

Form #7

FILED

2504 MAY 17 P 4: 12

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

Gregory A. Smith
Authorized Signature

EMERGENCY RULE QUESTIONNAIRE

DATE: _____

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV State Board of Examiners of Land Surveyors

P.O. Box 390, Flatwoods, WV 26621-0390

304-765-0315

EMERGENCY RULE TITLE: Title 23, Series 1; Rules and Minimum Standards for Practice of Land Surveying in West Virginia

1. Date of filing _____
2. Statutory authority for promulgating emergency rule:

WV Code 30-13A-4 (c) authorizes emergency rules and WV Code 30-13A-5(13) (SB 460, enrolled, pending Governor's signature): "Define, by legislative rule, the fees charged under the provisions of this article."
3. Date of filing of proposed legislative rule: _____
4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? The emergency rule amends the current rule and restores the language as previously approved by the Legislature in 2002 (SB 2001).
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.

The Board's primary mission is to protect the public by regulating the practice of surveying. New legislation (SB 460) was enacted but fees are to be set by legislative rule. Since licenses must be renewed by 6/30/04, an emergency rule is needed to set the renewal and late fees for the upcoming annual renewal period (7/1/04-6/30/05). A proposed legislative rule will be submitted for the 2005 legislative session to define the fees charged under the bill's provisions.

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 regulation and time limit established therein.

N/A

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

Without adequate funding, the public will be more at risk because the Board cannot regulate unethical licensed surveyors or unlicensed practices. Several complaints are at the final disciplinary stage and a cooperative effort with the Attorney General's office is needed for completion; funding must be available to proceed with these cases, as well as other probable court proceedings. Additionally, reduced funding would severely hamper other activities such as examining new candidates for licensure, issuing certificates of authorization, license verifications, etc.

West Virginia State Board of Examiners of Land Surveyors

Summary of Proposed Revisions, Title 23, Series 1

This rule provides the rules and minimum standards for the practice of land surveying in West Virginia. As a result of an inconsistency, the Legislature amended the rule in SB 399 to make it consistent with what is now the expiring language of WV Code 30-13A. With the passage and approval by the Governor of legislation (SB 460) to amend and reenact §30-13A, the Board is seeking to restore the Series 1 rule relating to license renewal and late fees to that approved by the Legislature in 2002 (SB 2001). That rule set the annual license renewal fee at a "not to exceed \$100" limit. The license renewal fee would continue at \$80, and the late fee would continue at \$16 per month (20% of the \$80 license renewal fee) for the July 1, 2004 to June 30, 2005 renewal year. No increases in license renewal or late fees are proposed.

West Virginia State Board of Examiners of Land Surveyors
Proposed Emergency Rule Amendment
Series 23, Series 1: Rules and Minimum Standards for Practice of Land Surveying
in West Virginia

During the 2002 and 2003 legislative sessions, the West Virginia Association of Land Surveyors, in consultation with this Board, sought amendments to the overall surveying legislation (§30-13A), including an increase in license renewal fees. Although enabling legislation was not amended as requested, the Legislature in a special session in 2002 approved SB 2001 which included the Board's Series 1 rule that, among other things, set the annual license renewal fee at a "not to exceed \$100" limit. At the time, the increase was needed because of broadened Board responsibilities, including a significant increase in the number of complaints from the public, mandatory continuing education requirements, as well as additional Chapter 30 requirements.

In its 2003 session, the Legislature opted to delay action on an amendatory bill because the Board's authorizing legislation was due to sunset in 2004 and a regulatory board evaluation was planned later in 2003. Alternatively, a Senate bill (SB 423) was passed by the Senate to allow the Board to set fees by rule; it was amended by the House on the last day of the 2003 session but the Senate refused to concur, thus resulting in the bill's failure in the waning hours of the session.

In its regulatory board evaluation for this Board (PE03-15-290, 9/03), the Legislative Auditor opined that the licensing of land surveyors is necessary to protect the public interest. Further, the Legislative Auditor recommended "that the Board seek an amendment through the Legislature to amend the Code to allow for an increase in license renewal fees."

Legislation (SB 460), which would amend and reenact §30-13A as well as restructure and continue the Board, was passed by the Legislature on March 13, 2004. The bill, which would be effective 90 days from passage, was also approved by the Governor on April 6. However, the legislation does not set a license renewal fee; it states instead that fees be defined by legislative rule.

Concurrently, the bundled legislative rule bill (SB 399) was amended to make the rule and the license fees consistent with the current law that will subsequently be superseded by SB 460.

Therefore, the Board seeks an emergency rule to increase the renewal fee to not exceed \$100 from the present code limitation of \$40 (imposed by SB 399) and return it to the language approved in the 2002 legislative session (not to exceed \$100 for the annual license renewal fee). The Board also seeks to restore the late fees to 20% of the annual renewal fee for each month that the renewal fee is not paid, from the present code limitation of \$1 per month. The fee for the next renewal period, July 1, 2004 to June 30, 2005, would continue at \$80. The resulting late fee (at 20% of \$80) would continue to be \$16 month. The Board's current budget of \$160,000 (a 7.5% reduction from FY 2003), is predicated on the \$80 license renewal fee. The Board had no way to predict the outcome of the legislative session or to propose legislative rules in advance of the upcoming license renewal period (July 1, 2004 to June 30, 2005 renewal year). Further, WV

Code mandates that renewal notices be mailed 30 days prior to license expiration on June 30, thus further constraining time.

Without proper funding, the Board cannot fulfill its mission to protect the public. Several complaints have culminated to the point where representation from the Attorney General's office will be required for the disciplinary/formal hearing process; funds will be required for completion of these actions, as well as several others relating to unlicensed practices. Since the majority of the Board's operating funds are supplied by the license renewal fees, it is imperative that the Board's revenues be maintained through receipt of \$80 for each renewing licensee.

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APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 23-1 Rules and Minimum Standards for Practice of Land Surveying in WV

Type of Rule: _____ Legislative _____ Interpretive _____ Procedural

Agency: West Virginia State Board of Examiners of Land Surveyors

Address: P.O. Box 390
Flatwoods, WV 26621-0390

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	N/A	N/A	N/A	N/A	N/A
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of Above Estimates:

None

3. Objectives of These Rules:

The objective is to maintain revenues in order to assure that the Board can fulfill its mission to protect the public by regulating the surveying profession.

Rule Title: 23.1 Rules and Minimum Standards for Practice of Land Surveying in WV

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

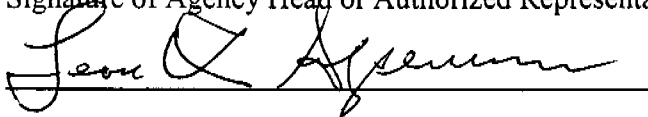
None

C. Economic Impact on Citizens/Public at Large.

None

Date: April 14, 2004

Signature of Agency Head or Authorized Representative:

A handwritten signature in black ink, appearing to read "John Q. Agnew", is written over a horizontal line.

**TITLE 23
LEGISLATIVE RULE
BOARD OF EXAMINERS OF LAND SURVEYORS**

FILED

2004 MAY 17 P 4: 12

**SERIES 1
RULES AND MINIMUM STANDARDS FOR PRACTICE
OF LAND SURVEYING IN WEST VIRGINIA**

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

§23-1-1. General.

1.1. Scope. -- This rule is promulgated by the State Board of Examiners of Land Surveyors to govern licensing of Land Surveyors in West Virginia.

1.2. Authority. -- W. Va. Code §§30-1-7a and 30-13A-4(a).

1.3. Filing Date. --

1.4. Effective Date. --

§23-1-2. General Purpose.

2.1. This Rule with the Minimum Standards for the practice of land surveying is promulgated for the purpose of administration and enforcement of W. Va. Code §§30-1-1 et seq. and 30-13A-1 et seq.

§23-1-3. Definitions

3.1. Terms Defined -- As used in this rule, the following terms have the following meanings unless the context or subject matter clearly requires a different interpretation:

3.1.1. "Felony" means a felony related to the fitness of a land surveyor to engage in the practice of land surveying, including those crimes that have dishonesty as a fundamental and necessary element. Felonies that, upon conviction, constitute grounds for disciplinary action by the Board include, but are not limited to:

3.1.1.a. False swearing or perjury in a court proceeding related to the applicant's practice of land surveying;

3.1.2.b. Felonies involving theft, bribery, embezzlement, forgery, falsification or destruction of records, fraud, or misrepresentation; and

3.1.1.c. Any other felony offense demonstrating a lack of business integrity or business honesty.

3.1.2. "Owner," when used in the context of ownership requirements for firms seeking a certificate of authorization to engage in the practice of land surveying, means a person who owns at least a majority interest of a firm or business entity.

3.1.3. "Professional negligence" means negligence demonstrating a wanton indifference to the interests of the public that caused, or that had a substantial likelihood of causing, serious harm to the public. A civil judgment for malpractice in the practice of land surveying is not conclusive proof that a surveyor is guilty of professional negligence sufficient to support the imposition of professional discipline.

3.1.4. "Willful departure from accepted standards of professional conduct" means:

3.1.4.a. Default on obligations owed to the state in connection with the practice of land surveying, including but not limited to obligations under the West Virginia workers' compensation act, the West Virginia unemployment compensation act, and West Virginia state tax and revenue laws;

3.1.4.b. Willful failure to substantially perform in accordance with the terms of a contract or subcontract, or failure to perform after accepting compensation for professional services;

3.1.4.c. Performance in violation of standards established by law or generally accepted standards for the practice of land surveying amounting to intentionally deficient or grossly negligent performance on a contract; or

3.1.4.d. Any other cause of a serious and compelling nature amounting to knowing and willful misconduct in the practice of land surveying.

§23-1-4. Qualifications Of Applicants For Licenses; Exceptions; Fees; Examinations.

4.1. To be eligible for a license to engage in the practice of land surveying, the applicant shall meet the requirements set forth in W. Va. Code §30-13A-5.

4.2. Any applicant for a license shall submit an application on forms provided by the board. The application shall be verified and shall contain a statement of the applicant's education and experience, the names of five (5) persons for reference (at least three (3) of whom shall be licensees, or persons eligible for a license, or persons authorized in another state or country to engage in the practice of land surveying, who have knowledge of the applicant's work). In support of an applicant's statement of experience, the Board may require designated records and documentation of a land survey made by the applicant. An applicant shall pay to the board with his or her application an examination fee determined by the board that does not exceed the exact cost of the examination or three hundred dollars (\$300.00).

4.3. Examinations shall be held at least once each year at a time and place as determined by the board.

4.4. The scope of the examination and methods of procedure shall be determined by the board. An applicant who fails to pass any parts of the examination for six consecutive times is precluded from taking any section of the examination for two full years, and may be required to obtain additional educational requirements as determined by the board. After the passage of the mandatory two-year period and the completion of any additional educational requirements, the applicant shall file a new application to take the examination as provided in subsection 4.2 of this section. An applicant who fails to pass any parts of the examination fewer than six times may reapply at any time to take the failed parts and shall furnish additional information as requested by the board. Each application shall be accompanied by an examination fee determined by the board, not to exceed the exact cost of the examination or three hundred dollars (\$300).

4.5. An applicant shall first pass the Fundamentals (SIT) portion of the National Council of Examiners for Engineering and Surveying (NCEES) Examination in order to be eligible to take the West Virginia Professional Surveyor's Examination. The Board shall issue a Surveyor-in-Training Certificate to an eligible applicant who passes the Fundamentals (SIT) portion of the NCEES Examination.

4.6. In accordance with the policy of the NCEES, no applicant may be granted access to or review of an NCEES examination or the state-specific West Virginia State Professional Surveyor's Examination.

§23-1-5. Issuance Of License; Notice Of Expiration; Renewal; Renewal Fee; Display; Certificate of Authorization; Professional Limited Liability Company (PLLC).

5.1. Whenever the board finds that an applicant meets all of the requirements for a license to engage in the practice of land surveying, it shall immediately issue the license; otherwise the board shall deny the license. All licenses, whether original or renewal, expire on the thirtieth day of June following the date of issuance or renewal. The secretary-treasurer of the board shall mail to every licensee, at least thirty (30) days prior to the expiration of a license, notice of the expiration date and the amount of the renewal fee. A licensee may renew a license without examination upon application for a renewal on a form prescribed by the board and payment to the board of an annual renewal fee ~~of forty dollars (\$40.00)~~, determined by the board, not to exceed one hundred dollars (\$100.00). If a license is not renewed when due, the fee shall ~~increase one dollar (\$1.00)~~ an amount determined by the Board, not to exceed twenty per cent (20%) of the annual renewal fee for each month or fraction of a month that the renewal fee is not paid, up to a maximum of thirty-six (36) months. No license may be renewed after the failure to renew continues for a period of thirty-six months, but the fact that a license cannot be renewed because of the expiration of a period of thirty-six (36) months shall not prevent a person from making application for a new license. The board may deny any application for renewal for any reason which would justify the denial of an original application for a license. The board shall prescribe the form of licenses for display by the licensee at his or her principal place of practice.

A duplicate license may be issued upon payment of a fee of ten dollars (\$10.00).

5.2. A firm or business entity, including a professional limited liability company, may not engage in, offer to engage in, or hold itself out to the public as being engaged in, the practice of land surveying as defined in W. Va. Code §30-13A-2 without first obtaining a certificate of authorization issued by the Board. No firm shall be issued a certificate without having as its owner or in its employ a licensed professional surveyor. An initial application fee of one hundred dollars (\$100.00), and an annual renewal fee determined by the Board, not to exceed one hundred dollars (\$100.00) is due on or before December 30 of each year. The Board shall develop the application form and the renewal form for the certificate.

5.3. A licensee may apply to the Board for a "retired" or "inactive" professional surveyors' status with the requirements, fees and certificate determined by the Board.

5.4. Professional surveyors who desire to render services as a professional limited liability company shall comply with the provisions of W.Va. Code §30-13A and this rule and W. Va. Code §31B-13-1 et seq. No person may be a member of a professional limited liability company who is not licensed and legally authorized to render such services by this board; copies of the professional surveyor's current license to practice and the company's valid certificate of authorization shall accompany the application with the Secretary of State.

§23-1-6. Accredited Surveying Curricula.

6.1. The Board shall approve survey curricula.

6.2. The Board recognizes the Accreditation Board for Engineering and Technology, Inc. (ABET), as a national accrediting body.

§23-1-7. Unethical Practices.

7.1. In addition to the reasons for suspension or revocation of a license set forth in W. Va. Code §§30-1-8(a) or 30-13A-8(b), any licensee who has committed any of the following unethical practices may be subject to suspension or revocation of a license:

7.2. Signing or affixing a seal to any document prepared by persons who are not employees under supervision of the licensee;

7.3. Accepting, paying, or offering to pay, either directly or indirectly, any gift, bribe, or other consideration to make an improper survey;

7.4. Associating with any survey project known by the licensee to be fraudulent or dishonest in character;

7.5. Failing or refusing to comply with any provision of W. Va. Code §30-13A-1 et seq.

or any rule promulgated by the Board or any order or final decision of the Board. For the purposes of this subsection; (1) if any licensee orders, counsels, encourages, incites, supports, helps, or assists another person to fail or refuse to comply with any such statutory provision, rule, order or final decision; or, (2) after the failure or refusal, if a licensee helps or assists the other person to avoid detection of the failure or refusal, then the licensee is considered to have also failed or refused to comply;

7.6. Knowingly or maliciously disseminating false statements which are intended to result in injury to the reputation of a licensee, to diminish the esteem, respect, goodwill or confidence in which the licensee is held, or to deter third persons from associating or dealing with the licensee;

7.7. Reviewing the work of another land surveyor for the same client, except with the knowledge of the surveyor, or unless the connection of the surveyor with the work has been terminated;

7.8. Failing to respond within thirty (30) days to written communications from the board and to make available any records relevant to an inquiry or complaint about the licensee's professional conduct. The thirty (30) day period begins on the date when the communication was sent by the board by certified mail with return receipt requested to the last known address of the surveyor;

7.9. Using advertising that is false, fraudulent, deceptive, misleading or unlawful; or

7.10. Accepting and undertaking to perform land survey services which the surveyor is not competent to perform without obtaining qualified associates, consultants or employees, or failing to directly supervise the work of subordinates in performing these services.

§23-1-8. Suspension, Revocation or Discipline Relevant to License; Hearings On Denial Of Application; Judicial Review.

8.1. The board may at any time upon its own motion and shall upon the verified written complaint of any person conduct an investigation to determine whether there are any grounds for a disciplinary action relevant to a license issued under the provisions of W. Va. Code §§ 30-1-8 or 30-13A and the rules issued by the board. The board may suspend or revoke any license, may impose a fine not to exceed one thousand dollars (\$1,000.00) per infraction, and may issue letters of reprimand, or may impose any combination of these disciplinary actions, when it finds a licensee has: (a) Been convicted of a felony or a crime involving moral turpitude; (b) Obtained a license by means of fraud or deceit; (c) Been incompetent or guilty of fraud, deceit, professional negligence, wilful departure from accepted standards of professional conduct or other misconduct in the practice of land surveying; or (d) Failed or refused to comply with the provisions of W. Va. Code §30-13A-1 et seq. or any reasonable rule promulgated by the board or any order or final decision of the board. Upon a final decision of the Board finding grounds for any disciplinary action, the Board may assess costs against the licensee for reimbursement of the

costs of investigation, hearings and other expenses relative to the complaint. The Board shall also suspend or revoke any license if it finds the existence of any ground which would justify the denial of an application for such license if application were then being made for it. Any suspension of a license continues for the period specified in the order of suspension. Revocation of a license shall not preclude application for a new license. The Board shall process the application in the same manner, approve or deny the application and issue or refuse the license on the same grounds as any other application for a license is processed, considered and determined, except that any previous suspension and the revocation may be given weight in deciding whether to approve or deny the application and issue or refuse to issue the license as is meet and proper under all the circumstances.

8.2. Whenever the Board denies an application for any original or renewal license or suspends or revokes any license, it shall make and enter an order to that effect and serve a copy on the applicant or licensee, as the case may be, by certified mail, return receipt requested. The order shall state the grounds for the action taken and shall require that any license suspended or revoked by the order shall be returned to the Board by the licensee within twenty (20) days after receipt of the order. Any person adversely affected by any order is entitled to a hearing (as to all issues not excluded from the definition of a "contested case" as set forth in W. Va. Code §29A-1-1 et seq. if, within twenty (20) days after receipt of a copy, the applicant files with the Board a written demand for a hearing. A demand for hearing operates automatically to stay or suspend the execution of any order suspending or revoking a license or denying an application for a renewal license. The Board may require the person demanding the hearing to give reasonable security for costs and if the person does not substantially prevail at the hearing costs shall be assessed against the person and may be collected by an action at law or other proper remedy.

8.3. Any person adversely affected by a decision of the Board rendered after a hearing held in accordance with this rule and the Board's Rule, Disciplinary and Complaint Procedures for Land Surveyors, 23 CSR 3, is entitled to judicial review of the decision. All of the pertinent provisions of W. Va. Code §29A-5-4 apply to and govern judicial review. The judgment of the circuit court is final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of W. Va. Code §29A-6-1. Legal counsel and services for the Board in all appeal proceedings in any circuit court and the supreme court of appeals shall be provided by the attorney general or his or her assistants and in any circuit court by the prosecuting attorney of the county as well, all without additional compensation.

§23-1-9. Competency In Field And Office Techniques.

9.1. A surveyor shall undertake to perform surveying assignments only when qualified by education or experience in the specific technical field of surveying involved.

9.2. A surveyor may accept an assignment requiring education or experience outside of his or her own field of competence, but only to the extent that his or her services are restricted to those phases of the project in which he or she is qualified. All other phases of the project shall be performed by qualified associates, consultants or employees.

9.3. A surveyor shall not affix his or her signature and/or seal to any surveying plan or document dealing with subject matter to which he or she lacks competence by virtue of education or experience, nor to any plan or document not prepared under his or her direct supervisory control.

9.4. In the event a question arises as to the competence of a surveyor to perform a surveying assignment in a specific technical field of surveying which cannot be otherwise resolved to the Board's satisfaction, the Board, either upon request of the surveyor or by its own volition, may require the surveyor to submit to an appropriate examination as determined by the Board.

§23-1-10. Underground Surveys And Maps; specific technical fields.

10.1. Underground surveys and maps shall comply with the requirements in W. Va. Code §22A-2-1.

10.2. For applicants seeking a certificate to engage in underground surveying, the Board may require designated records and documentation of underground surveys to support an applicant's claim of experience. The Board may further require an applicant or a surveyor to submit designated records and documentation of surveys to support a claim to experience in a specific technical field of surveying and mapping. The Board may also require an examination on procedures and knowledge on specific technical fields of surveying and mapping

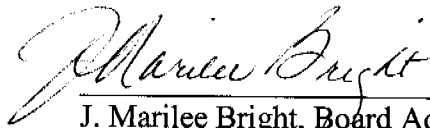
10.3. The Board may require an application and examination fee to cover cost incurred for review, verification and examination of a licensee's qualifications and experience to practice in a specific technical field.

§23-1-11. Licensing of Nonresident Surveyors.

11.1. The Board shall honor the acts of licensing, certification or registration of surveyors by licensing agencies in other states and countries, and shall accordingly license those surveyors upon proper application and payment of fees if the applicant has taken and passed in another jurisdiction all sections of the Professional Surveyor's Examination of the National Council of Examiners for Engineering and Surveying (NCEES), and the requirements to obtain a license or certificate or to become registered in the other state or country are found by the Board to be at least as great as those prescribed by W. Va. Code §30-13A-1 et seq. and by rule of the Board.

11.2. Notwithstanding the provisions of subsection 11.1 of this section, an individual licensed as a professional surveyor in any other state shall take and pass the state-specific West Virginia State Professional Surveyor's Examination as a condition precedent to obtaining a license to engage in the practice of land surveying in this state.

A public hearing was conducted on May 17, 2004, at 11 a.m., at the Best Western Glenville Inn, in Glenville, West Virginia, on the proposed revisions to the Board's Series 1 rule. The hearing was called to order by the Board Chairman, Gregory A. Smith, at 11:02 a.m. No licensee or member of the public appeared between 11:02 and 11:45 a.m., when the public hearing was adjourned. In addition, no written comments were received at the Board office prior to the public hearing. Therefore, the proposed rule was not amended.

A handwritten signature in cursive script, reading "J. Marilee Bright".

J. Marilee Bright, Board Administrator
Monday, May 17, 2004 at 1 p.m.