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(Plus all the volunteer  
help we can get)

November 20, 2000

**NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE**


**AGENCY: OFFICE OF OIL & GAS**

**RULE: NEW RULE, SERIES 7, CERTIFICATION OF GAS WELLS**

**DATE FILED AS AN EMERGENCY RULE: OCTOBER 23, 2000**

**DECISION NO. 19-00**

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.

  
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**KEN HECHLER**  
Secretary of State

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OFFICE OF THE SECRETARY OF STATE

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## EMERGENCY RULE DECISION (ERD 19-00)

AGENCY: OFFICE OF OIL & GAS  
RULE: NEW RULE, SERIES 7, CERTIFICATION OF GAS WELLS  
FILED AS AN EMERGENCY RULE: OCTOBER 23, 2000

- par. 1 The Division of Environmental Protection, Office of Oil & Gas (O&G) has filed the above new 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 O&G filed this emergency rule with supporting documents with the Secretary of State October 23, 2000 and with the LRMRC October 23, 2000.

par. 7 It is the determination of the Secretary of State that the O&G 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 in part:

*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 director are adequate to satisfy the purposes of this article & articles 7, 8, 9 & 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 & gas.*

par. 9 It is the determination of the Secretary of State that the O&G 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 O&G are as follows:

This emergency rule is being proposed in order for WV natural gas producers to submit applications to the O&G for approval to be certified for Section 29 tax credits as provided for in the US Federal Energy Regulatory Commission (FERC), 18CFR Parts 270, 375 & 381: Order No 616. The FERC Order became effective on September 25, 2000 and applications must first be reviewed and approved by O&G before they are submitted to the US FERC.

The FERC has recently approved insurance of a Final Rule (FERC Order 616, issued July 14, 2000, published in the Federal Register Volume 65, No. 144, pages 45,859 - 45,873) reinstating regulations for review of well category determinations under Section 503 of the Natural Gas Policy Act. The regulations allow certain designated formations of natural gas production to qualify for tax credits under Section 29 of the Internal Revenue Code (IRC), provided that the gas is sold before January 1, 2003.

In background, the Section 29 Credit was established in 1980, in part, to encourage

drilling of high cost gas formations in order to expand the United States natural gas resource base. For a gas well to receive the credit, the Section 503 procedure required an initial state or federal agency to determine that the well meets all qualifications as outlined in the IRC. The state or federal agency then sent notice to the FERC of the determination along with supporting documents.

FERC has the final authority for each well determination along with the power to reverse or remand the determination of complete or erroneous. If FERC did nothing, the determination became final. On January 1, 1993, Section 503 was repealed and FERC only reviewed determinations dated prior to this date. By early 1994, FERC arbitrarily stopped reviewing well determinations altogether leaving many otherwise qualified natural gas wells "uncertified" for lack of final FERC approval.

The issue was litigated in 1999 (True Oil Co. v. Commissioner, 120 F2d 1294 (10th Cir. 1999)). The True Oil decision involved a well being drilled in 1980 where the owner could have, but did not obtain a Section 503 well determination for the well. The court held that Section 29 of the IRC required that there be a Section 503 FERC determination for a well in order for the tax credit to be taken.

At the insistence of a coalition of producers who have an inventory of qualified but "uncertified" natural gas wells, the FERC finally agreed to reopen the Section 503 process. After consultations with the Independent Oil and Gas Association of West Virginia (IOGA\_WV), it appears that there are numerous West Virginia exploration and production companies who have an inventory of qualified wells which, having been previously unable to obtain Section 29 credit certifications, are currently being denied the tax credits they deserve.

While FERC has reinstated regulations for review of well category determination under Section 503 of the Natural Gas Policy Act, it did so under the assumption that it be for a limited time. FERC Order 616 does not reference a date certain which FERC will cease to certify Section 29 Credit applications, however FERC understands that there is a relatively small number of wells which failed to be properly certified. FERC does not expect this process to take more than a few months.

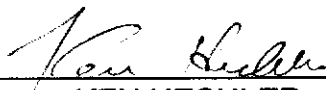
It is, therefore, a threat to the financial well-being of the WV operations of these uncertified natural gas wells not to process their Section 29 credit certification applications as promptly as possible after the FERC rulemaking takes effect on September 25, 2000.

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 the public welfare"

par. 14

This decision shall be cited as Emergency Rule Decision 19-00 or ERD 19-00 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Environmental Protection, Office of Oil & Gas, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER  
Secretary of State

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OFFICE OF THE SECRETARY OF STATE