protection rule there will be no enforceable rule in place to protect coal miner health and safety.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare" and "to prevent substantial harm to the public interest."

par. 14 This decision shall be cited as Emergency Rule Decision 1-09 or ERD 1-09 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Office of Oil and Gas, the Attorney General and the Legislative Rule Making Review Committee.



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