Office of the Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

Natalie E. Tennant
Secretary of State
State of West Virginia

FILED
2011 AUG 29 PM 12: 34
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Telephone: (304) 558-6000
Toll Free: 1-866-SOS-VOTE
Fax: (304) 558-0900
www.wvsos.com

August 29, 2011

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Environmental Protection - Office of Oil and Gas

RULE: New Rule, 35CSR8, Rules Governing Horizontal Well Development

DATE FILED AS AN EMERGENCY RULE: August 22, 2011

DECISION NO. 12-11

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.

Natalie E. Tennant

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 12-11)

AGENCY: Department of Environmental Protection - Office of Oil and Gas
RULE: New Rule, 35CSR8, Rules Governing Horizontal Well Development
FILED AS AN EMERGENCY RULE: August 22, 2011

par. 1 The Department of Environmental Protection - Office of Oil and Gas (DEP) 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 DEP filed this emergency rule with supporting documents with the Secretary of State August 22, 2011 and with the LRMRC August 22, 2011.

par. 7 It is the determination of the Secretary of State that the DEP 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 §22-1-3 reads:

§22-1-3. Rule making generally; relationship to federal programs.
(a) The director has the power and authority to propose legislative rules for promulgation in accordance with the provisions of article three, chapter twenty-nine-a of this code to carry out and implement the provisions of this chapter and to carry out and implement any other provision of law relating to offices or functions of the division.
(b) The requirements and limitations set forth in this section apply to any rule-making authority granted pursuant to this chapter or chapters twenty-two-b and twenty-two-c of

this code.
(c) Prior to the proposal of any new rule, the director shall consult with the division of environmental protection advisory council and after such consultation, the director may determine that such a rule should be the same in substance as a counterpart federal regulation. If the director determines that the rule should be the same in substance as a counterpart regulation, then to the greatest degree practicable, such proposed rule shall incorporate by reference the counterpart federal regulation. The director shall file, contemporaneously with the proposed rule, a statement setting forth whether the rule is the same in substance as a counterpart federal regulation. If the director determines that the rule should not be the same in substance as a counterpart federal regulation, then the director shall file contemporaneously with the proposed rule, a statement setting forth the differences between the proposed rule and the counterpart federal regulation. In addition, the director shall file a statement setting forth the results of the consultation with the advisory council.
(d) Whenever any existing rule is modified, amended or replaced, the provisions of subsection (c) of this section apply to the proposal of any such modification, amendment or replacement rule.
(e) Notwithstanding the provisions of article three, chapter twenty-nine-a of this code, at least one public hearing shall be held by the division in conjunction with each rule making prior to the expiration of the public comment period for the proposed rules.

par 9. W. Va Code further states in §22-6-2 in part:

(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;

par. 10 It is the determination of the Secretary of State that the DEP has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (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. 12 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. 13 The facts and circumstances as presented by the DEP are as follows:

While there are rules in place regulating the oil and gas industry, at the time those rules were enacted, they did not contemplate the scope, magnitude, and extent of the current developments in the industry, which involve large volume hydraulic fracturing and large area surface disturbance. The rate at which these developments have occurred and are continuing to occur has made it challenging for the State to fulfill its statutory obligation to maintain and protect the environment for our citizens while also fostering and promoting exploration for and development and production of the State's oil and gas resources.

Specifically, this rule is necessary to protect the public's interest in preserving its land and water resources and in giving the citizenry notice of permit applications. With regard to protecting the State's water resources, DEP's data shows that the average horizontal development uses approximately five million (5,000,000) gallons of water per well, although operators have reported using upwards of nine million (9,000,000) gallons of water to fracture a well. DEP proposes this rule to ensure that these water withdrawals and disposals occur in a manner that protects water quality, aquatic life, and uses of the State's waters by requiring a water management plan detailing the methods the well operator will use to protect the quantity and quality of the State's waters and requiring operators to disclose the chemical additives used during the hydraulic fracturing process. The rule also requires enhanced erosion and sediment control plans and site construction plans to protect both land (soil and ecosystems) and water resources by reducing, to the extent practicable, the wearing away of soil into the State's waters or onto contiguous property.

Further, hydraulic fracturing consists of a large volume of water, mixed with sand and other chemical additives, being pumped through well casings at high pressure. This increases the risk of blowouts, fires, and other significant environmental incidents. Moreover, accidental spills of fluids used in the drilling and completion of horizontally drilled/hydraulically fractured wells, improper construction of drilling and production related infrastructure, and other possible environmental incidents - while rare - can have significant, harmful effects on the public, streams and rivers, and wildlife. Therefore, DEP proposes this rule to ensure the health and safety of our citizens by requiring a well site safety plan that addresses specific measures the well operator will take to protect employees on the well site, as well as the general public and the environment. To this end, this rule also requires strengthened casing and cementing standards on horizontally drilled wells in order to reduce the potential for migration of contaminants and to stabilize surface soils in the vicinity of the drilling rig, which provides support during drilling activity.

Finally, this rule proposes a public notice requirement for horizontal wells intended to be drilled in municipal limits. This protects the public's interest in affording notification to the citizens that a horizontal well is proposed to be drilled in their area, which will help ensure that proper protections are in place when a permit is issued.

par. 14 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). . . "to prevent substantial harm to the public interest"

par. 15 This decision shall be cited as Emergency Rule Decision 12-11 or ERD 12-11 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Department of Environmental Protection - Office of Oil and Gas, the Attorney General and the Legislative Rule Making Review Committee.

NATALIE E. TENNANT
Secretary of State

Entered_____

2011 AUG 29 PM 12: 34
SECRETARY OF STATE