(b) The Legislature hereby determines and finds that oil and natural gas found in West Virginia in shallow sands or strata have been produced continuously for more than one hundred years; that oil and gas deposits in such shallow sands or strata have geological and other characteristics different than those found in deep er formations; and that in order to encourage the maximum recovery of oil and gas from all productive formations in this state, it is not in the public interest, with the exception of shallow wells utilized in a secondary recovery program, to enact new statutory provisions relating to the exploration for or production from oil and gas from shallow wells, as defined in section two of this article, but that it is in the public interest to enact new statutory provisions establishing regulatory procedures and principles to be applied to the exploration for or production of oil and gas from deep wells, as defined in said section two.

§22-4A-2. Definitions. — (a) Unless the context in which used clearly requires a different meaning, as used in this article:

(1) "Commission" means the oil and gas conservation commission and "commissioner" means the oil and gas conservation commissioner as provided for in section four of this article;

(2) "Director" means the director of the department of mines as defined in section one, article one of this chapter;

(3) "Deputy Director for Oil and Gas" means the deputy director for oil and gas provided for in section one-a, article four of this chapter;

(4) "Person" means any natural person, corporation, partnership, receiver, trustee, executor, administrator, guardian, fiduciary or other representative of any kind, and includes any government or any political subdivision or any agency thereof;

(5) "Operator" means any owner of the right to develop, operate and produce oil and gas from a pool and to appropriate the oil and gas produced therefrom, either for himself or for himself and others; in the event that there is no oil and gas lease in existence with respect to the tract in question, the owner of the oil and gas rights therein shall be considered as "operator" to the extent of seven eighths of the oil and gas in that portion of the pool underlying the tract owned by such owner, and as "royalty owner" as to one eighth interest in such oil and gas; and in the event the oil is owned separately from the gas, the owner of the substance being produced or sought to be produced from the pool shall be considered as "operator" as to such pool;

(6) "Royalty owner" means any owner of oil and gas in place, or oil and gas rights, to the extent that such owner is not an operator as defined in subdivision (5) of this section;

(7) "Independent Producer" means a person who is actively engaged in the production of oil and gas in West Virginia, but whose gross revenue from such production in West Virginia does not exceed five hundred thousand dollars per year.

(8) "Oil" means natural crude oil or petroleum and other hydrocarbons, regardless of gravity, which are produced at the well in liquid form by ordinary production methods and which are not the result of condensation of gas after it leaves the underground reservoir;

(9) "Gas" means all natural gas and other fluid hydrocarbons not defined as oil in subdivision (8) of this section;

(10) "Pool" means an underground accumulation of petroleum in a single and separate natural reservoir (ordinarily a porous sandstone or limestone). It is characterized by a single natural-pressure system so that production of petroleum from one part of the pool affects the reservoir pressure throughout its extent. A pool is bounded by geologic barriers in all directions, such as geologic structural conditions, impermeable strata, and water in the formations, so that it is effectively separated from any other pools that may be present in the same district or on the same geologic structure;

(11) "Well" means any shaft or hole sunk, drilled, bored or dug into the earth or underground strata for the extraction of oil or gas;

(12) "Shallow well" means any well drilled and completed in a formation above the top of the uppermost member of the "Onondaga Group" or at a depth less than six thousand feet, whichever is shallower;

(13) "Deep well" means any well drilled and completed in a formation at or below the top of the uppermost member of the "Onondaga Group" or at a depth of or greater than six thousand feet, whichever is shallower;

(14) "Drilling unit" means the acreage on which one well may be drilled;

(15) "Waste" means and includes: (a) Physical waste, as that term is generally understood in the oil and gas industry; (b) the locating, drilling, equipping, operating or producing of any oil or gas well in a manner that causes, or tends to cause, a reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations, or that causes or tends to cause unnecessary or excessive surface loss of oil or gas; or (c) the drilling of more deep wells than are reasonably required to recover efficiently and economically the maximum amount of oil and gas from a pool;

(16) "Correlative rights" means the reasonable opportunity of each person entitled thereto to recover and receive without waste the oil and gas in and under his tract or tracts, or the equivalent thereof; and

(17) "Just and equitable share of production" means, as to each person, an amount of oil or gas or both substantially equal to the amount of recoverable oil and gas in that part of a pool underlying his tract or tracts.

(b) Unless the context clearly indicates otherwise, the use of the word "and" and the word "or" shall be interchangeable, as, for example, "oil and gas" shall mean oil or gas or both.

§22-4A-3. Application of article; exclusions. — (a) Except as provided in subsection (b) of this section, the provisions of this article shall apply to all lands located in this state, however owned, including any lands owned or administered by any government or any agency or subdivision thereof, over which the state has jurisdiction under its police power. The provisions of this article are in addition to and not in derogation of or substitution for the provisions of article four of this chapter.

(b) This article shall not apply to or affect:

(1) Shallow wells other than those utilized in secondary recovery program as set forth in section eight of this article.

(2) Any well commenced or completed prior to the effective date of this article, unless such well is, after completion (whether such completion is prior or subsequent to the effective date of this article), (i) deepened subsequent to the effective date of this article to a formation at or below the top of the uppermost member of the "Onondaga Group" or at a depth of or greater than six thousand feet, whichever is shallower or (ii) involved in secondary recovery operations for oil under an order of the commissioner entered pursuant to section eight of this article;

(3) Gas storage operations or any well employed to inject gas into or withdraw gas from a gas storage reservoir or any well employed for storage observation; or

(4) Free gas rights.

(c) The provisions of this article shall not be construed to grant to the commissioner authority or power to:

(1) Limit production or output, or prorate production of any oil or gas well, except as provided in subdivision (6), subsection (a), section seven of this article; or

(2) Fix prices of oil or gas.

§22-4A-4. Oil and gas conservation commissioner and commission; commission membership; qualifications of members; terms of members; vacancies on commission; meetings; compensation and expenses; appointment and qualifications of commissioner; general powers and duties. — (a) There is hereby created the "West Virginia Oil and Gas Conservation Commission" which shall be composed of five members. The director of the department of natural resources and the deputy director for oil and gas shall be members of the commission ex officio. The remaining three members of the commission shall be appointed by the governor, by and with the advice and consent of the Senate. Of the three members appointed by the governor, one shall be an independent producer and at least one shall be a public member not engaged in full-time employment in an activity under the jurisdiction of the public service commission or the federal power commission. As soon as practical after appointment of the members of the commission, the governor shall call a meeting of the commission to be convened at the state capitol for the purpose of organizing and electing a chairman.

(b) The members of the commission appointed by the governor shall be appointed for overlapping terms of six years each, except that the original appointments shall be for terms of two, four and six years, respectively. Each member appointed by the governor shall serve until his successor has been appointed and qualified. Members may be appointed by the governor to serve any number of terms. The members of the commission appointed by the governor, before performing any duty hereunder, shall take and subscribe to the oath required by section five, article four of the constitution of West Virginia. Vacancies in the membership appointed by the governor shall be filled by appointment by him for the unexpired term of the member whose office shall be vacant and such appointment shall be made by the governor within sixty days of the occurrence of such vacancy. Any member appointed by the governor may be removed by the governor in case of incompetency, neglect of duty, gross immorality or malfeasance in office.

(c) The commission shall meet at such times and places as shall be designated by the chairman. The chairman may call a meeting of the commission at any time, and he shall call a meeting of the commission upon the written request of two members or upon the written request of the oil and gas conservation commissioner. Notification of each meeting shall be given in writing to each member by the chairman at least five days in advance of the meeting. Any three members, one of which may be the chairman, shall constitute a quorum for the transaction of any business as herein provided for. A majority of the commission shall be required to determine any issue brought before it.

(d) Each member of the commission appointed by the governor shall receive thirty-five dollars per diem not to exceed one hundred days per calendar year while actually engaged in the performance of his duties as a member of the commission. Each member of the commission shall also be reimbursed for all reasonable and necessary expenses actually incurred in the performance of his duties as a member of the commission.

(e) The commission shall appoint the oil and gas conservation commissioner, fix his salary within available funds, and advise him regarding his duties and authority under this article and consult with him prior to his reaching any final decisions and entering orders hereunder. However, the commissioner has full and final authority under this article with the commission serving in an advisory capacity to him. The commissioner shall possess a degree from an accredited college or university in petroleum engineering or geology and must be a registered professional engineer with particular knowledge and experience in the oil and gas industry.

(f) The oil and gas commissioner is hereby empowered and it shall be his duty to execute and carry out, administer and enforce the provisions of this article in the manner provided herein. Subject to the provisions of section three of this article, the commissioner shall have jurisdiction and authority over all persons and property necessary therefor. The commissioner is authorized to make such investigation of records and facilities as he deems proper. In the event of a conflict between the duty to prevent waste and the duty to protect correlative rights, the commissioner's duty to prevent waste shall be paramount. He shall serve as secretary of the oil and gas conservation commission.

(g) Without limiting his general authority, the commissioner shall have specific authority to:

(1) Regulate the spacing of deep wells;

(2) Make and enforce reasonable rules and regulations and orders reasonably necessary to prevent waste, protect correlative rights, govern the practice and procedure before the commissioner and otherwise administer the provisions of this article;

(3) Issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of any books, records, maps, charts, diagrams and other pertinent documents, and administer oaths and affirmations to such witnesses, whenever, in the judgment of the commissioner, it is necessary to do so for the effective discharge of his duties under the provisions of this article; and

(4) Serve as technical advisor regarding oil and gas to the Legislature, its members and committees, to the deputy director for oil and gas, to the department of natural resources and to any other agency of state government having responsibility related to the oil and gas industry.

§22-4A-5. Rules and regulations; notice requirements. — (a) The commissioner may promulgate such reasonable rules and regulations as he may deem necessary or desirable to implement and make effective the provisions of this article and the powers and authority conferred and the duties imposed upon him under the provisions of this article and for securing uniformity of procedure in the administration of the provisions of article three, chapter twenty-nine-a of this code.

(b) Notwithstanding the provisions of section two, article seven, chapter twenty-nine-a of this code, any notice required under the provisions of this article shall be given at the direction of the commissioner by (1) personal or substituted service and if such cannot be had then by (2) certified United States mail, addressed, postage prepaid, to the last known mailing address, if any, of the person being served, with the direction that the same be delivered to addressee only, return receipt requested, and if there be no known mailing address or if the notice is not so delivered then by (3) publication of such notice as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county or counties wherein any land which may be affected by such order is situate. In addition, the commissioner shall mail a copy of such notice all other persons who have specified to the commissioner an address to which all such notices may be mailed. The notice shall issue in the name of the state, shall be signed by the commissioner, shall specify the style and number of the proceeding, the time and place of any hearing, and shall briefly state the purpose of the proceeding. Personal or substituted service and proof thereof may be made by an officer authorized to serve process or by an agent of the commissioner in the same manner as is now provided by the "West Virginia Rules of Civil Procedure for Trial Courts of Record" for service of process in civil actions in the various courts of this state. A certified copy of any pooling order entered under the provisions of this article shall be presented by the commissioner to the clerk of the county court of each county wherein all or any portion of the pooled tract is located, for recordation in the record book of such county in which oil and gas leases are normally recorded. Such recording of such order from the time noted thereon by such clerk shall be notice of the order to all persons.

§22-4A-6. Waste of oil or gas prohibited. — Waste of oil or gas is hereby prohibited.

§22-4A-7. Drilling units and the pooling of interests in drilling units in connection with deep oil or gas wells. — (a) Drilling units.

(1) After one deep well has been drilled establishing a pool, an application to establish drilling units may be filed with the commissioner by the operator of such discovery deep well or by the operator of any lands directly and immediately affected by the drilling of such discovery deep well, or subsequent deep wells in said pool, and the commissioner shall promptly schedule a hearing on said application. Each application shall contain such information as the commissioner may prescribe by reasonable rules and regulations promulgated by him in accordance with the provisions of section five of this article.

(2) Upon the filing of an application to establish drilling units, notice of the hearing shall be given by the commissioner. Each notice shall specify the date, time and place of hearing, describe the area for which a spacing order is to be entered, and contain such other information as is essential to the giving of proper notice.

(3) On the date specified in such notice, the commissioner shall hold a public hearing to determine the area to be included in his spacing order and the acreage to be contained by each drilling unit, the shape thereof, and the minimum distance from the outside boundary of the unit at which a deep well may be drilled thereon. At such hearing the commissioner shall consider:

(i) The surface topography and property lines of the lands underlaid by the pool to be included in such order;

(ii) The plan of deep well spacing then being employed or proposed in such pool for such lands;

(iii) The depth at which production from said pool has been found;

(iv) The nature and character of the producing formation' or formations, and whether the substance produced or sought to be produced is gas or oil;

(v) The maximum area which may be drained efficiently and economically by one deep well; and

(vi) Any other available geological or scientific data pertaining to said pool which may be of probative value to the commissioner in determining the proper deep well drilling units therefor.

To carry out the purposes of this article, the commissioner shall, upon proper application, notice and hearing as herein provided, and if satisfied after such hearing that drilling units should be established, enter an order establishing drilling units of a specified and approximately uniform size and shape for each pool subject to the provisions of this section.

(4) When it is determined that an oil or gas pool underlies an area for which a spacing order is to be entered, the commissioner shall include in his order all lands determined or believed to be underlaid by such pool and exclude all other lands.

(5) No drilling unit established by the commissioner shall be smaller than the maximum area which can be drained efficiently and economically by one deep well: **Provided**, That if at the time of a hearing to establish drilling units, there is not sufficient evidence from which to determine the area which can be drained efficiently and economically by one deep well, the commissioner may enter an order establishing temporary drilling units for the orderly development of the pool pending the obtaining of information necessary to determine the ultimate spacing for such pool.

(6) An order establishing drilling units shall specify the minimum distance from the nearest outside boundary of the drilling unit at which a deep well may be drilled. The minimum distance provided shall be the same in all drilling units established under said order with necessary exceptions for deep wells drilled or being drilled at the time of the filing of the application. If the commissioner finds that a deep well to be drilled at or more than the specified minimum distance from the boundary of a drilling unit would not be likely to produce in paying quantities or will encounter surface conditions which would substantially add to the burden or hazard of drilling such deep well, or that a location within the area permitted by the order is prohibited by the lawful order of any state agency or court, the commissioner is authorized after notice and hearing to make an order permitting the deep well to be drilled at a location within the minimum distance prescribed by the spacing order. In granting exceptions to the spacing order, the commissioner may restrict the production from any such deep well so that each person entitled thereto in such drilling unit shall not produce or receive more than his just and equitable share of the production.

(7) An order establishing drilling units for a pool shall cover all lands determined or believed to be underlaid by such pool, and may be modified by the commissioner, from time to time, to include additional lands determined to be underlaid by such pool or to exclude lands determined not to be underlaid by such pool. An order establishing drilling units may be modified by the commissioner to permit the drilling of additional deep wells on a reasonably uniform pattern at a uniform minimum distance from the nearest unit boundary as provided above. Any order modifying a prior order shall be made only after application by an interested operator and notice and hearing as prescribed herein for the original order. However, drilling units established by order shall not exceed one hundred sixty acres for an oil well or six hundred forty acres for a gas well.

(8) After the date of the notice of hearing called to establish drilling units, no additional deep well shall be commenced for production from the pool until the order establishing drilling units has been made, unless the commencement of the deep well is authorized by order of the commissioner.

(9) The commissioner shall, within forty-five days after the filing of an application to establish drilling units for a pool subject to the provisions of this section, either enter an order establishing such drilling units or dismiss the application.

(10) As part of the order establishing a drilling unit, the commissioner shall prescribe just and reasonable terms and conditions upon which the royalty interests in the unit shall, in the absence of voluntary agreement, be deemed to be integrated without the necessity of a subsequent order integrating the royalty interests.

(b) Pooling of interests in drilling units.

(1) When two or more separately owned tracts are embraced within a drilling unit, or when there are separately owned interests in all or a part of a drilling unit, the interested persons may pool their tracts or interests for the development and operation of the drilling unit. In the absence of voluntary pooling and upon application of any operator having an interest in the drilling unit, and after notice and hearing, the commissioner shall enter an order pooling all tracts or interests in the drilling unit for the development and operation thereof and for sharing production therefrom. Each such pooling order shall be upon terms and conditions which are just and reasonable. In no event shall drilling be initiated on the tract of an unleased royalty owner without his written consent.

(2) All operations, including, but not limited to, the commencement, drilling or operation of a deep well, upon any portion of a drilling unit for which a pooling order has been entered, shall be deemed for all purposes the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof. That portion of the production allocated to a separately owned tract included in a drilling unit shall, when produced, be deemed for all purposes to have been actually produced from such tract by a deep well drilled thereon.

(3) Any pooling order under the provisions of this subsection (b) shall authorize the drilling and operation of a deep well for the production of oil or gas from the pooled acreage; shall designate the operator to drill and operate such deep well; shall prescribe the time and manner in which all owners of operating interests in the pooled tracts or portions of tracts may elect to participate therein; shall provide that all reasonable costs and expenses of drilling, completing, equipping, operating, plugging and abandoning such deep well shall be borne, and all production therefrom shared, by all owners of operating interests in proportion to the net oil or gas acreage in the pooled tracts owned or under lease to each owner; and shall make provisions for payment of all reasonable costs thereof, including a reasonable charge for supervision and for interest on past-due accounts, by all those who elect to participate therein.

(4) No drilling or operation of a deep well for the production of oil or gas shall be permitted upon or within any tract of land unless the operator shall have first obtained the written consent and easement therefor, duly acknowledged and placed of record in the office of the county clerk, for valuable consideration of all owners of the surface of such tract of land, which consent shall describe with reasonable certainty, the location upon such tract, of the location of such proposed deep well, a certified copy of which consent and easement shall be submitted by the operator to the commission.

(5) Upon request, any such pooling order shall provide just and equitable alternatives whereby an owner of an operating interest who does not elect to participate in the risk and cost of the drilling of a deep well may elect:

(i) Option 1. To surrender his interest or a portion thereof to the participating owners on a reasonable basis and for a reasonable consideration, which, if not agreed upon, shall be determined by the commissioner; or

(ii) Option 2. To participate in the drilling of the deep well on a limited or carried basis on terms and conditions which, if not agreed upon, shall be determined by the commissioner to be just and reasonable.

(6) In the event a nonparticipating owner elects Option 2, and an owner of any operating interest in any portion of the pooled tract shall drill and operate, or pay the costs of drilling and operating, a deep well for the benefit of such nonparticipating owner as provided in the pooling order, then such operating owner shall be entitled to the share of production from the tracts or portions thereof pooled accruing to the interest of such nonparticipating owner, exclusive of any royalty or overriding royalty reserved in any leases, assignments thereof or agreements relating thereto, of such tracts or portions thereof, or exclusive of one eighth of

the production attributable to all unleased tracts or portions thereof, until the market value of such nonparticipating owner's share of the production, exclusive of such royalty, overriding royalty or one eighth of production, equals double the share of such costs payable by or charged to the interest of such nonparticipating owner.

(7) If a dispute shall arise as to the costs of drilling and operating a deep well, the commissioner shall determine and apportion the costs, within ninety days from the date of written notification to the commissioner of the existence of such dispute.

§22-4A-8. Secondary recovery of oil; unit operations. — Upon the application of any operator in a pool productive of oil and after notice and hearing, the commissioner may enter an order requiring the unit operation of such pool in connection with a program of secondary recovery of oil, and providing for the unitization of separately owned tracts and interests within such pool, but only after finding that: (1) The order is reasonably necessary for the prevention of waste and the drilling of unnecessary deep wells; (2) the proposed plan of secondary recovery will increase the ultimate recovery of oil from the pool to such an extent that the proposed secondary recovery operation will be economically feasible; (3) the production of oil from the unitized pool can be allocated in such a manner as to insure the recovery by all operators of their just and equitable share of such production; and (4) the operators of at least three fourths of the acreage (calculating partial interests on a pro rata basis for operator interests on any parcel owned in common) and the royalty owners of at least three fourths of the acreage (calculating partial interests on a pro rata basis for royalty interests on any parcel owned in common) in such pool have approved the plan and terms of unit operation to be specified by the commissioner in its order, such approval to be evidenced by a written contract setting forth the terms of the unit operation and executed by said operators and said royalty owners, and filed with the commissioner on or before the day set for hearing. The order requiring such unit operation shall designate one operator in the pool as unit operator and shall also make provision for the proportionate allocation to all operators of the costs and expenses of the unit operation, including reasonable charges for supervision and interest on past-due accounts, which allocation shall be in the same proportion that the separately owned tracts share in the production of oil from the unit. In the absence of an agreement entered into by the operators and filed with the commissioner providing for sharing the costs of capital investment in wells and physical equipment, and intangible drilling costs, the commissioner shall provide by order for the sharing of such costs in the same proportion as the costs and expenses of the unit operation: **Provided,** That any operator who has not consented to the unitization shall not be required to contribute to the costs or expenses of the unit operation, or to the cost of capital investment in wells and physical equipment, and intangible drilling costs, except out of the proceeds from the sale of the production accruing to the interest of such operator: **Provided, however,** That no credit to the well costs shall be adjusted on the basis of less than the average well costs within the unitized area: **Provided further,** That no order entered under the provisions of this section requiring unit operation shall vary or alter any of the terms of any contract entered into by operators and royaltyowners under the provisions of this section.

§22-4A-9. Validity of unit agreements. No agreement between or among operators, lessees or other owners of oil or gas rights in oil and gas properties, entered into pursuant to the provisions of this article or with a view to or for the purpose of bringing about the unitized development or operation of such properties, shall be held to violate the statutory or common law of this state prohibiting monopolies or acts, arrangements, contracts, combinations or conspiracies in restraint of trade or commerce.

§22-4A-10. Hearing procedures. — (a) Upon receipt of an application for an order of the commissioner for which a hearing is required by the provisions of this article, the commissioner shall set a time and place for such hearing not less than ten and not more than thirty days thereafter. Any scheduled hearing may be continued by the commissioner upon his own motion or for good cause shown by any party to the hearing. All interested parties shall be entitled to be heard at any hearing conducted under the provisions of this article.

(b) All of the pertinent provisions of article five, chapter twenty-nine-a of this code shall apply to and govern the hearing and the administrative procedures in connection with and following such hearing, with like effect as if the provisions of said article five were set forth in extenso in this subsection.

(c) Any such hearing shall be conducted by the commissioner. For the purpose of conducting any such hearing, the commissioner shall have the power and authority to issue subpoenas and subpoenas duces tecum which shall be issued and served within the time, for the fees and shall be enforced, as specified in section one, article five of said chapter twenty-nine-a, and all of the said section one provisions dealing with subpoenas and subpoenas duces tecum shall apply to subpoenas and subpoenas duces tecum issued for the purpose of a hearing hereunder.

(d) At any such hearing any interested person may represent himself or be represented by an attorney at law admitted to practice before any circuit court of this state. Upon request by the commissioner, he shall be represented at such hearing by the attorney general or his assistants without additional compensation. The commissioner, with the written approval of the attorney general, may employ special counsel to represent the commissioner at any such hearing.

(e) After any such hearing and consideration of all of the testimony, evidence and record in the case, the commissioner shall render his decision in writing. The written decision of the commissioner shall be accompanied by findings of fact and conclusions of law as specified in section three, article five, chapter twenty-nine-a of this code, and a copy of such decision and accompanying findings and conclusions shall be served by certified mail, return receipt requested, upon all interested persons and their attorney of record, if any.

(f) The decision of the commissioner shall be final unless reversed, vacated or modified upon judicial review thereof in accordance with the provisions of section eleven of this article.

§22-4A-11. Judicial review; appeal to supreme court of appeals; legal representation for commissioner. — (a) Any person adversely affected by a decision of the commissioner rendered after a hearing held in accordance with the provisions of section ten of this article shall be entitled to judicial review thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this code shall apply to and govern such judicial review with like effect as if the provisions of said section four were set forth in extenso in this section.

(b) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of section one, article six, chapter twenty-nine-a of this code, except that notwithstanding the provisions of said section one the petition seeking such review must be filed with said supreme court of appeals within thirty days from the date of entry of the judgment of the circuit court.

(c) Legal counsel and services for the commissioner in all appeal proceedings in any circuit court and the supreme court of appeals shall be provided by the attorney general or his assistants and in any circuit court by the prosecuting attorney of the county as well, all without additional compensation. The commissioner, with the written approval of the attorney general, may employ special counsel to represent the commissioner at any such appeal proceedings.

§22-4A-12. Injunctive relief. — (a) Whenever it appears to the commissioner that any person has been or is violating or is about to violate any provision of this article, any reasonable rule and regulation promulgated by the commissioner hereunder or any order or final decision of the commissioner, the commissioner may apply in the name of the state to the circuit court of the county in which the violations or any part thereof has occurred, is occurring or is about to occur, or the judge thereof in vacation, for an injunction against such person and any other persons who have been, are or are about to be, involved in any practices, acts or omissions, so in violation, enjoining such person or persons from any such violation or violations. Such application may be made and prosecuted to conclusion whether or not any such violation or violations have resulted or shall result in prosecution or conviction under the provisions of section fourteen of this article.

(b) Upon application by the commissioner, the circuit courts of this state may by mandatory or prohibitory injunction compel compliance with the provisions of this article, the reasonable rules and regulations promulgated by the commissioner hereunder and all orders and final decisions of the commissioner. The court may issue a temporary injunction in any case pending a decision on the merits of any application filed. Any other section of this code to the contrary notwithstanding, the state shall not be required to furnish bond or other undertaking as a prerequisite to obtaining mandatory, prohibitory or temporary injunctive relief under the provisions of this article.

(c) The judgment of the circuit court upon any application permitted by the provisions of this section shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals. Any such appeal shall be sought in the manner and within the time provided by law for appeals from circuit courts in other civil actions.

(d) The commissioner shall be represented in all such proceedings by the attorney general or his assistants and in such proceedings in the circuit courts by the prosecuting attorneys of the several counties as well, all without additional compensation. The commissioner, with the written approval of the attorney general, may employ special counsel to represent the commissioner in any such proceedings.

(e) If the commissioner shall refuse or fail to apply for an injunction to enjoin a violation or threatened violation of any provision of this article, any reasonable rule and regulation promulgated by the commissioner hereunder or any order or final decision of the commissioner, within ten days after receipt of a written request to do so by any person who is or will be adversely affected by such violation or threatened violation, the person making such request may apply in his own behalf for an injunction to enjoin such violation or threatened violation in any court in which the commissioner might have brought suit. The commissioner shall be made a party defendant in such application in addition to the person or persons violating or threatening to violate any provision of this article, any reasonable rule and regulation promulgated by the commissioner hereunder or any order or final decision of the commissioner. The application shall proceed and injunctive relief may be granted without bond or other undertaking in the same manner as if the application had been made by the commissioner.

§22-4A-13. Special oil and gas conservation tax. — Owners of leases on oil or gas for the exploration, development or production of oil or natural gas shall pay to the commission a special oil and gas conservation tax of three cents for each acre under lease, excluding from the tax the first twenty-five thousand acres. The commission shall deposit with the treasurer of the state of West Virginia, to the credit of the special oil and gas conservation fund, all taxes collected hereunder. The special oil and gas conservation fund shall be a special fund and shall be administered by the commission for the sole purpose of carrying out all costs necessary to carry out the provisions of this article. This tax shall be paid as provided herein annually on or before the first day of July, one thousand nine hundred seventy-two, and on or before the first day of July in each succeeding year.

§22-4A-14. Penalties. — (a) Any person who violates any provision of this article, any of the reasonable rules and regulations promulgated by the commissioner hereunder or any order or any final decision of the commissioner, other than a violation covered by the provisions of subsection (b) of this section, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one thousand dollars, and each day that a violation continues shall constitute a new and separate violation.

(b) Any person who, for the purpose of evading any provision of this article, any of the reasonable rules and regulations promulgated by the commissioner hereunder or any order or final decision of the commissioner, shall make or cause to be made any false entry or statement in a report required under the provisions of this article, any of the reasonable rules and regulations promulgated by the commis-

sioner hereunder or any order or final decision of the commissioner, or shall make or cause to be made any false entry in any record, account or memorandum required under the provisions of this article, any of the reasonable rules and regulations promulgated by the commissioner hereunder or any order or any final decision of the commissioner, or who shall omit, or cause to be omitted, from any such record, account or memorandum, full, true and correct entries, or shall remove from this state or destroy, mutilate, alter or falsify any such record, account or memorandum, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or imprisoned in the county jail not more than six months, or both fined and imprisoned.

(c) Any person who knowingly aids or abets any other persons in the violation of any provision of this article, any of the reasonable rules and regulations promulgated by the commissioner hereunder or any order of final decision of the commissioner, shall be subject to the same penalty as that prescribed in this article for the violation by such other person.

§22-4A-15. Construction and severability. — Except as provided in subsection (c), section three of this article, this article shall be liberally construed so as to effectuate the declaration of public policy set forth in section one of this article.

If any section, subsection, subdivision, subparagraph, sentence or clause of this article is adjudged to be unconstitutional or invalid, such invalidation shall not affect the validity of the remaining portions of this article, and, to this end, the provisions of this article are hereby declared to be severable.

FOREWARD

The Rules and Regulations and the Rules of Practice and Procedure of the West Virginia Oil and Gas Conservation Commission contained herein are made pursuant to and by virtue of an Act amending chapter twenty-two of the Code of West Virginia, one thousand, nine hundred thirty-one, as amended, which Act is hereby expressly incorporated herein by reference and made a part of these Rules and Regulations and Rules of Practice and Procedure.

EFFECTIVE: SEPTEMBER 21, 1973

WEST VIRGINIA
ADMINISTRATIVE REGULATIONS

Oil and Gas Conservation Commission

Chapter 22-4A

(1977)

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SECTION I — GENERAL RULES

1.01 Effective Scope of Rules and Regulations.

All rules and regulations of a general nature herein promulgated are to prevent waste, protect correlative rights, and to conserve oil and gas in the State of West Virginia and are applicable in all pools and fields developed subsequent to their adoption, except as may be amended, modified, altered or enlarged generally or in specific pools or fields by orders hereafter issued by the Commissioner. Where Special Field Rules apply, the Special Field Rules shall govern to the extent of any conflict.

1.02 Duties of the Commissioner.

The duties of the Commissioner shall be as described in the Statute.

1.03 Access to Records.

The Commissioner and/or his authorized agent shall have access to such deep well and lease records, wherever located, as may be necessary in the performance of his statutory duties. All persons or operators, drilling or servicing deep wells, shall permit the Commissioner and/or his authorized agent, to come upon any lease, property, or deep well operated or controlled by them, and to inspect the record and operation of such deep wells and to have access at reasonable times to such records of deep wells; provided that, information so obtained shall be kept confidential.

1.04 Reports.

All operators and purchasers of oil and gas within the State shall, from time to time, file such reports containing such information and covering such periods as the Commissioner, in order to perform his statutory duties, may require by rule or regulation.

1.05 Tests and Surveys.

When deemed necessary or advisable in the performance of his statutory duties, the Commissioner, by rule or regulation, may require tests and surveys to determine the occurrence of waste of oil, gas, water, or reservoir energy and the magnitude thereof.

1.06 Corrective Action.

The Commissioner shall require correction of any condition which is causing or is likely to cause waste of oil or gas and require the proper plugging and abandonment of any deep well or wells no longer used or useful.

1.07 Well Designations.

The operator, upon completion of any deep well, shall install and maintain, upon the deep well site, proper identification thereof, including but not limited to, the operator's name, name of lease, number of the well, API number (composed of State, county, and permit number).

1.08 Naming of Fields.

All oil and gas fields subject to the Statute discovered subsequent to the adoption of these rules and regulations shall be named by the Commissioner or at his direction.

1.09 Forms Upon Request.

Forms required by the Commissioner will be furnished upon request.

SECTION II — DEFINITIONS

2.01 "Commission" shall mean the West Virginia Oil and Gas Conservation Commission, composed of three members appointed by the Governor, the Director of Natural Resources and the Deputy Director for Oil and Gas of the Department of Mines.

2.02 "Commissioner" shall mean the person appointed by the West Virginia Oil and Gas Conservation Commission to the position of Commissioner.

2.03 "Code" shall mean the Code of West Virginia, one thousand, nine hundred thirty-one, as amended.

2.04 "Statute" shall mean article 4-A of chapter twenty-two of the Code of West Virginia, one thousand, nine hundred, thirty-one, as amended.

2.05 "Hearing" shall mean a proceeding in which any matter is heard before the Commissioner.

2.06 "Day" shall mean a period of twenty-four (24) consecutive hours.

2.07 "Barrel" shall mean forty-two (42) U. S. gallons of two hundred and thirty-one (231) cubic inches each at a temperature of sixty degrees (60°) Fahrenheit.

2.08 "Cubic Foot of Gas" shall mean, in these rules and regulations, the volume of gas contained in one cubic foot of space at a standard pressure base and a standard temperature base. The standard pressure base shall be fourteen and seventy-three hundredths (14.73) psia and the standard temperature base shall be sixty degrees (60°) Fahrenheit.

2.09 "Log or Well Log" shall mean a systematic detailed geological record of formations encountered in the drilling of a well.

2.10 The words, "Person, Operator, Royalty Owner, Independent Producer, Oil, Gas, Pool, Well, Shallow Well, Deep Well, Drilling Unit, Waste, Correlative Rights, and Just and Equitable Share of Production", are defined by the Statute and said definitions are hereby adopted in these Rules and Regulations.

2.11 "Oil Well" shall mean any well which produces less than six thousand (6,000) cubic feet of gas to each one (1) barrel of oil on initial gas-oil ratio test, defining oil and gas as in the Statute.

2.12 "Gas Well" shall mean any well which produces six thousand (6,000) cubic feet or more than six thousand (6,000) cubic feet of gas to each one (1) barrel of oil on initial gas-oil ratio test, defining oil and gas in the Statute.

2.13 "Completion". An oil well shall be considered completed when the well is first capable of producing new oil through wellhead equipment into lease tanks from the ultimate producing interval after the producing string has been run. A gas well shall be considered completed when the well is capable of producing gas through wellhead equipment from the ultimate producing zone after the producing string has been run. A dry hole shall be considered completed when all provisions of plugging have been performed. A multiple completion is the completion of more than one pool of hydrocarbon fluids into one wellbore.

2.14 "Purchaser" shall mean any person who directly or indirectly purchases, transports, takes or otherwise removes oil, gas or other hydrocarbon to his account from a well, lease, drilling unit or pool.

2.15 "Field" shall mean a geographic area which is underlaid or appears to be underlaid by at least one pool; and "field" shall include the underground reservoir or reservoirs containing oil or gas or both. The words "field" and "pool" are synonymous when only one underground reservoir is involved; however, "field" may relate to two or more pools.

2.16 "Well Spacing" shall mean the pattern or minimum distances from drilling unit boundary lines and from other deep wells drilling to or producible from the same pool, at which deep wells may be located on the surface.

2.17 "Unit" shall mean a lease or two or more leases which have been combined in such a manner that the combined leases may be regarded as a common lease for the drilling and operation of a deep oil or gas well.

2.18 "Designated Agent". The designated agent shall be a resident of the State of West Virginia upon whom process, notices, orders or other communications issued pursuant to these Rules and Regulations may be served. Change in designated agent must be received by the Commissioner within five (5) days after such change.

2.19 "Authorized Agent" shall mean a representative of the Commissioner.

2.20 "Special Field Rules" are rules ordered after a deep well has been drilled establishing a field or pool and an application is filed by the operator of the deep well or by the operator of any lands directly and immediately affected by the drilling of such deep well or wells in the field or pool. The Special Field Rules will designate the field or pool by name, the area to which they are applicable, the acreage of each drilling unit, the shape thereof, the minimum distance from the outside boundary of each drilling unit at which a deep well may be drilled and a minimum distance between deep wells. The Commissioner may conform the size and shape of the drilling unit upon which a deep well is situated to the applicable Special Field Rules.

SECTION III — OPERATIONAL RULES

3.01 Notices — General and Emergency.

Any written notice of intention to do work which requires the Commissioner's approval or to change plans previously approved by the Commissioner must be filed with the Commissioner in triplicate, unless otherwise directed, and must receive his approval before the work is begun.

In case of emergency or a situation where operations might be unduly delayed, any written notice or approval required by these rules and regulations to be given to or received from the Commissioner may be given or received orally or by wire, and, if approval is obtained, the transaction shall be confirmed in writing as a matter of record.

3.02 Location of Wells.

To prevent waste, in the absence of an application for Special Field Rules or Special Field Rules ordered by the Commissioner establishing drilling units or authorizing different deep well spacing or location patterns for a particular field or pool or parts thereof, each deep well drilled shall be not less than three thousand feet (3,000') from a deep well drilling to or capable of producing hydrocarbons from the objective pool of the deep well and no deep well shall be less than four hundred feet (400') from a lease or unit boundary.

The Commissioner shall have the discretion to determine pattern location of deep wells adjacent to an area governed by Special Field Rules where there is sufficient evidence to indicate that the pool or reservoir spaced by the Special Field Rules may extend beyond the boundary of the spacing order and the uniformity of the spacing pattern is necessary to insure orderly development of the pool or field.

3.03 Exception to Location of Wells.

When exception to Operational Rule 3.02 or a Special Field Rule applicable to the location of deep wells is desired, the operator shall file a supplemental application to the application required by operational Rule 3.04 of these rules and regulations with the Commissioner.

The supplemental application shall be accompanied by a plat or sketch, with appropriate coordinates, drawn to the scale of one (1) inch equaling to two thousand feet (2,000') accurately showing to scale all other completed, drilling, or permitted

deep oil and gas wells on said property or surrounding property within a distance of two (2) miles if the plat or sketch submitted under Operational Rule 3.04 does not accurately reflect the hereinabove information. The plat shall show:

(a) The location at which a deep oil or gas well could be drilled in compliance with the applicable order;

(b) The location at which the applicant requests permission to drill, and;

(c) The location at which deep oil or gas wells have been drilled or could be drilled in accordance with the applicable Special Field Order, directly or diagonally offsetting the proposed exception.

The Commissioner, after notice and hearing, may grant or deny the application and require the withholding or approve issuing of a permit pursuant to Operational Rule 3.04.

No exception shall prevent any operator from drilling a deep oil or gas well on adjacent lands, directly or diagonally offsetting the exception, at locations permitted by any applicable Special Field Rules ordered by the Commissioner.

3.04 Application for Permit.

All applications submitted to the Deputy Director for Oil and Gas for a permit to drill, redrill, stimulate, operate, plug, abandon, deepen, case, fracture, pressure, convert, or combine any deep well, or physically change any deep well to allow the migration of fluid from one formation to another shall be reviewed by the Commissioner or by an authorized agent to ascertain compliance with these rules and regulations. The Commissioner will provide the Deputy Director for Oil and Gas with a statement either approving or disapproving the application based upon its compliance with Oil and Gas Conservation rules and regulations and the statute. The permit will be issued by the Deputy Director for Oil and Gas when the applicant has complied with all rules and regulations. The application shall contain, or show by plat or sketch, in addition to the requirements of §22-4-1k, and administrative rules and regulations promulgated thereunder:

(a) A certificate of consent and easement from all owners of the surface of the tract on which the deep well is to be drilled, and;

(b) A tabulation of all deep wells within one mile of the proposed location, including the API number of the deep well, well name, and the name and address of the operator, and;

(c) On a plat for a proposed deep well location in an area covered by Special Field Rules, the boundaries of the drilling unit, the distances from the proposed deep well location to the nearest outside boundary and the acreage of each tract within the drilling unit shall be shown. Such plat shall accompany the application and shall be drawn to a scale of one (1) inch equal to two thousand feet (2,000). The plat shall be prepared by a licensed land surveyor or registered engineer showing the district and county in which the tract of land upon which the well to be drilled is located, the acreage of the tract, the names of mineral owners or lessees of adjacent tracts, the proposed or actual location of the well determined by survey, the courses and distances of such locations from two (2) permanent points or landmarks on said tracts and the number to be given the deep well. The plat will show all deep oil and gas or abandoned deep oil and gas wells within one (1) mile of the proposed or actual deep well for which a permit is sought and the distances to each, and;

(d) Any other information which the Commissioner, by rule or regulation, may require in order to perform his statutory duties.

3.05 Monthly Report of Oil and Gas Production.

For each deep oil or gas well, an annual report of production by month shall be filed with the Commissioner. The report will be filed on or before the succeeding March 31st. The report will be filed regardless of the status of the deep well.

The report to be submitted by the operator or a person specified by the operator shall include the operator's name, place of business, lease or well name, API number (composed of State, county, and permit number), days produced during the report month, volume of oil measured in barrels or gas measured in thousand cubic feet, and other pertinent information as the Commissioner, by rule or regulation, may require in the performance of his statutory duties.

3.06 Filing of Well Logs.

Within ninety (90) days after the completion of drilling or recompletion of a deep well, the operator shall submit to the Commissioner a copy of the well log and the electrical, radioactive or other similar conventional log if they have been run. In addition, as soon as practicable, and upon the request of the Commissioner, operators shall file a copy of drill stem test charts, formation water analysis, porosity, permeability or fluid saturation measurements, core analysis, and lithologic log or sample description as compiled; provided that, no such information shall be required unless the operator has compiled such information in the ordinary course of business. No interpretation of the data is to be filed.

All information furnished to the Commissioner hereunder with respect to a deep well marked "confidential" shall be kept confidential for one (1) year after the date the information is required to be filed hereunder, unless the operator gives written permission to release such information at an earlier date.

For good cause shown by the operator, the Commissioner may extend the period of confidentiality for one (1) year. The total period of confidentiality shall not exceed three (3) years.

3.07 Measurement of Oil.

The volume of production of oil shall be computed in terms of barrels of clean oil on the basis of meter measurement or tank measurements of oil level difference, made and recorded to the nearest quarter-inch of one hundred percent (100%) capacity tables, subject to the following corrections:

(a) Correction for Impurities — The percentage of impurities (water, sand, and other foreign substances, not constituting a natural component part of the oil) shall be determined to the satisfaction of the Commissioner and the observed gross volume of oil shall be corrected to exclude the entire volume of such impurities.

(b) Temperature Correction — The observed volume of oil corrected for impurities shall be further corrected to the standard volume at 60° Fahrenheit in accordance with A. S. T. M. D.-1250, Table 7, or any revisions thereof and any supplements thereto or any close approximation thereof approved by the Commissioner.

3.08 Measurement of Gas.

All gas, except gas used on the lease for development purposes and lease operations, when produced or sold shall be measured by an approved meter of sufficient capacity. The standard pressure base for reporting purposes shall be 14.73 psia regardless of atmospheric pressure at the point of measurement and the standard temperature base shall be 60° Fahrenheit.

3.09 Multiple Pool Completion or Commingling in one Well Bore.

In the absence of Special Field Rules, an operator will, within seventy-two (72) hours after commencing to complete a deep well in more than one (1) pool, file written notice in the office of the Conservation Commission of the intended multiple completion. Within fourteen (14) days after the multiple completion and before any production from the deep well is marketed, the operator shall file a report stating whether the production is segregated or commingled, include a diagrammatic sketch of the mechanical installation, name and address of the operators and a plat showing the location of the deep well and deep wells within two (2) miles of the deep multiple completion well which have been or may be capable of being completed in the same pool or pools.

The Commissioner will provide all operators of deep wells, within two (2) miles of the multiple completion, a copy of the report. If no protest is received and the Commissioner determines no waste will result from the completion within fourteen (14) days, the completion will be approved without notice and hearing.

In the event the pools are segregated, the Commissioner may require tests as he deems necessary to determine the effectiveness of the segregation of the different producing pools.

3.10 Intentional and Unintentional Deviation in Drilling.

Before beginning intentional directional drilling, other than sidetracking due to hole conditions, when the intent is to direct the bottom of the hole away from the vertical, notice of intention to do so shall be filed with the permit application and approval obtained. Such notice shall state clearly name and address of operator, the deep well's API number, lease name, field or pool, county, the depth, exact surface location of the well bore, proposed direction of deviation, and proposed horizontal distance between the bottom of the hole and surface location, reason for intentional deviation and a list of offset operators. The Commissioner shall notify offset operators of the applicants plan and hold the notice ten (10) days. If objection is received, the application will be set for public hearing. If no objection is received, the application shall be approved. If approval is obtained, the operator shall file, with the Commissioner within sixty (60) days after the completion of the work, an accurate and complete copy of the directional survey.

In all deep wells, all operators shall, when the safety of the well bore is not in jeopardy, survey their well bore for unintentional deviation from the vertical at least every five hundred feet (500') or every bit change if less than five hundred feet (500'), but not more frequently than two hundred and fifty feet (250'). The operator shall calculate the cumulative random drift of the bore hole from such survey as drilling progresses. The operator shall file a copy of such record within sixty (60) days after completion of drilling operation and before sale of hydrocarbons is made from the well.

In the event safety precludes a survey being performed as described above, the operator shall, at the Commissioner's request, before completion of drilling operations and before sale of hydrocarbons is made from the well, run cased hole deviation surveys or directional surveys on the well bore to determine that the bore hole is within the confines of the drilling unit.

In all deep wells, should the operator calculate or have reason to suspect the cumulative random drift exceeds the surface distance of the well from the nearest drilling unit boundary, the operator shall run a directional survey on the bore hole to determine where the bore hole actually lies and file a copy of such record within sixty (60) days after completing the survey.

3.11 Production Potential, Shut-in Pressure and Gas-Oil Ratio Testing and Reports.

Production potential, shut-in pressure and gas-oil ratio testing and reporting may be required by the Commissioner to perform his statutory responsibilities. In deep well gas testing, the methods prescribed in the Interstate Oil Compact Commission's "Manual of Gas Well Testing" shall be used.

3.12 Gas-Oil Ratio Test.

Each operator shall take a gas-oil ratio test not later than thirty (30) days following the completion or recompletion of any deep well producing from a pool which contains both oil and gas. The results of such test shall be reported to the Commissioner within fifteen (15) days after the completion of the test. Upon application, the Commissioner may waive or extend the time for making a gas-oil ratio test. Additional tests may be taken at any time and shall be taken as required by the Commissioner to perform his statutory responsibilities.

SECTION IV — SECONDARY RECOVERY RULES

4.01 Waterflooding and Other Recovery Operations.

Applications for secondary or additional recovery operations, whether by waterflooding or repressuring or pressure maintenance operations, for a pool productive of oil shall contain:

(a) A plat drawn to a scale of one (1) inch equal to two thousand feet (2,000') showing the area involved, together with the well or wells, including shallow wells and dry and abandoned wells located thereon, all of which shall be properly designated;

(b) The name, description, and depth of the formations to be affected;

(c) The log of any injection well, or such similar information as is available;

(d) A description of any injection well's casing or the proposed casing program and the proposed method for testing casing before use in any injection well;

(e) A statement as to the type of fluid to be used for injection, its source and the estimated amounts to be injected daily;

(f) A full description of the particular operation for which approval is requested, including the additional oil recovery anticipated and the economic feasibility of the project;

(g) A copy of the unit agreement showing the approval of the plan and its terms of operation by the operators of approximately three-fourths (¾) of the acreage (calculating partial interests on a pro rata basis for operator interests on any parcel owned in common) and the royalty owners of approximately three-fourths (¾) of the acreage (calculating partial interests on a pro rata basis for royalty interests on any parcel owned in common); and

(h) A statement of the designated operator for the unit.

4.02 Unit Operations.

Subsequent to notice and hearing, at which the applicant will provide a copy of the unit agreement showing the approval of the plan and its terms of operation by the operators of at least three-fourths (¾) of the acreage (calculating partial interests on a pro rata basis for operator interests on any parcel owned in common) and the royalty owners of at least three-fourths (¾) of the acreage (calculating partial interests on a pro rata basis for royalty interests on any parcel owned in common), the Commissioner may enter an order as provided in section eight, article four-a of chapter twenty-two of the Code of West Virginia.

4.03 Monthly Report.

A monthly report of fluids injected and withdrawn shall be filed in a form prescribed by the Commissioner.

4.04 Notice of Commencement and Discontinuance of Injection Operations.

The Commissioner shall be notified immediately, in writing, upon the commencement of injection operations and within ten (10) days after the discontinuance of injection operations. No injection well shall be plugged without a permit.

SECTION V — RULES OF PRACTICE AND PROCEDURE

5.01 The Commissioner, in all proceedings relating to the determination of Special Field Rules for the conservation of oil and gas in the State of West Virginia, shall, in addition to the provisions of section ten, article four-a, chapter twenty-two of the Code, require evidence from an applicant as follows:

(a) A topographic map at a scale of one (1) inch equal to two thousand (2,000) feet with an outline of the area for which Special Field Rules are requested;

(b) Known lease ownership of the area for which Special Field Rules are requested by plat at a scale of one (1) inch equal to two thousand (2,000) feet and/or a tabulation of such ownership;

(c) Geological mapping, records, and testimony relevant to the area to be spaced;

(d) Reservoir data anticipated for an average proposed drilling unit within the spaced area;

(e) A comparative economic evaluation of spacing patterns, based on estimated production and rate of production of oil and/or gas of the average proposed drilling unit within the spaced area.

5.02 Conduct of attorneys before the Commission shall be the same as required of attorneys before the Circuit Courts of the State of West Virginia. Attorneys or persons representing themselves shall stand when addressing the Commission or a witness. Any person testifying in response to a subpoena or subpoena duces tecum issued by the Commissioner and any person testifying in support of an application, or in opposition thereto, shall be required to do so under oath or affirmation administered by the Commissioner. Witnesses shall be examined with courtesy and respect and their good faith shall be presumed.

Smoking shall not be permitted in the hearing room of the Commission, either during session or during recess. Taking of photographs or the broadcasting of proceedings in or from any hearing room or so close thereto as to disturb the order and decorum thereof either while the hearing is in session or at recess is prohibited.

The conduct and demeanor of attorneys and persons when present during the proceedings shall be such as to reflect respect for the dignity and authority of the Commission and to maintain the proceedings as an objective search for the applicable facts and the correct principles of law.

The electronic recording of any session is prohibited except as may be required by the Commissioner for preserving a record thereof for the use of the Commissioner in connection with the matter being heard. A transcript of testimony shall be taken and preserved as part of the permanent record. Interested parties may examine the official transcript or purchase a copy from the Commissioner.

5.03 Any operator intending to apply for Special Field Rules, shall, along with the application which shall show applicants name and address and describe the area for which a spacing order is requested, send a notice of a pre-hearing conference to the Commissioner and the operators of any lands directly or immediately affected by the proposal. The pre-hearing notice shall include a list of the names and addresses of all operators to whom it was sent, a statement that a diligent effort has been made to determine to whom the notice must be sent, a statement that opponents to the application must file written notice with the Commissioner within ten (10) days or the conference will not be held, and the evidence required in 5.01. The Commissioner shall set a day, time, and place for the pre-hearing conference to be not less than twenty (20) days following the date of the pre-hearing notice. If no written opposition to the application is received by the Commissioner within ten (10) days after the date of the pre-hearing notice, the Commissioner will advise all persons to whom the pre-hearing notice was sent that a conference will not be held. If any operator relates in writing to the Commissioner opposition to the applicant's proposal, within ten (10) days, a conference will be held. Any operator may attend and participate in the conference even though he did not request it. Opponents to the application shall present evidence, as required of an applicant in 5.01, indicating where there is disagreement with the applicant, sufficient to permit all operators to attempt to resolve the difference.

5.04 The Commissioner shall assign the application a Cause Number and enter the proceeding along with its date of filing on a separate page of the docket. Notice of the docket and the time and place of the hearing shall be in accordance with the provisions of the Statute. Hearing shall be not less than ten (10) days and not more than thirty (30) days after receipt of the application.

In addition to any other notice required by law or these rules, any person who believes that he may be interested in any hearing before the Commissioner who has filed a request for notices, in writing, shall be entitled to receive a copy of the docket for the hearing mailed by the Commissioner not later than ten (10) days before the date of the hearing. Upon request, such person will be furnished a copy of the application filed with the Commissioner.

5.05 Any person desiring to protest the granting of the application, shall, at least five (5) days prior to the date of the hearing, file a statement of opposition and a counterplan with the Commissioner and all operators of lands directly and immediately affected and state briefly the issues.

5.06 The applicant will open the hearing and present the testimony and exhibits offered in support of the application. The applicant's witnesses will then be subject cross-examination by the Commissioner or any interested parties. The Commissioner shall determine the order of the appearances of the other participants in the hearing. Each interested party affected by the application who has complied with the Rules of Practice and Procedure, may present testimony and exhibits in support of or in opposition to the applicant's proposals. All witnesses shall be subject to cross-examination as previously set forth.

The applicant may offer rebuttal testimony and exhibits, but the witnesses will again be subject to cross-examination. Surrebuttal testimony and exhibits and subsequent testimony and exhibits may be permitted at the discretion of the Commissioner.

Closing statements and statements of position may be made by the participants and all other interested persons before the hearing is closed or at such time as designated by the Commissioner. No order shall be made which is not supported by competent legal evidence.

5.07 In addition to any special hearings which may be held, regular monthly hearings shall be held before the Commissioner. Where circumstances permit, the Commissioner, after sounding the docket, may first call up and dispose of all non-contested matters and motions for continuance.

5.08 Any interested party may petition the Commissioner for the promulgation, amendment or repeal of any rule by filing a written petition setting forth such facts and arguments as support the petition. Upon receiving such petition, the Commissioner, as soon as practicable, shall either (1) deny the petition in writing (stating his reasons for denial), or (2) initiate rule-making proceedings pursuant to chapter twenty-nine-a, article three or other appropriate provisions of the Code of the State of West Virginia.

5.09 The Commissioner shall enter a spacing order or dismiss the application therefor within forty-five (45) days after the application for a spacing order has been filed.

5.10 Any person who is bound by any order of the Commissioner shall have the right to compel a hearing on the matter if no such hearing has been held.

WEST VIRGINIA
SHALLOW GAS WELL REVIEW BOARD

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OIL AND GAS LAWS
Chapter 22, Article 4B
Official Code of West Virginia

ARTICLE 4B. SHALLOW GAS WELL REVIEW BOARD.

§22-4B-1. Declaration of public policy; legislative findings. — (a) It is hereby declared to be the public policy of this state and in the public interest to:

(1) Insure the safe recovery of coal and gas;

(2) Foster, encourage and promote the fullest practical exploration, development, production, recovery and utilization of this state's coal and gas, where both are produced from beneath the same surface lands, by establishing procedures, including procedures for the establishment of drilling units, for the location of shallow gas wells without substantially affecting the right of the gas operator proposing to drill a shallow gas well to explore for and produce gas; and

(3) Safeguard, protect and enforce the correlative rights of gas operators and royalty owners in a pool of gas to the end that each such gas operator and royalty owner may obtain his just and equitable share of production from such pool of gas.

(b) The legislature hereby determines and finds that gas found in West Virginia in shallow sands or strata has been produced continuously for more than one hundred years; that the placing of shallow wells has heretofore been regulated by the state for the purpose of insuring the safe recovery of coal and gas, but that regulation should also be directed toward encouraging the fullest practical recovery of both coal and gas because modern extraction technologies indicate the desirability of such change in existing regulation and because the energy needs of this state and the United States require encouragement of the fullest practical recovery of both coal and gas; that in order to encourage and insure the fullest practical recovery of coal and gas in this state and to further insure the safe recovery of such natural resources, it is in the public interest to enact new statutory provisions establishing a shallow gas well review board which shall have the authority to regulate and determine the appropriate placing of shallow wells when gas well operators and owners of coal seams fail to agree on the placing of such wells, and establishing specific considerations, including minimum distances to be allowed between certain shallow gas wells, to be utilized by the shallow gas well review board in regulating the placing of shallow wells; that in order to encourage and insure the fullest practical recovery of coal and gas in this state and to protect and enforce the correlative rights of gas operators and royalty owners of gas resources, it is in the public interest to enact new statutory provisions establishing a shallow gas well review board which shall also have authority to establish drilling units and order the pooling of interests therein to provide all gas operators and royalty owners with an opportunity to recover their just and equitable share of production.

§22-4B-2. Definitions. — Unless the context in which used clearly requires a different meaning, as used in this article:

(1) "Board" means the West Virginia shallow gas well review board provided for in section four of this article;

(2) "Chairman" means the chairman of the West Virginia shallow gas well review board provided for in section four of this article;

(3) "Coal operator" means any person who proposes to or does operate a coal mine,

(4) "Coal seam" and "workable coal bed" are interchangeable terms and mean any seam of coal twenty inches or more in thickness, unless a seam of less thickness is being commercially worked, or can in the judgment of the department foreseeably be commercially worked and will require protection if wells are drilled through it;

(5) "Commission" means the oil and gas conservation commission provided for in section four, article four-a of this chapter;

(6) "Commissioner" means the oil and gas conservation commissioner provided for in section four, article four-a of this chapter;

(7) "Correlative rights" means the reasonable opportunity of each person entitled thereto to recover and receive without waste the gas in and under a tract or tracts, or the equivalent thereof;

(8) "Deep well" means any well drilled and completed in a formation at or below the top of the uppermost member of the "Onondaga Group" or at a depth of or greater than six thousand feet, whichever is shallower;

(9) "Department" or "department of mines" means the state department of mines provided for in section two, article two of this chapter;

(10) "Deputy director" means the deputy director for oil and gas provided for in section one-a, article four of this chapter;

(11) "Drilling unit" means the acreage on which the board decides one well may be drilled under section ten of this article;

(12) "Gas" means all natural gas and all other fluid hydrocarbons not defined as oil in subdivision (15) of this section;

(13) "Gas operator" means any person who owns or has the right to develop, operate and produce gas from a pool and to appropriate the gas produced therefrom either for himself or for himself and others. In the event that there is no gas lease in existence with respect to the tract in question, the person who owns or has the gas rights therein shall be considered a "gas operator" to the extent of seven-eighths of the gas in that portion of the pool underlying the tract owned by such person, and a "royalty owner" to the extent of one-eighth of such gas;

(14) "Just and equitable share of production" means, as to each person, an amount of gas in the same proportion to the total gas production from a well as that person's acreage bears to the total acreage in the drilling unit;

(15) 'Oil" means natural crude oil or petroleum and other hydrocarbons, regardless of gravity, which are produced at the well in liquid form by ordinary production methods and which are not the result of condensation of gas after it leaves the undergound reservoir;

(16) "Owner" when used with reference to any coal seam, shall include any person or persons who own, lease or operate such coal seam.

(17) "Person" means any natural person, corporation, firm, partnership, partnership association, venture, receiver, trustee, executor, administrator, guardian, fiduciary or other representative of any kind, and includes any government or any political subdivision or any agency thereof;

(18) "Plat" means a map, drawing or print showing the location of one or more wells or a drilling unit;

(19) "Pool" means an underground accumulation of gas in a single and separate natural reservoir (ordinarily a porous sandstone or limestone). It is characterized by a single natural pressure system so that production of gas from one part of the pool tends to or does affect the reservoir pressure throughout its extent. A pool is bounded by geologic barriers in all directions, such as geologic structural conditions, impermeable strata, and water in the formation, so that it is effectively separated from any other pools which may be present in the same district or in the same geologic structure;

(20) "Royalty owner" means any owner of gas in place, or gas rights, to the extent that such owner is not a gas operator as defined in subdivision (13) of this section;

(21) "Shallow well" means any gas well drilled and completed in a formation above the top of the uppermost member of the "Onondaga Group" or at a depth less than six thousand feet, whichever is shallower;

(22) "Tracts comprising a drilling unit" means all separately owned tracts or portions thereof which are included within the boundary of a drilling unit;

(23) "Well" means any shaft or hole sunk, drilled, bored or dug into the earth or into undergound strata for the extraction, injection or placement of any liquid or gas, or any shaft or hole sunk or used in conjunction with such extration, injection or placement. The term "well" does not include any shaft or hole sunk, drilled, bored or dug into the earth for the sole purpose of core drilling or pumping or extracting therefrom potable, fresh or usable water for household, domestic, industrial, agricultural or public use; and

(24) "Well operator" means any person who proposes to or does locate, drill, operate or abandon any well.

§22-4B-3. Application of article; exclusions. — (a) Except as provided in subsection (b) of this section, the provisions of this article shall apply to all lands located in this state, under which a coal seam as defined in section two, article four-b, chapter twenty-two and section one, article four, chapter twenty-two of this code, one thousand nine hundred thirty-one, is located, however owned, including any lands owned or administered by any government or any agency or subdivision thereof, over which the state has jurisdiction under its police power. The provisions of this article are in addition to and not in derogation of or substitution for the provisions of articles four and four-a of this chapter.

(b) This article shall not apply to or affect:

(1) Deep wells;

(2) Oil wells and enchanced oil recovery wells associated with oil wells;

(3) Any shallow well permitted under article four of this chapter prior to 12:01 a.m., August first, one thousand nine hundred seventy-eight, unless such well is, after completion (whether such completion is prior or subsequent to the effective date of this article), deepened subsequent to the effective date of this article through another coal seam to another formation above the top of the uppermost member of the "Onondaga Group" or to a depth of less than six thousand feet, whichever is shallower;

(4) Any shallow well as to which no objection is made under section three-b, article four of this chapter;

(5) Wells as defined in subdivision (4), section one, article seven of this chapter; or

(6) Free gas rights.

(c) The provisions of this act affecting applications for permits to drill shallow gas wells shall only apply to such applications filed after 12:01 a.m., August first, one thousand nine hundred seventy eight, and the provisions of article four of this chapter affecting such applications which were in effect immediately prior to the effective date of this act shall apply to all such applications filed prior to 12:01 a.m., August first, one thousand nine hundred seventy eight, with like effect as if this act had not been enacted.

§22-4B-4 West Virginia shallow gas well review board; membership; method of appointment; vancincies; compensation and expenses; staff. — (a) There is hereby created the "West Virginia Shallow Gas Well Review Board" which shall be composed of three members, two of whom shall be the commissioner and the deputy director. The remaining member of the board shall be a registered professional mining engineer with at least ten years practical experience in the coal mining industry and shall be appointed by the governor, by and with the advice and consent of the Senate: *Provided,* That any person so appointed while the Senate of this state is not in session shall be permitted to serve in an acting capacity for one year from his appointment or until the next session of the Legislature, whichever is less. As soon as practical after appointment and qualification of the member appointed by the governor, the governor shall convene a meeting of the board for the purpose of organizing and electing a chairman, who shall serve as such until his successor is elected by the board.

(b) The member of the board appointed by the governor shall be appointed within three months of the effective date of this article. A vacancy in the membership appointed by the governor shall be filled by appointment by the governor within sixty days after the occurrence of such vacancy. Before performing any duty hereunder, each member of the board shall take and subscribe to the oath required by section five, article four of the constitution of West Virginia, and shall serve thereafter until his successor has been appointed and qualified.

(c) The member of the board appointed by the governor shall receive not less than seventy-five dollars per diem while actually engaged in the performance of his duties as a member of the board. Each member of the board shall also be reimbursed for all reasonable and necessary expenses actually incurred in the performance of his duties as a member of the board.

(d) The department shall furnish office and clerical staff and supplies and services, including reporters for hearings, as required by the board.

§22-4B-5. Same—Meetings; notice; general powers and duties. — (a) The board shall meet and hold conferences and hearings at such times and places as shall be designated by the chairman. The chairman may call a meeting of the board at any time. The chairman shall call a meeting of the board (1) upon receipt of a notice from the deputy director that an objection to the proposed drilling or deepening of a shallow well has been filed by a coal seam owner pursuant to section three-b, article four of this chapter or that an objection has been made by the department, (2) upon receipt of an application to establish a drilling unit filed with the board pursuant to section nine of this article, or (3) within twenty days upon the written request by another member of the board. Meetings called pursuant to subdivisions (1) and (2) of this subsection shall be scheduled not less than ten days nor more than twenty days from receipt by the chairman of the notice of objection or the application to establish a drilling unit. Notice of all meetings shall be given to each member of the board by the chairman at least ten days in advance thereof, unless otherwise agreed by the members.

(b) At least ten days prior to every meeting of the board called pursuant to the provisions of subdivisions (1) and (2), subsection (a) of this section, the chairman shall also notify (1) in the case of a notice of objection, the well operator and all objecting coal seam owners and (2) in the case of an application to establish a drilling unit, the applicant, all persons to whom copies of the application were required to be mailed pursuant to the provisions of subsection (d), section nine of this article and all persons who filed written protests or objections with the board in accordance with the provisions of subsection (c), section nine of this article.

(c) A majority of the members of the board shall constitute a quorum for the transaction of any business. A majority of the members of the board shall be required to determine any issue brought before it.

(d) The board is hereby empowered and it shall be its duty to execute and carry out, administer and enforce the provisions of this article in the manner provided herein. Subject to the provisions of section three of this article, the board shall have jurisdiction and authority over all persons and property necessary therefor: *Provided,* That the provisions of this article shall not be construed to grant to the board authority or power to (1) limit production or output from or prorate production of any gas well, or (2) fix prices of gas.

(e) The board shall have specific authority to:

(1) Take evidence and issue orders concerning applications for drilling permits and drilling units in accordance with the provisions of this article;

(2) Promulgate, pursuant to the provisions of chapter twenty-nine-a of this code, and enforce reasonable rules and regulations necessary to govern the practice and procedure before the board;

(3) Make such relevant investigations of records and facilities as it deems proper; and

(4) Issue subpoenas for the attendance of and sworn testimony by witnesses and subpoenas duces tecum for the production of any books, records, maps, charts, diagrams and other pertinent documents; and administer oaths and affirmations to such

witnesses, whenever, in the judgment of the board, it is necessary to do so for the effective discharge of its duties under the provisions of this article.

§22-4B-6. Rules and regulations; notice requirements. — (a) The board may promulgate, pursuant to the provisions of chapter twenty-nine-a of this code, such reasonable rules and regulations as are deemed necessary or desirable to implement and make effective the provisions of this article.

(b) Notwithstanding the provisions of section two, article seven, chapter twenty-nine-a of this code, any notice required under the provisions of this article shall be given at the direction of the chairman by (1) personal or substituted service and if such cannot be had then by (2) certified United States mail, addressed, postage and certification fee prepaid, to the last known mailing address, if any, of the person being served, with the direction that the same be delivered to addressee only, return receipt requested, and if there be no known mailing address or if the notice is not so delivered then by (3) publication of such notice as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county or counties wherein any land which may be affected by the order of the board is situate. The chairman shall also mail a copy of such notice to all other persons who have specified to the chairman an address to which all such notices may be mailed. All notices shall issue in the name of the state, shall be signed by the chairman, shall specify the style and number of the proceeding, the date, time and place of any meeting, conference or hearing, and shall briefly state the purpose of the proceeding. Proof of service or publication of such notice shall be made to the board promptly and in any event within the time during which the person served must respond to the notice. If service is made by a person other than the sheriff or the chairman, he shall make proof thereof by affidavit. Failure to make proof of service or publication within the time required shall not affect the validity of the service of the notice.

§22-4B-7. Objections to proposed drilling; conferences; agreed locations and changes on plats; hearings; orders. — (a) At the time and place fixed by the chairman for the meeting of the board and for consideration of the objections to proposed drilling filed by coal seam owners pursuant to section three-b, article four of this chapter, the well operator and the objecting coal seam owners present or represented, shall hold a conference with the board to consider the objections. Such persons present or represented at the conference may agree upon either the drilling location as proposed by the well operator or an alternate location. Any change in the drilling location from the drilling location proposed by the well operator shall be indicated on the plat enclosed with the notice of objection filed with the chairman by the deputy director in accordance with the provisions of section three-b, article four of this chapter, and the distance and direction to the new drilling location from the proposed drilling location shall also be shown on such plat. If agreement is reached at the conference by the well operator and such objecting coal seam owners present or represented at the conference, the board shall issue a written order stating that an agreement has been reached, stating the nature of such agreement, and directing the department to grant the well operator a drilling permit for the location agreed upon. The original of such order shall be filed with the department within five days after the conference of the board at which the drilling location was agreed upon and copies thereof shall be mailed by registered or certified mail to the well operator and the objecting coal seam owners present or represented at such conference.

(b) If the well operator and the objecting coal seam owners present or represented at the conference with the board are unable to agree upon a drilling location, then, unless they otherwise agree, the board shall, without recess for more than one business day, hold a hearing to consider the application for a drilling permit. All of the pertinent provisions of article five, chapter twenty-nine-a of this code shall apply to and govern such hearing. Within twenty days after the close of a hearing, the board shall issue and file with the department a written order directing it, subject to other matters requiring approval of the department, to:

(1) Refuse a drilling permit; or

(2) Issue a drilling permit for the proposed drilling location; or

(3) Issue a drilling permit for an alternate drilling location different than that requested by the well operator; or

(4) Issue a drilling permit either for the proposed drilling location or for an alternate drilling location different than that requested by the well operator, but not allow the drilling of the well for a period of not more than one year from the date of issuance of such permit.

(c) The written order of the board shall contain findings of fact and conclusions based thereon concerning the following safety aspects, and no drilling permit shall be issued for any drilling location where the board finds from the evidence that such drilling location will be unsafe:

(1) Whether the drilling location is above or in close proximity to any mine opening or shaft, entry, travelway, airway, haulageway, drainageway or passageway, or to any proposed extension thereof, in any operated or abandoned or operating coal mine, or any coal mine already surveyed and platted but not yet being operated;

(2) Whether the proposed drilling can reasonably be done through an existing or planned pillar of coal, or in close proximity to an existing well or such pillar of coal, taking into consideration the surface topography;

(3) Whether the proposed well can be drilled safely, taking into consideration the dangers from creeps, squeezes or other disturbances due to the extraction of coal; and

(4) The extent to which the proposed drilling location unreasonably interferes with the safe recovery of coal and gas.

The written order of the board shall also contain findings of fact and conclusions based thereon concerning the following:

(5) The extent to which the proposed drilling location will unreasonably interfere with present or future coal mining operations on the surface, including but not limited to operations subject to the provisions of article six, chapter twenty of this code;

(6) The feasibility of moving the proposed drilling location to a mined out area, below the coal outcrop, or to some other location;

(7) The feasibility of a drilling moratorium for not more than one year in order to permit the completion of imminent coal mining operations;

(8) The methods proposed for the recovery of coal and gas;

(9) The distance limitations established in section eight of this article;

(10) The practicality of locating the well on a uniform pattern with other wells;

(11) The surface topography and use; and

(12) Whether the order of the board will substantially affect the right of the gas operator to explore for and produce gas.

Any member of the board may file a separate opinion. Copies of all orders and opinions shall be mailed by the board, by registered or certified mail, to the parties present or represented at the hearing.

§-22-4B-8. Distance limitations. — (a) If the well operator and the objecting coal seam owners present or represented at the time and place fixed by the chairman for consideration of the objections to the proposed drilling location are unable to agree upon a drilling location, then the written order of the board shall direct the department to refuse to issue a drilling permit unless the following distance limitations are observed:

(1) For all shallow wells with a depth less than three thousand feet, there shall be a minimum distance of one thousand feet from the drilling location to the nearest existing well as defined in subsection (b) of this section; and

(2) For all shallow wells with a depth of three thousand feet or more, there shall be a minimum distance of one thousand five hundred feet from the drilling location to the nearest existing well as defined in subsection (b) of this section, except that where the distance from the drilling location to such nearest existing well is less than two thousand feet but more than one thousand five hundred feet and a coal seam owner has objected, the gas operator shall have the burden of establishing the need for the drilling

location less than two thousand feet from such nearest existing well. Where the distance from the drilling location proposed by the operator or designated by the board to the nearest existing well as defined in subsection (b) of this section is greater than two thousand feet, distance criterion will not be a ground for objection by a coal seam owner.

(b) The words "existing well" as used in this section shall mean (i) any well not plugged within nine months after being drilled to its total depth and either completed in the same target formation or drilled for the purpose of producing from the same target formation, and (ii) any unexpired, permitted drilling location for a well to the same target formation.

(c) The minimum distance limitations established by this section shall not apply if the proposed well will be drilled through an existing or planned pillar of coal required for protection of a pre-existing oil or gas well and the proposed well will neither require enlargement of such pillar nor otherwise have an adverse effect on existing or planned coal mining operations.

(d) Nothing in this article shall be construed to empower the board to order the department to issue a drilling permit to any person other than the well operator filing the application which is the subject of the proceedings.

§22-4B-9. Application to establish a drilling unit; contents; notice. — (a) Whenever the board has issued an order directing the department to refuse a drilling permit, the gas operator may apply to the board for the establishment of a drilling unit encompassing a contiguous tract or tracts if such gas operator believes that such a drilling unit will afford one well location for the production of gas from under the tract on which the drilling permit was sought, and will be agreeable to the coal seam owners.

(b) An application to establish a drilling unit shall be filed with the board and shall contain:

(1) The name and address of the applicant;

(2) A plat prepared by a licensed land surveyor or registered professional engineer showing the boundary of the proposed drilling unit, the district and county in which such unit is located, the acreage of the proposed drilling unit, the boundary of the tracts which comprise the proposed drilling unit, the names of the owners of record of each such tract, the proposed well location on the proposed drilling unit, and the proposed well location for which the department refused to issue a drilling permit;

(3) The names and addresses of the royalty owners of the gas underlying the tracts which comprise the proposed drilling unit;

(4) The names and addresses of the gas operators of the tracts which comprise the proposed drilling unit;

(5) The approximate depth and target formation to which the well for the proposed drilling unit is to be drilled;

(6) A statement indicating whether a voluntary pooling agreement has been reached among any or all of the royalty owners of the gas underlying the tracts which comprise the proposed drilling unit and the gas operators of such tracts;

(7) An affidavit of publication of the notice of intent to file an application to establish a drilling unit as required in subsection (c) of this section; and

(8) Such other pertinent and relevant information the board may prescribe by reasonable rules and regulations promulgated in accordance with the provisions of section six of this article.

(c) Prior to the filing of an application to establish a drilling unit, the applicant shall cause to be published, as a Class II legal advertisement in accordance with the provisions of article three, chapter fifty-nine of this code, a notice of intent to file an application to establish a drilling unit. Such notice shall contain the information required by subdivisions (1), (4) and (5) of subsection (b) of this section, the name of the royalty

owner of the gas underlying the proposed well location on the proposed drilling unit, plus an abbreviated description, or at the applicant's option a plat of the drilling unit, disclosing the county and district wherein the proposed drilling unit is to be located, the post office closest to the proposed drilling unit, a statement that the applicant will deliver a copy of the plat required by subdivision (2) of this subsection to any person desiring the same, the date upon which applicant intends to file the application to establish a drilling unit, and a statement that written protests and objections to such application may be filed with the board until a specified date, which date shall be at least ten days after the date upon which applicant intends to file the application to establish a drilling unit. The publication area of the notice required by this subsection shall be the county or counties in which the proposed drilling unit is to be located.

(d) At the time an application to establish a drilling unit is filed, the applicant shall forward a copy thereof by registered or certified mail to each and every person whose name and address were included on the application in accordance with the provisions of subdivisions (3) and (4), subsection (b) of this section. With each such application there shall be enclosed a notice (the form for which shall be furnished by the board on request) addressed to each such person to whom a copy of the application is required to be sent, informing him that such application is being mailed to him respectively by registered or certified mail, pursuant to the requirements of this article: *Provided*, That the application and notice need not be forwarded to those royalty owners or gas operators within the boundary of the proposed drilling unit who have previously agreed to voluntary pooling by separately stated document or documents empowering the gas operator, by assignment or otherwise, unilaterally to declare a unit.

§22-4B-10. Establishment of drilling units; hearings; orders. — (a) At the time and place fixed by the chairman for the meeting of the board and for consideration of an application to establish a drilling unit, the applicant shall present proof that the drilling location on the proposed drilling unit has been agreed to by all of the owners of the coal seams underlying such drilling location; and thereafter the applicant, the royalty owners of the gas underlying the tracts comprising the unit, and the gas operators of the tracts comprising the unit, or such of them as are present or represented, shall hold a conference with the board to consider the application. Such persons present or represented at the conference may agree upon the boundary of the drilling unit as proposed by the applicant or as changed to satisfy all valid objections of those persons present or represented. Any change in the boundary of the drilling unit from the boundary proposed by the applicant shall be shown on the plat filed with the board as part of the application. If agreement is reached at the conference upon the boundary of the drilling unit among the applicants, the royalty owners of the gas underlying the tracts comprising the drilling unit and the gas operators of the tracts comprising such unit, or such of them as are present or represented, and if such agreement is approved by the board, the board shall issue a written order establishing and specifying the boundary of the drilling unit.

(b) If the applicant, the royalty owners of the gas underlying the tracts comprising the drilling unit and the gas operators of the tracts comprising such unit, or such of them as are present or represented at the time and place fixed by the chairman for consideration of the application, are unable to agree upon the boundary of the drilling unit, then the board shall hold a hearing without recess of more than one business day to consider the application to establish a drilling unit. All of the pertinent provisions of article five, chapter twenty-nine-a of this code shall apply to and govern such hearing. Within twenty days after the close of the hearing, the board shall issue a written order either establishing a drilling unit or dismissing the application. If the board determines to establish a drilling unit, the order shall specify the boundary of such drilling unit. In determining whether to grant or deny an application to establish a drilling unit, the board shall consider:

(1) The surface topography and property lines of the lands comprising the drilling unit;

(2) The correlative rights of all gas operators and royalty owners therein;

(3) The just and equitable share of production of each gas operator and royalty owner therein;

(4) Whether a gas operator or royalty owner objecting to the drilling unit has proved by clear and convincing evidence that the drilling unit is substantially smaller than the area that will be produced by the proposed well; and

(5) Other evidence relevant to the establishment of the boundary of a drilling unit.

(c) The board shall not grant an application to establish a drilling unit, nor shall it approve any drilling unit, unless the board finds that:

(1) The applicant has proved that the drilling location on the drilling unit has been agreed to by all of the owners of the coal seams underlying such drilling location;

(2) The department has previously refused to issue a drilling permit on one of the tracts comprising the drilling unit because of an order of the board;

(3) The drilling unit includes all acreage within the minimum distance limitations provided by section eight of this article, unless the gas operators and royalty owners of any excluded acreage have agreed to such exclusion; and

(4) The drilling unit includes a portion of the acreage from under which the well operator intended to produce gas under the drilling permit which was refused.

(d) All orders issued by the board under this section shall contain findings of fact and conclusions based thereon as required by section three, article five, chapter twenty-nine-a of this code and shall be filed with the department within twenty days after the hearing. Any member of the board may file a separate opinion. Copies of all orders and opinions shall be mailed by the board, by registered or certified mail, to the parties present or represented at the hearing.

§22-4B-11. Pooling of interests in a drilling unit; limitations. — (a) Whenever the board establishes a drilling unit pursuant to the provisions of sections nine and ten of this article, the order establishing such drilling unit shall include an order pooling the separately owned interests in the gas to be produced from such drilling unit.

(b) If a voluntary pooling agreement has been reached between all persons owning separate operating interests in the tracts comprising the drilling unit, the order of the board shall approve such agreement.

(c) If no voluntary pooling agreement is reached prior to or during the hearing held pursuant to subsection (b), section ten of this article, then at such hearing the board shall also determine the pooling of interests in the drilling unit.

(d) Any order of the board pooling the separately owned interests in the gas to be produced from the drilling unit shall be upon terms and conditions which are just and equitable and shall authorize the production of gas from the drilling unit; shall designate the applicant as the operator to drill and operate such gas well; shall prescribe the procedure by which all owners of operating interests in the pooled tracts or portions of tracts may elect to participate therein; shall provide that all reasonable costs and expenses of drilling, completing, equipping, operating, plugging, abandoning, and reclaiming such well shall be borne, and all production therefrom shared, by all owners of operating interests in proportion to the net gas acreage in the pooled tracts owned or under lease to each owner; and shall make provisions for payment of all reasonable costs thereof, including all reasonable charges for supervision and for interest on past-due accounts, by all those who elect to participate therein.

(e) Upon request, any such pooling order shall provide an owner of an operating interest an election to be made within ten days from the date of the pooling order, (i) to participate in the risks and costs of the drilling of the well, or (ii) to participate in the drilling of the well on a limited or carried basis on terms and conditions which, if not agreed upon, shall be determined by the board to be just and equitable. If the election is not made within the ten-day period, such owner shall be conclusively presumed to have elected the limited or carried basis. Thereafter, if an owner of any operating interest in any portion of the pooled tract shall drill and operate, or pay the costs of drilling and

operating, a well for the benefit of such nonparticipating owner as provided in the order of the board, then such operating owner shall be entitled to the share of production from the tracts or portions thereof pooled accruing to the interest of such nonparticipating owner, exclusive of any royalty or overriding royalty reserved with respect to such tracts or portions thereof, or exclusive of one-eighth of the production attributable to all unleased tracts or portions thereof, until the market value of such nonparticipating owner's share of the production, exclusive of such royalty, overriding royalty or one-eighth of production, equals double the share of such costs payable by or charged to the interest of such nonparticipating owner.

(f) In no event shall drilling be initiated or completed on any tract, where the gas underlying such tract has not been severed from the surface thereof by deed, lease or other title document, without the written consent of the person who owns such tract.

(g) All disputes which may arise as to the costs of drilling and operating a well under a pooling order issued pursuant to this section shall be resolved by the board within ninety days from the date of written notification to the board of the existence of such dispute.

§22-4B-12. Effect of order establishing drilling unit or pooling of interests; recordation. — (a) An order issued by the board establishing a drilling unit and ordering the pooling of interests therein shall not entitle the gas operator designated in such order to drill a well on such drilling unit until such gas operator shall have received a drilling permit in accordance with the provisions applicable to alternative drilling locations set out in section three-b of article four of this chapter. All orders issued by the board establishing a drilling unit shall be filed with the department and shall also direct the department to issue a drilling permit for the drilling location agreed to by all of the owners of the coal seams underlying such drilling location.

(b) A certified copy of any order of the board establishing a drilling unit or a pooling of interests shall be mailed by the board to the clerk of the county commission of each county wherein all or any portion of the drilling unit is located, for recordation in the record book of such county in which oil and gas leases are normally recorded. Such recordation from the time noted thereon by such clerk shall be notice of the order to all persons.

§22-4B-13. Judicial review; appeal to supreme court of appeals; legal representation for board. — (a) Any person adversely affected by an order of the board shall be entitled to judicial review thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this code shall apply to and govern such judicial review with like effect as if the provisions of said section four were set forth in extenso in this section.

(b) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of section one, article six, chapter twenty-nine-a of this code.

(c) 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 assistants and in any circuit court by the prosecuting attorney of the county as well, all without additional compensation. The board, with the written approval of the attorney general, may employ special counsel to represent the board at any such appeal proceedings.

§22-4B-14. Operation on drilling units. — All operations, including, but not limited to, the commencement, drilling or operation of a well upon a drilling unit for which a pooling order has been entered, shall be deemed for all purposes the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof. That portion of the production allocated to a separately owned tract included in a drilling unit shall, when produced, be deemed for all purposes to have been actually produced from such tract by a well drilled thereon.

§22-4B-15. Validity of unit agreements. — No agreement between or among gas operators, lessees or other owners of gas rights in gas properties, entered into pursuant to the provisions of this article or with a view to or for the purpose of bringing about the unitized development or operation of such properties, shall be held to violate the

statutory or common law of this state prohibiting monopolies or acts, arrangements, contracts, combinations or conspiracies in restraint of trade or commerce.

§22-4B-16. Injunctive relief. — (a) Whenever it appears to the board that any person has been or is violating or is about to violate any provision of this article, any rule and regulation promulgated by the board hereunder or any order or final decision of the board, the board may apply in the name of the state to the circuit court of the county in which the violations or any part thereof has occurred, is occurring or is about to occur, or the judge thereof in vacation, for an injunction against such person and any other persons who have been, are or are about to be, involved in any practices, acts or omissions, so in violation, enjoining such person or persons from any such violation or violations. Such application may be made and prosecuted to conclusion whether or not any such violation or violations have resulted or shall result in prosecution or conviction under the provisions of section seventeen of this article.

(b) Upon application by the board, the circuit courts of this state may by mandatory or prohibitory injunction compel compliance with the provisions of this article, the rules and regulations promulgated by the board hereunder and all orders of the board. The court may issue a temporary injunction in any case pending a decision on the merits of any application filed. Any other section of this code to the contrary notwithstanding, the state shall not be required to furnish bond or other undertaking as a prerequisite to obtaining mandatory, prohibitory or temporary injunctive relief under the provisions of this article.

(c) The judgment of the circuit court upon any application permitted by the provisions of this section shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals. Any such appeal shall be sought in the manner and within the time provided by law for appeals from circuit courts in other civil actions.

(d) The board shall be represented in all such proceedings by the attorney general or his assistants and in such proceedings in the circuit courts by the prosecuting attorneys of the several counties as well, all without additional compensation. The board with the written approval of the attorney general, may employ special counsel to represent the board in any such proceedings.

(e) If the board shall refuse or fail to apply for an injunction to enjoin a violation or threatened violation of any provision of this article, any rule and regulation promulgated by the board hereunder or any order or final decision of the board, within ten days after receipt of a written request to do so by any person who is or will be adversely affected by such violation or threatened violation, the person making such request may apply in his own behalf for an injunction to enjoin such violation or threatened violation in any court in which the board might have brought suit. The board shall be made a party defendant in such application in addition to the person or persons violating or threatening to violate any provision of this article, any rule and regulation promulgated by the board hereunder or any order of the board. The application shall proceed and injunctive relief may be granted without bond or other undertaking in the same manner as if the application had been made by the chairman.

§22-4B-17. Penalties. — (a) Any person who violates any provision of this article, any of the rules and regulations promulgated by the board hereunder or any order of the board other than a violation governed by the provisions of subsection (b) of this section, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one thousand dollars.

(b) Any person who, with the intention of evading any provision of this article, any of the rules and regulations promulgated by the board hereunder or any order of the board shall make or cause to be made any false entry or statement in any application or other document permitted or required to be filed under the provisions of this article, any of the rules and regulations promulgated by the board hereunder or any order of the board, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or imprisoned in the county jail not more than six months, or both fined and imprisoned.

(c) Any person who knowingly aids or abets any other person in the violation of any provision of this article, any of the rules and regulations promulgated by the board hereunder or any order or final decision of the board, shall be subject to the same penalty as that prescribed in this article for the violation by such other person.

§22-4B-18. Construction. — This article shall be liberally construed so as to effectuate the declaration of public policy set forth in section one of this article.

WEST VIRGINIA
ADMINISTRATIVE REGULATIONS
Department of Mines

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(1978)

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WEST VIRGINIA
ADMINISTRATIVE REGULATIONS

Department of Mines

Chapter 22-4B

SERIES I

(1978)

PART I GENERAL PROVISIONS

1.01 Scope and Construction (a) The procedures and rules of practice set forth herein shall govern and apply to all proceedings before the West Virginia Shallow Gas Well Review Board.

(b) These rules shall be liberally construed to secure the just, prompt and inexpensive conduct of all proceedings consistent with adequate consideration of the issues involved.

1.02 Authority These rules are promulgated pursuant to the authority of Code §22-4B-6 and Article 3, Chapter 29A of the Code.

1.03 Effective Date These rules were promulgated on the 30th day of October, 1978, and become effective on the 30th day of November, 1978.

1.04 Filing Date These rules were filed in the office of the Secretary of State on the 31st day of October, 1978.

1.05 Definitions As used in these rules: (a) The terms "Board", "Chairman", "coal operator", "coal seam" or "workable coal bed", "Commissioner", "Department" or "Department of Mines", "Deputy Director", "drilling unit", "gas", "gas operator", "owner", "person", "plant", "pool", "royalty owner", "shallow well", "tract comprising a drilling unit", "well", and "well operator" shall have the meanings set forth in Code §22-4B-2.

(b) The term "Code" shall mean the West Virginia Code of 1931, as amended.

(c) The term "barrel" shall mean 42 U. S. gallons of 231 cubic inches each of liquids, including slurries, at a temperature of 60 degrees Fahrenheit.

(d) The term "cubic foot of gas" shall mean the volume of gas contained in one cubic foot of space at a standard pressure base and a standard temperature base. The standard pressure base shall be 14.73 pounds per square inch and the standard temperature base shall be 60 degrees Fahrenheit.

(e) The term "day" shall mean a period of 24 consecutive hours.

(f) The term "designated agent" shall mean the resident of the State of West Virginia designated by a gas operator or well operator as the agent or attorney in fact of such operator upon whom process, notices, orders or other communications issued pursuant to Chapter 22 of the Code may be served.

(g) The term "gas-oil ratio test" shall mean a test, by any means generally accepted in the industry, to determine the number of cubic feet of gas produced per barrel of oil produced.

(h) The term "gas well" shall mean any well which produces or appears capable of producing a ratio of 6,000 cubic feet of gas or more to each barrel of oil on the basis of the initial gas-oil ratio test.

(i) The term "initial gas-oil ratio test" shall mean the gas-oil ratio test performed for the purpose of completing Form IV-36, "Well Operator's Report of Initial Gas-Oil Ratio Test", to designate the type of well.

(j) The term "log" or "well log" shall mean a systematic, detailed geological record of all formations, including coal, fresh water and salt water, encountered in the drilling of a well.

(k) The term "oil well" shall mean any well which produces or appears capable of producing a ratio of less than 6,000 cubic feet of gas to each barrel of oil on the basis of the initial gas-oil ratio test.

1.06. Parties (a) In proceedings concerning the location of shallow wells under Code §22-4B-7, the parties shall be:

(1) The well operator who proposes to drill a shallow well, and

(2) All coal seam owners who have objected to such proposed drilling pursuant to Code §22-4-3b, and

(3) The Department, if it has included an objection in the notice of objection.

(b) In proceedings to establish drilling units under Code §§22-4B-9, 10 and 11, the parties shall be:

(1) The gas operator who has applied for the establishment of a drilling unit, and

(2) The royalty owners of gas underlying the tracts which comprise the proposed drilling unit, and

(3) The gas operators of the tracts which comprise the proposed drilling unit, and

(4) All persons who have objected to the establishment of the proposed drilling unit pursuant to Code §22-4B-9(c).

(c) In proceedings to resolve disputes concerning the costs of drilling and operating a well under a pooling order issued by the Board, the parties shall be all royalty owners and gas operators owning interests in the gas produced from the drilling unit for which the pooling order was issued.

1.07 Intervention Any person claiming a right of participation as a party with a direct pecuniary interest may intervene in a proceeding and become a party upon petition to the Board and the granting of such petition. The petition must set forth the direct pecuniary interest of the petitioner in the proceeding and show that the petitioner's participation will assist in the determination of the issues in question. A petition for leave to intervene may be filed at any stage of a proceeding before the commencement of the hearing. In the discretion of the Board, a person may be denied intervention in a matter in which he could have participated as a party but failed to avail himself of the opportunity to do so; and a person shall be denied intervention unless he has a direct pecuniary interest in the proceeding. The Board may permit intervention limited to a particular stage of the proceeding.

1.08 Filing and Service of Documents and Orders

(a) Where to file. All documents required to be filed in a proceeding described in these rules shall be filed with the Chairman, West Virginia Shallow Gas Well Review Board, Department of Mines, 1613 Washington Street East, Charleston, West Virginia 25311.

(b) How to file. All filing may be accomplished by personal delivery or first class mail.

(c) When filing effected. Filing is effective upon delivery.

(d) Copies to be served. Copies of all documents filed in any proceeding described in these rules shall be served upon all other parties to the proceeding.

(e) Method of service; service of attorney. Service of documents shall be accomplished by personal delivery or by registered or certified mail, return receipt requested, unless otherwise provided in these rules. Whenever a party is represented by an

attorney who has signed any document filed on behalf of such party or otherwise entered an appearance on behalf of such party, service thereafter shall be made upon the attorney.

(f) **When service effected.** In the case of personal delivery, service is effective upon delivery. In the case of mailing, service is effective upon mailing.

(g) **Proof of service.** Unless otherwise provided in these rules, all documents required to be served shall be accompanied by proof of service in the form of a certificate of service. The certificate of service shall include a statement of how service was accomplished.

1.09 Consolidation of Proceedings The Board may at any time order a proceeding described in these rules consolidated with any other such proceeding then pending before the Board which involves the same parties and similar issues of law and fact.

1.10 Hearings All hearings shall be conducted by the Board in accordance with the provisions of Part V of these rules, and all such hearings shall be open to the public.

PART II RULES APPLICABLE TO PROCEEDINGS CONCERNING THE LOCATION OF SHALLOW GAS WELLS

2.01 Scope The rules in this part govern and are applicable to proceedings concerning the location of shallow wells under Code §22-4B-7. In addition to the rules contained in this part, the general rules of practice before the Board contained in Part I and the rules relating to hearings held by the Board contained in Part V are also applicable to such proceedings.

2.02 How Initiated; Notice of Meeting (a) Upon receipt of a Form IV-15, "Notice to West Virginia Shallow Gas Well Review Board of Objection Under Code §22-4-36 to a Proposed Drilling Site", from the Deputy Director, the Chairman shall call a meeting of the Board. Such meeting shall be scheduled not less than 10 days nor more than 20 days from receipt by the Chairman of the notice of objection, and notice of such meeting shall be given by the Chairman at least ten days in advance thereof to all parties and the remaining members of the Board.

(b) The notice of each meeting called by the Chairman pursuant to subsection (a) of this section shall issue in the name of the State, shall specify the style of the proceeding and a docket number assigned by the Chairman, shall state that such meeting is being called for the purpose of holding a conference and, if necessary, a hearing concerning the objections to proposed drilling, shall state the date, time and place of the meeting, and shall be signed by the Chairman.

(c) The notice of each meeting required by subsection (a) of this section shall be given in the manner provided in Code §22-4B-6. A copy of such notice, including proof of service or publication thereof, shall be retained in the record of the proceeding by the Chairman. Proof of service or publication of such notice shall be made by (i) a verified return if service was made personally, (ii) a certificate of service or return receipt if service was by certified mail, or (iii) a copy of the published notice if service was by publication.

(d) The Chairman shall also mail, by regular United States mail, a copy of all notices given pursuant to subsection (a) of this section to all other persons who have specified to the Chairman an address to which all such notices may be mailed.

2.03 Agreed Location (a) At any time prior to a meeting called pursuant to the provisions of section 2.02 of these rules, the parties may agree upon either the drilling location as proposed by the well operator or an alternate drilling location on the tract.

(b) If all parties agree to a drilling location prior to a meeting of the Board, the well operator shall immediately file a notice that an agreement has been reached with the Chairman. Such notice shall specify the nature of the agreement and shall include a

copy of the plat filed with the Department pursuant to Code §22-4-2. Any change in the drilling location from the drilling location proposed by the well operator shall be shown on the plat and the distance and direction to the new drilling location from the proposed drilling location shall also be shown. Copies of the notice of an agreed location, including a copy of the plat, shall be served upon all other parties.

(c) Upon receipt of any notice of agreement filed pursuant to subsection (b) of this section, the Chairman shall promptly cancel the meeting of the Board and shall issue a written order stating that an agreement has been reached, stating the nature of such agreement, and directing the Department to grant the well operator a drilling permit for the location agreed upon. The original of such order, together with the entire record of the proceeding, shall be filed with the Department within 5 days after receipt of a notice of agreement. A copy of the order shall be mailed by registered or certified mail to all parties.

2.04 Conference (a) If a drilling location is not agreed upon pursuant to the provisions of section 2.03 of these rules, the parties shall meet with the Board at the time and place fixed by the Chairman to consider the objections to proposed drilling. At such conference, the parties may agree upon either the drilling location as proposed by the well operator or an alternate drilling location on the same tract.

(b) If all parties agree upon a drilling location, the Board shall issue a written order stating that an agreement has been reached, stating the nature of such agreement, and directing the Department to grant the well operator a drilling permit for the location agreed upon. Any change in the drilling location from the drilling location proposed by the well operator shall be indicated on the plat enclosed with the notice of objection filed with the Chairman by the Deputy Director and the distance and direction to the new drilling location from the proposed drilling location shall also be shown on such plat. The original of the Board's order, together with the entire record of the proceeding, shall be filed with the Department within 5 days after the conference of the Board at which the drilling location was agreed upon. A copy of the order shall be mailed by registered or certified mail to all parties.

2.05 Hearings (a) If the parties present or represented at the conference with the Board are unable to agree upon a drilling location, then, unless they otherwise agree, the Board shall, without recess for more than one business day, hold a hearing to consider the application for a drilling permit. Such hearing shall be conducted in the manner provided in Part V of these rules and the pertinent provisions of Article 5, Chapter 29A of the Code shall apply to and govern such hearing.

(b) Within 20 days after the close of such hearing, the Board shall issue and file with the Department a written order in accordance with Code §§22-4B-7 and 8. The entire record of the proceedings shall be filed with the Department simultaneously with the order, and a copy of the order shall be mailed by registered or certified mail to all parties at the time such order is filed.

(c) Any member of the Board may file a separate opinion with the Department within 25 days after the close of a hearing. A copy of any such opinion shall be mailed by registered or certified mail to all parties at the same time it is filed.

PART III RULES APPLICABLE TO PROCEEDINGS TO ESTABLISH DRILLING UNITS

3.01 Scope The rules in this part govern and are applicable to proceedings concerning the establishment of drilling units under Code §§22-4B-9, 10 and 11. In addition to the rules contained in this part, the general rules of practice before the Board contained in Part I and the rules relating to hearings held by the Board contained in Part V are also applicable to such proceedings.

3.02 How Initiated; Notice of Meeting (a) Upon receipt of an application to establish a drilling unit, the Chairman shall call a meeting of the Board. Such meeting shall be scheduled not less than 10 days nor more than 20 days from receipt by the Chairman of the application to establish a drilling unit, and notice of such meeting shall be given by the Chairman at least 10 days in advance thereof to all parties and the remaining members of the Board.

(b) The notice of each meeting called by the Chairman pursuant to subsection (a) of this section shall issue in the name of the State, shall specify the style of the proceedings and a docket number assigned by the Chairman, shall state that such meeting is being called for the purpose of holding a conference and, if necessary, a hearing concerning the application to establish a drilling unit, shall state the date, time and place of the meeting, and shall be signed by the Chairman.

(c) The notice of each meeting required by subsection (a) of this section shall be given in the manner provided in Code §22-4B-6. A copy of such notice, including proof of service or publication thereof, shall be retained in the record of the proceeding by the Chairman. Proof of service or publication of such notice shall be made by (i) a verified return if service was made personally, (ii) a certificate of service or return receipt if service was by certified mail, or (iii) a copy of the published notice if service was by publication.

(d) The Chairman shall also mail, by regular United States mail, a copy of all notices given pursuant to subsection (a) of this section to all other persons who have specified to the Chairman an address to which all such notices may be mailed.

3.03 **Conference** (a) The parties shall meet with the Board at the time and place fixed by the Chairman for consideration of an application to establish a drilling unit, and the applicant shall be called upon to show that the drilling location on the proposed drilling unit has been agreed to by all of the owners of the coal seams underlying such drilling location. Failure to make such showing shall result in dismissal of the application by the Board, but such dismissal shall not prevent the applicant from later filing a similar application when the drilling location is agreed to by all of the owners of the coal seams underlying such drilling location.

(b) If the Board finds that the applicant has shown that the drilling location on the proposed drilling unit has been agreed to by all owners of coal seams underlying such drilling location, then the parties shall confer with the Board concerning the boundary of the proposed drilling unit and the pooling of the separately-owned interests in the gas to be produced from the drilling unit. The parties may agree upon either the drilling unit as proposed by the applicant or as changed to satisfy all valid objections of the parties, and also may agree upon the pooling of the separately-owned interests in the gas to be produced from such drilling unit.

(c) If the parties agree upon the boundary of a drilling unit and also agree upon the pooling of the separately-owned interests in the gas to be produced from such drilling unit, the Board shall determine whether the criteria provided in Code §22-4B-10(c) have been met. If the Board finds that such criteria are satisfied, the Board shall issue a written order specifying the boundary of the drilling unit agreed upon and approving the voluntary pooling agreement. Any change in the boundary of the drilling unit from the boundary proposed by the applicant shall be shown on the plat filed with the Board as part of the application. The original of the Board's order, together with the entire record of the proceeding, shall be filed with the Department within 20 days after the conference of the Board at which the boundary of the drilling unit was agreed upon. A copy of the order shall be mailed by registered or certified mail to all parties.

3.04 **Hearings** (a) If the parties present or represented at the conference with the Board are unable to agree upon the boundary of the drilling unit or the pooling of the separately-owned interests in the gas to be produced from such drilling unit, then, unless the parties otherwise agree, the Board shall, without recess for more than one business day, hold a hearing to consider the issues in dispute. Such hearing shall be conducted in the manner provided in Part V of these rules and the pertinent provisions of Article 5, Chapter 29A of the Code shall apply to and govern such hearing.

(b) Within 20 days after the close of such hearing, the Board shall issue and file with the Department a written order in accordance with the provisions of Code §§22-4B-10 and 11. The entire record of the proceedings shall be filed with the Department simultaneously with the order, and a copy of the order shall be mailed by registered or certified mail to all parties at the time such order is filed.

(c) Any member of the Board may file a separate opinion with the Department within 25 days after the close of the hearing. A copy of any such opinion shall be mailed by registered or certified mail to all parties at the time it is filed.

PART IV DISPUTES UNDER POOLING ORDER

4.01 Scope The rules in this part govern and are applicable to disputes concerning the costs of drilling and operating a well under a pooling order issued by the Board pursuant to Code §22-4B-11. In addition to the rules contained in this part, the general rules of practice before the Board contained in Part I and the rules relating to hearings held by the Board contained in Part V are also applicable to such proceedings.

4.02 Initiation of Proceedings; Petition to Resolve Dispute (a) Proceedings for the resolution of disputes concerning the costs of drilling and operating a well under a pooling order issued by the Board may be initiated by any party to such pooling order by filing a petition to resolve dispute.

(b) Such petition shall be filed with the Chairman and copies thereof shall be served upon all other parties owning interests in the gas produced from the drilling unit for which the pooling order was issued.

4.03 Contents of Petition (a) A petition to resolve a dispute shall identify the subject drilling unit, shall state the name and address of all persons owning interests in such drilling unit, and shall contain a short and plain statement of (1) the facts underlying the dispute, (2) such party's position with respect to each issue of law or fact in dispute, and (3) the relief requested by such party.

(b) A copy of the pooling order which is involved in the dispute shall be attached to each petition.

4.04 Notice of Meeting (a) Upon receipt of a petition to resolve dispute, the Chairman shall call a meeting of the Board. Such meeting shall be scheduled not less than 30 days from receipt by the Chairman of the petition, and notice of such meeting shall be given by the Chairman at least 10 days in advance thereof to all owners of interests in the gas produced from the drilling unit and of the remaining members of the Board.

(b) The notice of each meeting called by the Chairman pursuant to subsection (a) of this section shall issue in the name of the State, shall specify the style of the proceeding and a docket number assigned by the Chairman, shall state that such meeting is being called for the purpose of holding a hearing concerning the petition, shall state the date, time and place of the hearing, and shall be signed by the Chairman.

(c) The notice of such meeting required by subsection (a) of this section shall be given in the manner provided in Code §22-4B-6. A copy of such notice, including proof of service or publication thereof, shall be retained in the record of the proceeding by the Chairman. Proof of service or publication of such notice shall be made by (1) a verified return if service was made personally, (2) a certificate of service or return receipt if service was by certified mail, or (3) a copy of the published notice if service was a publication.

(d) The Chairman shall also mail, by regular United States mail, a copy of all notices given pursuant to subsection (a) of this section to all other persons who specify to the Chairman an address to which all such notices may be mailed.

4.05 Hearing (a) At the time and place fixed by the Chairman for the meeting of the Board and for hearing on the petition to resolve dispute, the Board shall hold a hearing to consider the petition. Such hearing shall be conducted in the manner provided in Part V of these rules and the pertinent provisions of Article 5, Chapter 29A of the Code shall apply to and govern such hearing.

(b) Within 20 days after the close of such hearing, the Board shall issue and file with the Department a written order resolving the dispute and either granting, granting in part or denying the relief requested in the petition. The entire record of the proceedings shall be filed with the Department simultaneously with the order, and a copy of the order shall be mailed by registered or certified mail to all parties.

(c) Any member of the Board may file a separate opinion with the Department within 25 days after the close of the hearing. A copy of any such opinion shall be mailed by registered or certified mail to all parties.

PART V HEARINGS

5.01 Scope Unless otherwise specified in these rules, the rules in this part shall govern and apply to hearings conducted by the Board pursuant to the authority provided in Article 4B, Chapter 22 of the Code or rules and regulations promulgated pursuant thereto.

5.02 Quorum; Presiding Officer No hearings shall be held by the Board unless at least two members of the Board are present. The Chairman shall preside over every hearing unless he is absent, in which case, the two members present shall decide who shall preside over the hearing.

5.03 Powers of Presiding Officers (a) The Chairman or other presiding officer in his absence, subject to the rules set forth in this section, may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas in accordance with the provisions of Code §29A-5-1;

(3) Rule upon offers of proof and receive relevant evidence;

(4) Permit evidentiary depositions to be taken and read as in civil actions in the circuit courts of this State;

(5) Permit discovery depositions with the agreement of the Board;

(6) Regulate the course of a hearing;

(7) Dispose of procedural requests or similar matters;

(8) Hold conferences for the settlement or simplification of the issues with the consent of the parties; and

(9) Take any other action in connection with such hearing authorized by law.

5.04 Notice of Hearing Unless otherwise specified in these rules, no hearing shall be conducted under these rules or otherwise unless the parties to the proceedings shall have received at least 10 days' written notice of a meeting of the Board at which a hearing may be held.

5.05 Representation at Hearings At hearings held pursuant to these rules, any party may represent himself or be represented by an attorney at law admitted to practice before the courts of any state or the District of Columbia. In addition, any party which is also an operator may be represented by a full-time employee.

5.06 Conduct of Hearing (a) Conduct of attorneys before the Board shall be the same as required of attorneys before the Circuit Courts of the State of West Virginia. Any person testifying in response to a subpoena or subpoena duces tecum issued by the Chairman and any person testifying in support of an application or in opposition thereto shall be required to do so under oath or affirmation administered by the Chairman or other presiding officer. Witnesses shall be examined with courtesy and respect, and their good faith shall be presumed.

(b) Smoking shall not be permitted in the hearing room during session or during recess.

(c) Electronic recording of any hearing is prohibited except as may be required by the Board for preserving a record thereof for the use of the Board in connection with the matter being heard. The taking of photographs in or broadcasting of proceedings from any hearing room or so close thereto as to disturb the hearing is prohibited.

(d) A transcript of testimony shall be taken and preserved as part of the permanent record. Parties may examine the official transcript or purchase copies thereof from the court reporter or Board.

5.07 Applicability of Administrative Procedures Act All of the pertinent provisions of Article 5, Chapter 29A of the Code shall apply to and govern hearings conducted under these rules with like effect as if the provisions of said Article 5 were set forth in

extenso of this section. If any provision of these rules of practice and procedure is inconsistent with any pertinent provision of said Article 5, the provision of said Article 5 shall control.

5.08 Burden of Proof (a) In proceedings concerning the location of shallow wells, the party objecting to the proposed drilling location shall have the burden of proving its case by a preponderance of the evidence, except that the gas operator shall have the burden of proving its case by a preponderance of the evidence if (1) the Department has objected to the proposed drilling location, or (2) the well is proposed to be drilled to a depth of 3,000 feet or more and the drilling location is less than 2,000 feet from the nearest existing well as defined in Code §22-4B-8(b).

(b) In proceedings to establish drilling units, the party initiating the proceeding shall have the burden of proving its case by preponderance of the evidence.

5.09 Proposed Findings, Conclusions and Orders The Chairman, or other presiding officer in the Chairman's absence, may request the submission by parties of proposed findings of fact, conclusions of law and orders, together with a supporting brief. Such proposals and briefs shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon.

5.10 Hearings to be Public All hearings to be conducted under these rules shall be open to the public. Notice to the public shall be as follows:

(1) The Board shall file with the Secretary of State's office a Notice containing the time, date and place of all regularly scheduled meetings of the Board.

(2) The Board shall file with the Secretary of State's office a Notice or Notices containing the time, date and place of all hearings to be heard by the Board pursuant to Code 22-4B-7. Said Notice shall be filed with the Secretary of State at least ten (10) days before the date set for the hearing.

(3) The Board shall file with the Secretary of State's office a Notice containing the time, date, place and purpose of all special meetings to be held by the Board. Said Notice must be filed with that office at least twenty-four (24) hours in advance.

(4) Copies of all Notices required to be filed by this Regulation with the Secretary of State's office shall also be delivered to the Capitol News Media Office W-123, State Capitol Building.

(5) None of the provisions of this Regulation shall apply to Board actions taken in the event of an emergency requiring immediate official action.

5.11 Written Orders (a) As soon as practicable after conclusion of a hearing, the members of the Board shall meet to consider the evidence and issue an order which shall be in writing and shall include a statement of:

(1) findings and conclusions and the reasons therefor on the material issues of fact and law; and

(2) the appropriate ruling or order in compliance with the provisions of Code §22-4B-7 or Code §22-4B-10.

(b) The original of all written orders issued by the Board shall be filed with the Department within 20 days after the hearing which is the subject of such order. The record of the proceeding shall be simultaneously filed with the Department, and a copy of the order shall be served, by certified mail, upon all parties at the time the order is filed. Unless the order otherwise provides, the order shall become effective upon filing unless a party makes application for re-hearing or modification in accordance with section 5.12 of these rules.

5.12 Re-opening; Re-hearing; Modification (a) Applications for re-opening a proceeding after hearing and before written order shall be made by petition filed prior to service of an order. Such petition shall state specifically the grounds relied upon and, if it be for the purpose of introducing additional evidence, shall also state the nature and purpose of the evidence to be introduced.

(b) Applications for re-hearing or re-argument after issuance of a written order shall be made by petition filed within 30 days after service of such order. Such petition shall state specifically the grounds relied upon and, if any written order is sought to be

vacated, reversed or modified by reason of (1) matters arising since the issuance of such order, (2) consequences which would result from compliance with the Board's order or (3) facts not in the possession of the petitioner prior to issuance of such order, such reasons shall also be stated.

(c) Applications for modification of written orders, which seek only a change in the date such order shall take effect, shall be made by petition filed within 30 days after service of the written order, except that, in the event of unforeseen emergencies satisfactorily shown by petitioner, such relief may be sought informally by telegram or otherwise, upon notice to all parties or attorneys who appeared in the proceeding.

(d) A copy of each petition filed under this section shall be served on all other parties to the original proceeding and such petition shall be accompanied by a certificate showing service upon such parties. Within 15 days after such service, an adverse party may file and serve a reply to the petition.

(e) Upon the filing of the reply or upon the failure of an adverse party to reply within 15 days after service of a copy of the petition on such party, the Board shall consider the petition, the replies thereto, and the record of the proceeding, and, if it determines a hearing upon the petition to be necessary, shall, after 10 days' notice to all parties in the manner provided in Code §22-4B-6, hold such hearing in accordance with the provisions of Part V of these rules. As soon as practicable after consideration of the petition, the replies thereto and the record of the proceeding, the Board shall issue an order either granting in part or denying the relief requested in the petition.

(f) The filing of a petition seeking (i) re-hearing or re-argument after issuance of a written order or (ii) modification of a written order pursuant to subsections (b) and (c) of this section, shall not stay the time for appeal of such written order to the circuit court unless the Board orders re-hearing or re-argument or modifies the written order, in which case, the time for appeal pursuant to Code §22-4b-13 shall begin to run anew after the Board's final action.

5.13 Appeal If an appeal is filed pursuant to Code §22-4B-13, the Deputy Director shall be responsible for certifying and forwarding the entire record of the proceedings to the circuit court.

ARTICLE 7.

UNDERGROUND GAS STORAGE RESERVOIRS.

Sec.

22-7-1. Definitions.
22-7-2. Filing of maps and data by persons operating or proposing to operate gas storage reservoirs.
22-7-3. Filing of maps and data by persons operating coal mines.
22-7-4. Notice by persons operating coal mines.
22-7-5. Obligations to be performed by persons operating storage reservoirs.
22-7-6. Inspection of facilities and records; reliance on maps; burden of proof.
22-7-7. Exemptions.
22-7-8. Alternative method.
22-7-9. Powers and duties of department.
22-7-10. Conferences, hearings and appeals.
22-7-11. Enforcement.
22-7-12. Penalties.

Michie's Jurisprudence. — See generally 13A M.J., Mines and Minerals.

W. Va. Law Review. — For article on underground storage of natural gas, see 68 W. Va. L. Rev. 136 (1966).

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§ 22-7-1. Definitions.

In this article unless the context otherwise requires:

(1) The term "coal mine" means those operations in a coal seam which include the excavated and abandoned portions as well as the places actually being worked; also all underground workings and shafts, slopes, tunnels, and other ways and openings and all such shafts, slopes, tunnels, and other openings in the course of being sunk or driven, together with all roads and facilities connected with them below the surface.

(2) The term "operating coal mine" means (a) a coal mine which is producing coal or has been in production of coal at any time during the twelve months immediately preceding the date its status is put in question under this article and any worked out or abandoned coal mine connected underground with or contiguous to such operating coal mine as herein defined and (b) any coal mine to be established or reestablished as an operating coal mine in the future pursuant to section four [§ 22-7-4] of this article.

(3) The term "outside coal boundaries" when used in conjunction with the term "operating coal mine" means the boundaries of the coal acreage assigned

to such coal mine and which can be practicably and reasonably expected to be mined through such coal mine.

(4) The term "well" means a borehole drilled or proposed to be drilled within the storage reservoir boundary or reservoir protective area for the purpose of or to be used for producing, extracting or injecting any gas, petroleum or other liquid but excluding boreholes drilled to produce potable water to be used as such.

(5) The term "gas" means any gaseous substance.

(6) The term "storage reservoir" means that portion of any subterranean sand or rock stratum or strata into which gas is or may be injected for the purpose of storage or for the purpose of testing whether said stratum is suitable for storage.

(7) The term "bridge" means an obstruction placed in a well at any specified depth.

(8) The term "linear foot" means a unit of measurement in a straight line on a horizontal plane.

(9) The term "person" means any individual, association, partnership or corporation.

(10) The term "reservoir protective area" means all of that area outside of and surrounding the storage reservoir boundary but within two thousand linear feet thereof.

(11) The term "retreat mining" means the removal of such coal, pillars, ribs and stumps as remain after the development mining has been completed in that section of a coal mine.

(12) The term "pillar" means a solid block of coal surrounded by either active mine workings or a mined out area.

(13) The term "inactivate" means to shut off all flow of gas from a well by means of a temporary plug, or other suitable device or by injecting aquagel or other such equally nonporous material into the well.

(14) The term "storage operator" means any person as herein defined who proposes to or does operate a storage reservoir, either as owner or lessee.

(15) The term "workable coal seam" shall have the same meaning as the term "workable coal bed" as set out in section one [§ 22-4-1] of article four of this chapter.

(16) The terms "owner," "coal operator," "well operator," "department," "department of mines," "plat," "casing," "oil," and "cement," shall have the meanings set out in section one [§ 22-4-1] of article four of this chapter. (1955, c. 106.)

§ 22-7-2. Filing of maps and data by persons operating or proposing to operate gas storage reservoirs.

(a) Any person who, on the effective date of this article [June 8, 1955], is injecting gas into or storing gas in a storage reservoir which underlies or is within three thousand linear feet of an operating coal mine which is operating in a coal seam that extends over the storage reservoir or the reservoir protective area, shall, within sixty days thereafter, file with the department a copy of a map and certain data in the form and manner provided in this subsection.

Any person who, on the effective date of this article, is injecting gas into or storing gas in a storage reservoir which is not at such date under or within three thousand linear feet, but is less than ten thousand linear feet from an operating coal mine which is operating in a coal seam that extends over the storage reservoir or the reservoir protective area, shall file such map and data within such time in excess of sixty days as the department may fix.

Any person who, after the effective date of this article [June 8, 1955], proposes to inject or store gas in a storage reservoir located as above, shall file the required map and data with the department not less than six months prior to the starting of actual injection or storage.

The map provided for herein shall be prepared by a competent engineer or geologist. It shall show the stratum or strata in which the existing or proposed storage reservoir is or is to be located, the geographic location of the outside boundaries of the said storage reservoir and the reservoir protective area, the location of all known oil or gas wells which have been drilled into or through the storage stratum within the reservoir or within three thousand linear feet thereof, indicating which of these wells have been, or are to be cleaned out and plugged or reconditioned for storage and also indicating the proposed location of all additional wells which are to be drilled within the storage reservoir or within three thousand linear feet thereof.

The following information, if available, shall be furnished for all known oil or gas wells which have been drilled into or through the storage stratum within the storage reservoir or within three thousand linear feet thereof; name of the operator, date drilled, total depth, depth of production if the well was productive of oil or gas, the initial rock pressure and volume, the depths at which all coal seams were encountered and a copy of the driller's log or other similar information. At the time of the filing of the aforesaid maps and data such person shall file a detailed statement of what efforts he has made to determine, (1) that the wells shown on said map are accurately located thereon, and (2) that to the best of his knowledge they are all the oil or gas wells which have ever been drilled into or below the storage stratum within the proposed storage reservoir or within the reservoir protective area. This statement shall also include information as to whether or not the initial injection is for testing purposes, the maximum pressures at which injection and storage of gas is contemplated, and a detailed explanation of the methods to be used or which theretofore have been used in drilling, cleaning out, reconditioning and plugging wells in the storage reservoir or within the reservoir protective area. The map and data required to be filed hereunder shall be amended or supplemented semiannually in case any material changes have occurred: Provided, however, that the department may require a storage operator to amend or supplement such map or data at more frequent intervals if material changes have occurred justifying such earlier filing.

(b) The requirements of this section shall not apply to the operator of an underground gas storage reservoir so long as said reservoir is located more than ten thousand linear feet from an operating coal mine: Provided, however, that such storage operator shall give notice to the department of the name of each political subdivision and county in which said operator maintains and

operates a gas storage reservoir. In those political subdivisions and counties where both gas storage reservoirs and coal mines are being operated the department may request the storage operator to furnish maps showing the geographical location and outside boundaries of such storage reservoirs. The department shall keep a record of such information and shall promptly notify both the coal operator and the storage operator if it is found that the coal mine and storage reservoir are within ten thousand linear feet of each other.

(c) At the time of the filing of the above maps and data, and the filing of amended or supplemental maps or data, the department shall give written notice of said filing to all persons who may be affected under the provisions of this article by the storage reservoir described in such maps or data. Such notices shall contain a description of the boundaries of such storage reservoir. When a person operating a coal mine or owning an interest in coal properties which are or may be affected by the storage reservoir, requests in writing a copy of any map or data filed with the department such copy shall be furnished by the storage operator.

(d) For all purposes of this article, the outside boundaries of a storage reservoir shall be defined by the location of those wells around the periphery of the storage reservoir which had no gas production when drilled in said storage stratum: Provided, however, that the boundaries as thus defined shall be originally fixed or subsequently changed where, based upon the number and nature of such wells, upon the geological and production knowledge of the storage stratum, its character, permeability, and distribution, and operating experience, it is determined in a conference or hearing under section ten [§ 22-7-10] of this article that modification should be made. (1955, c. 106.)

§ 22-7-3. Filing of maps and data by persons operating coal mines.

(a) Any person owning or operating a coal mine shall, within thirty days from the effective date of this article [June 8, 1955], file with the department a map, prepared by a competent engineer, showing the outside coal boundaries of the said operating coal mine, the existing workings and exhausted areas and the relationship of said boundaries to identifiable surface properties and landmarks. Any person who is storing or contemplating the storage of gas in the vicinity of such operating coal mines shall, upon written request, be furnished a copy of the aforesaid map by the coal operator and such person and the department shall thereafter be informed of any boundary changes at the time such changes occur. The department shall keep a record of such information and shall promptly notify both the coal operator and the storage operator if it is found that the coal mine and the storage reservoir are within ten thousand linear feet of each other.

(b) Any person owning or operating any coal mine which, on the date of the enactment of this article [March 10, 1955], is or which thereafter comes within ten thousand linear feet of a storage reservoir, and where the coal seam being operated extends over the storage reservoir or the reservoir protective area, shall within forty-five days after he has notice from the department of such fact, file with the department, and furnish to the person operating such storage

reservoir, a map in the form hereinabove provided and showing in addition, the existing and projected excavations and workings of such operating coal mine for the ensuing eighteen-month period, and also the location of any oil or gas wells of which said coal operator has knowledge. Such person owning or operating said coal mine shall each six months thereafter file with the department and furnish to the person operating such storage reservoir a revised map showing any additional excavations and workings, together with the projected excavations and workings for the then ensuing eighteen-month period which may be within ten thousand linear feet of said storage reservoir: Provided, however, that the department may require a coal operator to file such revised map at more frequent intervals if material changes have occurred justifying such earlier filing. Such person owning or operating said coal mine shall also file with the department and furnish the person operating said reservoir prompt notice of any wells which have been cut into, together with all available pertinent information. (1955, c. 106.)

§ 22-7-4. Notice by persons operating coal mines.

(a) Any person owning or operating a coal mine on the effective date of this article [June 8, 1955], and having knowledge that it overlies or is within two thousand linear feet of a gas storage reservoir, shall within thirty days notify the department and the storage operator of such fact.

(b) When any person owning or operating a coal mine hereafter expects that within the ensuing nine-month period such coal mine will be extended to a point which will be within two thousand linear feet of any storage reservoir he shall notify the department and the storage operator in w iting of such fact.

(c) Any person hereafter intending to establish or reestablish an operating coal mine which when established or reestablished will be over a storage reservoir or within two thousand linear feet of a storage reservoir, or which upon being established or reestablished may within nine months thereafter be expected to be within two thousand linear feet of a storage reservoir, shall notify the department and the storage operator in writing before doing so and such notice shall include the date on which it is intended the operating coal mine will be established or reestablished.

Any person who serves such notice of an intention to establish or reestablish an operating coal mine under this subsection, without intending in good faith to establish or reestablish such mine, shall be liable for continuing damages to any storage operator injured by the serving of such improper notice and shall be guilty of a misdemeanor under this article and subject to the same penalties as set forth in section twelve [§ 22-7-12] of this article. (1955, c. 106.)

§ 22-7-5. Obligations to be performed by persons operating storage reservoirs.

(a) Any person who, on the effective date of this article [June 8, 1955], is operating a storage reservoir which underlies or is within two thousand linear feet of an operating coal mine which is operating in a coal seam that extends over the storage reservoir or the reservoir protective area, shall:

(1) Use every known method which is reasonable under the circumstances for discovering and locating all wells which have or may have been drilled into or through the storage stratum in that acreage which is within the outside coal boundaries of such operating coal mine and which overlies the storage reservoir or the reservoir protective area;

(2) Plug or recondition, in the manner provided by sections nine and ten [§§ 22-4-9 and 22-4-10] of article four of this chapter and subsection (e) of this section, all known wells (except to the extent otherwise provided in subsections (e), (f), (g) and (h) of this section) drilled into or through the storage stratum and which are located within that portion of the acreage of the operating coal mine overlying the storage reservoir or the reservoir protective area: Provided, however, that where objection is raised as to the use of any well as a storage well, and after a conference or hearing in accordance with section ten [§ 22-7-10] of this article it is determined, taking into account all the circumstances and conditions, that such well should not be used as a storage well, such well shall be plugged: Provided, however, that if, in the opinion of the storage operator, the well to which such objection has been raised may at some future time be used as a storage well, the storage operator may recondition and inactivate such well instead of plugging it, if such alternative is approved by the department after taking into account all of the circumstances and conditions.

The requirements of clause (2) of this subsection shall be deemed to have been fully complied with if, as the operating coal mine is extended, all wells which, from time to time, come within the acreage described in said clause (2) are reconditioned or plugged as provided in subsections (e) or (f) of this section and in section ten [§ 22-4-10] of article four of this chapter so that by the time the coal mine has reached a point within two thousand linear feet of any such wells, they will have been reconditioned or plugged so as to meet the requirements of said subsections (e) or (f) and of said section ten [§ 22-4-10] of article four.

(b) Any person operating a storage reservoir referred to in subsection (a) of this section shall within sixty days after the effective date of this article [June 8, 1955] file with the department and furnish a copy to the person operating the affected operating coal mine, a verified statement setting forth:

(1) That the map and any supplemental maps required by subsection (a) of section two [§ 22-7-2] of this article have been prepared and filed in accordance with section two [§ 22-7-2];

(2) A detailed explanation of what the storage operator has done to comply with the requirements of clauses (1) and (2) of subsection (a) of this section and the results thereof;

(3) Such additional efforts, if any, as the storage operator is making and intends to make to locate all oil and gas wells; and

(4) Any additional wells that are to be plugged or reconditioned to meet the requirements of clause (2) of subsection (a) of this section.

If such statement is not filed by the storage reservoir operator within the time specified herein, the department shall summarily order such operator to file such statement.

(c) Within one hundred twenty days after the receipt of any such statement, the department may, and it shall, if so requested by either the storage operator or the coal operator affected, direct that a conference be held in accordance with section ten [§ 22-7-10] of this article to determine whether the information as filed indicates that the requirements of section two [§ 22-7-2] of this article and of subsection (a) of this section have been fully complied with. At such conference, if any person shall be of the opinion that such requirements have not been fully complied with, the parties shall attempt to agree on what additional things are to be done and the time within which they are to be completed, subject to the approval of the department, to meet the said requirements.

If such agreement cannot be reached, the department shall direct that a hearing be held in accordance with section ten [§ 22-7-10] of this article. At such hearing the department shall determine whether the requirements of said section two [§ 22-7-2] of this article and of subsection (a) of this section have been met and shall issue an order setting forth such determination. If the department shall determine that any of the said requirements have not been met, the order shall specify, in detail, both the extent to which such requirements have not been met, and the things which the storage operator must do to meet such requirements. The order shall grant to the storage operator such time as is reasonably necessary to complete each of the things which he is directed to do. If, in carrying out said order, the storage operator encounters conditions which were not known to exist at the time of the hearing and which materially affect the validity of said order or the ability of the storage operator to comply with the order, the storage operator may apply for a rehearing or modification of said order.

(d) Whenever, in compliance with subsection (a) of this section, a storage operator, after the filing of the statement provided for in subsection (b) of this section, plugs or reconditions a well, he shall so notify the department and the coal operator affected in writing, setting forth such facts as will indicate the manner in which the plugging or reconditioning was done. Upon receipt thereof, the coal operator affected or the department may request a conference or hearing in accordance with section ten [§ 22-7-10] of this article.

(e) In order to meet the requirements of subsection (a) of this section, wells which are to be plugged shall be plugged in the manner specified in section ten [§ 22-4-10] of article four of this chapter. When a well located within the storage reservoir or the reservoir protective area has been plugged prior to the enactment of this article [March 10, 1955] and on the basis of the data, information and other evidence submitted to the department it is determined that: (1) Such plugging was done in the manner required in section ten [§ 22-4-10] of article four of this chapter; and (2) said plugging is still sufficiently effective to meet the requirements of this article, the obligations imposed by subsection (a) of this section as to plugging said well shall be considered fully satisfied.

(f) In order to meet the requirements of subsection (a) of this section wells which are to be reconditioned shall be cleaned out from the surface through the storage horizon and the following casing strings shall be pulled and replaced with new casing, using the same procedure as is applicable to drilling a new well as provided for in sections five, six, seven and eight [§§ 22-4-5 to 22-4-8]

of article four of this chapter: (1) The producing casing; (2) the largest diameter casing passing through the lowest workable coal seam unless such casing extends at least twenty-five feet below the bottom of such coal seam and is determined to be in good physical condition: Provided, however, that the storage operator may, instead of replacing the largest diameter casing, replace the next largest casing string if such casing string extends at least twenty-five feet below the lowest workable coal seam; and (3) such other casing strings which are determined not to be in good physical condition. In the case of wells to be used for gas storage, the annular space between each string of casing, and the annular space behind the largest diameter casing to the extent possible, shall be filled to the surface with cement or aquagel or such equally nonporous material as is approved by the department pursuant to section eight [§ 22-7-8] of this article. At least fifteen days prior to the time when a well is to be reconditioned the storage operator shall give notice thereof to the coal operator or owner and to the department setting forth in such notice the manner in which it is planned to recondition such well and any pertinent data known to the storage operator which will indicate the then existing condition of such well. In addition the storage operator shall give the coal operator or owner and such representative of the department as the director of the department of mines shall have designated at least seventy-two hours notice of the time when such reconditioning is to begin. The coal operator or owner shall have the right to file, within ten days after the receipt of the first notice required herein, objections to the plan of reconditioning as submitted by the storage operator. If no such objections are filed or if none is raised by the department within such ten-day period, the storage operator may proceed with the reconditioning in accordance with the plan as submitted. If any such objections are filed by the coal operator or owner or are made by the department, the department shall fix a time and place for a conference in accordance with section ten [§ 22-7-10] of this article at which conference the well operator and the person who has filed such objections shall endeavor to agree upon a plan of reconditioning which meets the requirements herein and which will satisfy such objections. If no plan is approved at such conference the department shall direct that a hearing be held in accordance with section ten [§ 22-7-10] of this article and, after such hearing, shall by an appropriate order determine whether the plan as submitted meets the requirements set forth herein, or what changes, if any, should be made to meet such requirements. If, in reconditioning a well in accordance with said plan, physical conditions are encountered which justify or necessitate a change in said plan, the storage operator or the coal operator may request that the plan be changed. If the storage operator and the coal operator cannot agree upon such change, the department shall arrange for a conference or hearing in accordance with section ten [§ 22-7-10] of this article to determine the matter in the same manner as set forth herein in connection with original objections to said plan. Application may be made to the department in the manner prescribed in section eight [§ 22-7-8] of this article for approval of an alternative method of reconditioning a well. When a well located within the storage reservoir or the reservoir protective area has been reconditioned prior to the enactment of this article [March 10, 1955] or was so drilled and equipped

previously and on the basis of the data, information and other evidence submitted to the department it is determined that: (1) Such reconditioning or previous drilling and equipping was done in the manner required in this subsection, or in a manner approved as an alternative method in accordance with section eight [§ 22-7-8] of this article and (2) such reconditioning or previous drilling and equipping is still sufficiently effective to meet the requirements of this article, the obligations imposed by subsection (a) as to reconditioning said well shall be considered fully satisfied. Where a well requires emergency repairs this subsection shall not be construed to require the storage operator to give the notices specified herein before making such repairs.

(g) When a well located within the reservoir protective area is a producing well in a stratum below the storage stratum the obligations imposed by subsection (a) of this section shall not begin until such well ceases to be a producing well.

(h) When a well within a storage reservoir or the reservoir protective area penetrates the storage stratum but does not penetrate the coal seam being mined by an operating coal mine the department may, upon application of the operator of such storage reservoir, exempt such well from the requirements of this section. Either party affected may request a conference and hearing with respect to the exemption of any such well in accordance with section ten [§ 22-7-10] of this article.

(i) In fulfilling the requirements of clause (2) of subsection (a) of this section with respect to a well within the reservoir protective area, the storage operator shall not be required to plug or recondition such well until he has received from the coal operator written notice that the mine workings will within the period stated in such notice, be within two thousand linear feet of such well. Upon the receipt of such notice the storage operator shall use due diligence to complete the plugging or reconditioning of such well in accordance with the requirements of this section and of section ten [§ 22-4-10] of article four of this chapter. If the said mine workings do not, within a period of three years after said well has been plugged, come within two thousand linear feet of said well, the coal operator shall reimburse the storage operator for the cost of said plugging, provided such well is still within the reservoir protective area as of that time.

(j) When retreat mining approaches a point where within ninety days it is expected that such retreat work will be at the location of the pillar surrounding an active storage well the coal operator shall give written notice of such approach to the storage operator and by agreement said parties shall determine whether it is necessary or advisable to inactivate effectively said well temporarily. The well shall not be reactivated until a reasonable period has elapsed, such reasonable period to be determined by the said parties. In the event that the said parties cannot agree upon either of the foregoing matters, such question shall be submitted to the department for decision in accordance with section ten [§ 22-7-10] of this article. The number of wells required to be temporarily inactivated during the retreat period shall not be such as to materially affect the efficient operation of such storage pool. This provision shall not preclude the temporary inactivation of a particular well where the practical effect of inactivating such well is to render the pool temporarily inoperative.

(k) The requirements of subsections (a), (l), and (m) of this section shall not apply to the injection of gas into any stratum when the sole purpose of such injection (such purpose being herein referred to as testing) is to determine whether the said stratum is suitable for storage purposes: Provided, however, that such testing shall be conducted only in compliance with the following requirements:

(1) The person testing or proposing to test shall comply with all the provisions and requirements of section two [§ 22-7-2] of this article and shall verify the statement required to be filed thereby;

(2) If any part of the proposed storage reservoir is under or within two thousand linear feet of an operating coal mine which is operating in a coal seam that extends over the proposed storage reservoir or the reservoir protective area, the storage operator shall give at least six months' written notice to the department and to the coal operator of the fact that injection of gas for testing purposes is proposed;

(3) The coal operator affected may at any time file objections with the department in accordance with subsection (d) of section nine [§ 22-7-9] of this article. If any such objections are filed by the coal operator or if the department shall have any objections, the department shall fix a time and place for a conference in accordance with section ten [§ 22-7-10] of this article, not more than ten days from the date of the notice to the storage operator, at which conference the storage operator and the person who has filed such objections shall attempt to agree, subject to the approval of the department, on the questions involved. If such agreement cannot be reached at such conference, the department shall direct that a hearing be held in accordance with section ten [§ 22-7-10] of this article. At such hearing the department shall determine and set forth in an appropriate order the conditions and requirements which it shall deem necessary or advisable in order to prevent gas from such storage reservoir from entering any operating coal mine. The storage operator shall comply with such conditions and requirements throughout the period of the testing operations. In determining such conditions and requirements the department shall take into account the extent to which the matters referred to in subsection (a) of this section have been performed. If, in carrying out said order, either the storage operator or the coal operator encounters or discovers conditions which were not known to exist at the time of the hearing and which materially affect said order or the ability of the storage operator to comply with the order, either operator may apply for a rehearing or modification of said order;

(4) Where, at any time, a proposed storage reservoir being tested comes under or within two thousand linear feet of an operating coal mine either because of the extension of the storage reservoir being tested or because of the extension or establishment or reestablishment of the operating coal mine, then and at the time of any such event the requirements of this subsection shall become applicable to such testing.

(l) Any person who, after the effective date of this article [June 8, 1955], proposes to establish a storage reservoir under, or within two thousand linear feet of an operating coal mine which is operating in a coal seam that extends over the storage reservoir or the reservoir protective area, shall, prior to estab-

lishing such reservoir, in addition to complying with the requirements of section two [§ 22-7-2] of this article and subsection (a) of this section, file the verified statement required by subsection (b) of this section and fully comply with such order or orders, if any, as the department may issue in the manner provided for under subsections (b) or (c) of this section before beginning the operation of such storage reservoir. After the person proposing to operate such storage reservoir shall have complied with such requirements and shall have thereafter begun to operate such reservoir, he shall continue to be subject to all of the provisions of this article.

(m) When a gas storage reservoir, (1) is in operation on the effective date of this article [June 8, 1955], and at any time thereafter it is under or within two thousand linear feet of an operating coal mine, or (2) when a gas storage reservoir is put in operation after the effective date of this article [June 8, 1955] and at any time after such storage operations begin it is under or within two thousand linear feet of an operating coal mine, then and in either such event, the storage operator shall comply with all of the provisions of this section except that the time for filing the verified statement under subsection (b) shall be sixty days after the date stated in the notice filed by the coal operator under subsections (b) or (c) of section four [§ 22-7-4] of this article as to when the operating coal mine will be at a point within two thousand linear feet of such reservoir: Provided, however, that if the extending of the projected workings or the proposed establishment or reestablishment of the operating coal mine is delayed after the giving of the notice provided in subsections (b) and (c) of section four [§ 22-7-4] of this article, the coal operator shall give notice of such delay to the department and the department shall, upon the request of the storage operator, extend the time for filing such statement by the additional time which will be required to extend or establish or reestablish such operating coal mine to a point within two thousand linear feet of such reservoir. Such verified statement shall also indicate that the map referred to in subsection (a) of section two [§ 22-7-2] of this article has been currently amended as of the time of the filing of such statement. The person operating any such storage reservoir shall continue to be subject to all of the provisions of this article.

(n) If, in any proceeding under this article, the department shall determine that any operator of a storage reservoir has failed to carry out any lawful order of the department issued under this article, the department shall have authority to require such storage operator to suspend the operation of such reservoir and to withdraw the gas therefrom until such violation is remedied. In such an event the gas shall be withdrawn under the following conditions. The storage operator shall remove the maximum amount of gas which is required by the department to be removed from the storage reservoir that can be withdrawn in accordance with recognized engineering and operating procedures and shall proceed with due diligence insofar as existing facilities used to remove gas from the reservoir will permit.

(o) In addition to initial compliance with the other provisions of this article and any lawful orders issued thereunder, it shall be the duty at all times of the person owning or operating any storage reservoir which is subject to the provisions of this article to keep all wells drilled into or through the storage stratum

in such condition and to operate the same in such manner as to prevent the escape of gas into any coal mine therefrom, and to operate and maintain such storage reservoir and its facilities in such manner and at such pressures as will prevent gas from escaping from such reservoir or its facilities into any coal mine, provided that this duty shall not be construed to include the inability to prevent the escape of gas where such escape results from an act of God or an act of any person not under the control of the storage operator other than in connection with any well which the storage operator has failed to locate and to make known to the department: Provided, however, that if any escape of gas into a coal mine does result from an act of God or an act of any person not under the control of the storage operator, the storage operator shall be under the duty of taking such action thereafter as is reasonably necessary to prevent further escape of gas into the coal mine. (1955, c. 106.)

Editor's note. — The director of the department of mines was formerly the chief of the department of mines. See § 22-1-1.

§ 22-7-6. Inspection of facilities and records; reliance on maps; burden of proof.

(a) In determining whether a particular coal mine or operating coal mine is or will be within any distance material under this article from any storage reservoir, the owner or operator of such coal mine and the storage operator may rely on the most recent map of the storage reservoir or coal mine filed by the other with the department.

(b) In any proceeding under this article where the accuracy of any map or data filed by any person pursuant to the requirements of this article is in issue, the person filing the same shall at the request of any party to such proceeding be required to disclose the information and method used in compiling such map and data and such information as is available to such person that might affect the current validity of such map or data. If any material question is raised in such proceeding as to the accuracy of such map or data with respect to any particular matter or matters contained therein, the person filing such map or data shall then have the burden of proving the accuracy of the map or data with respect to such matter or matters.

(c) The person operating any storage reservoir affected by the terms of this article shall, at all reasonable times, be permitted to inspect the applicable records and facilities of any coal mine overlying such storage reservoir or the reservoir protective area, and the person operating any such coal mine affected by the terms of this article, shall similarly, at all reasonable times, be permitted to inspect the applicable records and facilities of any such storage reservoir underlying any such coal mine. In the event that either such storage operator or coal operator shall refuse to permit any such inspection of records or facilities, the department shall, on its own motion, or on application of the party seeking the inspection after reasonable written notice, and a hearing thereon, if requested by either of the parties affected, make an order providing for such inspection. (1955, c. 106.)

§ 22-7-7. Exemptions.

(a) The provisions of this article shall not apply to strip mines and auger mines operating from the surface.

(b) Injection of gas for storage purposes in any workable coal seam, whether or not such seam is being or has been mined, shall be prohibited. Nothing in this article shall be construed to prohibit the original extraction of natural gas, crude oil, or coal. No storage operator shall have authority to appropriate any coal or coal measure whether or not being mined, or any interest therein. (1955, c. 106.)

§ 22-7-8. Alternative method.

(a) Whenever provision is made in this article by reference to this section for using an alternative method or material in carrying out any obligation imposed by the article, the person seeking the authority to use such alternative method or material shall file an application with the department describing such proposed alternative method or material in reasonable detail. Notice of filing of any such application shall be given by registered mail to any coal operator or operators affected. Any such coal operator may within ten days following such notice, file objections to such proposed alternative method or material. If no objections are filed within said ten-day period or if none is raised by the department, the department shall forthwith issue a permit approving such proposed alternative method or material.

(b) If any such objections are filed by any coal operator or are raised by the department, the department shall direct that a conference be held in accordance with section ten [§ 22-7-10] of this article within the ten days following the filing of such objections. At such conference the person seeking approval of the alternative method or material and the person who has filed such objections shall attempt to agree on such alternative method or material or any modification thereof, and if such agreement is reached and approved by the department, the department shall forthwith issue a permit approving the alternative method or material. If no such agreement is reached and approved, the department shall direct that a hearing be held in accordance with section ten [§ 22-7-10] of this article: Provided, however, that if the alternative method or material involves a new development in technology or technique the department may, before such a hearing is held, grant such affected parties a period not to exceed ninety days to study and evaluate said proposed alternative method or material. Following such hearing, if the department shall find that such proposed alternative method or material will furnish adequate protection to the workable coal seams, the department shall by order approve such alternative method or material; otherwise the department shall deny the said application. (1955, c. 106.)

§ 22-7-9. Powers and duties of department.

(a) The department may review the maps and data filed under sections two and three [§§ 22-7-2 and 22-7-3] hereof for the purpose of determining the accuracy thereof. Where any material question is raised by any interested storage operator or coal operator or owner as to the accuracy of any such map or data, the department shall hold hearings thereon and shall by an appropriate order require the person filing such map or data to correct the same if they are found to be erroneous.

(b) It shall be the duty of the department to receive and keep in a safe place for public inspection any map, data, report, well log, notice or other writing required to be filed with it pursuant to the provisions of this article. The department shall keep such indices of all such information as will enable any person using the same to readily locate such information either by the identity of the person who filed the same or by the person or persons affected by such filing or by the geographic location of the subject matter by political subdivision. The department shall also keep a docket for public inspection of all proceedings, in which shall be entered the dates of any notices, the names of all persons notified and their addresses, the dates of hearings, conferences and all orders, decrees, decisions, determinations, rulings or other actions issued or taken by the department and such docket shall constitute the record of each and every proceeding before the department.

(c) The department shall have authority to make any inspections and investigations of records and facilities which it shall deem necessary or desirable to perform its functions under this article.

(d) Where in any section of this article provision is made for the filing of objections, such objections shall be filed in writing with the department by the person entitled to file the same or by the department, and shall state as definitely as is reasonably possible the reasons for such objections. The person filing such objections shall send a copy thereof by registered mail to the person or persons affected thereby. (1955, c. 106.)

§ 22-7-10. Conferences, hearings and appeals.

(a) The department or any person having a direct interest in the subject matter of this article may at any time request that a conference be held for the purpose of discussing and endeavoring to resolve by mutual agreement any matter arising under the provisions of this article. Prompt notice of any such conference shall be given by the department to all such interested parties. At such conference a representative of the department shall be in attendance, and the department may make such recommendations as it deems appropriate. Any agreement reached at such conference shall be consistent with the requirements of this article and, if approved by such representative of the department, it shall be reduced to writing and shall be effective unless reviewed and rejected by the department within ten days after the close of the conference. The record of any such agreement approved by the department shall be kept on file by the department with copies furnished to the parties. The conference shall be deemed terminated as of the date any party refuses to confer

thereafter. Such a conference shall be held in all cases prior to conducting any hearing under this section.

(b) Within ten days after termination of the conference provided for in this section at which no approved agreement has been reached or within ten days after the rejection by the department of any agreement approved at any such conference, any person who has a direct interest in the subject matter of the conference may submit the matter or matters, or any part thereof, considered at the conference, to the department for determination at a public hearing. The hearing procedure shall be formally commenced by the filing of a petition with the department upon forms prescribed by the department or by specifying in writing the essential elements of the petition, including name and address of the petitioner and of all other persons affected thereby, a clear and concise statement of the facts involved, and a specific statement of the relief sought. The hearing shall thereafter be conducted in accordance with such regulations and such provisions as to reasonable notice as the department may prescribe. Consistent with the requirements for reasonable notice all hearings under this article shall be held by the department promptly. All testimony taken at such hearings shall be under oath and shall be reduced to writing by a reporter appointed by the department, and the parties shall be entitled to appear and be heard in person or by attorney. The department may present at such hearing any evidence which is material to the matter under consideration and which has come to the department's attention in any investigation or inspection made pursuant to provisions of this article.

(c) After the conclusion of hearings, the department shall make and file its findings and order with its opinion, if any. A copy of such order shall be served by registered mail upon the person against whom it runs, or his attorney of record, and notice thereof shall be given to the other parties to the proceedings, or their attorney of record.

(d) The department may, at any time after notice and after opportunity to be heard as provided in this section, rescind or amend any approved agreement or order made by it. Any order rescinding or amending a prior agreement or order shall, when served upon the person affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders; but no such order shall affect the legality or validity of any acts done by such person in accordance with the prior agreement or order before receipt by such person of the notice of such change.

(e) The director of the department of mines shall have power, either personally or by any of his authorized representatives, to subpoena witnesses and take testimony, and administer oaths to any witness in any hearing, proceeding or examination instituted before the department or conducted by it with reference to any matter within the jurisdiction of the department. In all hearings or proceedings before the department the evidence of witnesses and the production of documentary evidence may be required at any designated place of hearing; and in case of disobedience to a subpoena or other process the department or any party to the proceedings before the department may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses and the production of such books, records, maps, plats, papers, documents and

other writings as it may deem necessary or proper in and pertinent to any hearing, proceeding or investigation held or had by it. Such court, in case of the refusal of any such person to obey the subpoena, shall issue an order requiring such person to appear before the department and produce the required documentary evidence, if so ordered, and give evidence touching the matter in question. Any failure to obey such order of the court may be punished by such court as contempt thereof. A claim that any such testimony or evidence may tend to criminate the person giving the same shall not excuse such witness from testifying, but such witness shall not be prosecuted for any offense concerning which he is compelled hereunder to testify.

(f) With the consent of the department the testimony of any witness may be taken by deposition at the instance of a party to any hearing before the department at any time after hearing has been formally commenced. The department may, of its own motion, order testimony to be taken by deposition at any stage in any hearing, proceeding or investigation pending before it. Such deposition shall be taken in the manner prescribed by the laws of West Virginia for taking depositions in civil cases in courts of record.

(g) Whether or not it be so expressly stated, an appeal from any final order, decision or action by the department in administering the provisions of this article may be taken by any aggrieved person within ten days of notice of such order, decision or action, to the circuit court of the county in which the subject matter of such order, decision or action is located, and in all cases of appeals to the circuit court, that court shall certify its decisions to the department. The circuit court to which the appeal is taken shall hear the appeal without a jury on the record certified by the department. In any such appeal the findings of the department shall, if supported by substantial evidence, be conclusive. If the order of the department is not affirmed, the court may set aside or modify it, in whole or in part, or may remand the proceedings to the department for further disposition in accordance with the order of the court. From all final decisions of the circuit court an appeal shall lie to the supreme court of appeals as is now provided by law in cases in equity, by the department as well as by any other party of record before the circuit court.

Any party feeling aggrieved by the final order of the circuit court affecting him, may present his petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within twenty days after the entry of such order, praying for the suspension or modification of such final order. The applicant shall deliver a copy of such petition to the department and to all other parties of record before presenting the same to the court or judge. The court or judge shall fix a time for the hearing on the application, but such hearing shall not be held sooner than seven days after its presentation unless by agreement of the parties, and notice of the time and place of such hearing shall be forthwith given to the department and to all other parties of record. If the court or judge, after such hearing, be of opinion that such final order should be suspended or modified, the court or the judge may require bond, upon such conditions and in such penalty, and impose such terms and conditions upon the petitioner as are just and reasonable. For such hearing the entire record before the circuit court, or a certified copy thereof, shall be filed in the supreme court, and that

court, upon such papers, shall promptly decide the matter in controversy as may seem to it to be just and right, and may award costs in each case as to it may seem just and equitable. (1955, c. 106.)

Editor's note. — The director of the department of mines was formerly the chief of the department of mines. See § 22-1-1.

Rules of Civil Procedure. — As to depositions, see Rule 26 et seq., appearing in Volume 1, Appendix. As to review of decisions of administrative agencies, see Rule 81 (a)(1).

§ 22-7-11. Enforcement.

(a) The department or any person having a direct interest in the subject matter of this article may complain in writing setting forth that any person is violating or is about to violate, any provisions of this article, or has done, or is about to do, any act, matter or thing therein prohibited or declared to be unlawful, or has failed, omitted, neglected or refused, or is about to fail, omit, neglect or refuse, to perform any duty enjoined upon him by this article. Upon the filing of a complaint against any person, the department shall cause a copy thereof to be served upon such person by registered mail accompanied by a notice from the department setting such complaint for hearing at a time and place specified in such notice. At least five days' notice of such hearing shall be given to the parties affected and such hearing shall be held in accordance with the provisions of section ten [§ 22-7-10] of this article. Following such hearing, the department shall, if it finds that the matter alleged in the complaint is not in violation of this article, dismiss the complaint, but if the department shall find that the complaint is justified, it shall by appropriate order compel compliance with this article.

(b) Whenever the department shall be of the opinion that any person is violating, or is about to violate, any provisions of this article, or has done, or is about to do, any act, matter or thing therein prohibited or declared to be unlawful, or has failed, omitted, neglected or refused, or is about to fail, omit, neglect or refuse, to perform any duty enjoined upon him by this article, or has failed, omitted, neglected or refused, or is about to fail, omit, neglect or refuse to obey any lawful requirement or order made by the department, or any final judgment, order or decree made by any court pursuant to this article, then and in every such case the department may institute in the circuit court of the county or counties wherein the operation is situated, injunction, mandamus or other appropriate legal proceedings to restrain such violations of the provisions of this article or of orders of the department to enforce obedience therewith. No injunction bond shall be required to be filed in any such proceeding. Such persons or corporations as the court may deem necessary or proper to be joined as parties in order to make its judgment, order or writ effective may be joined as parties. The final judgment in any such action or proceedings shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction or other order, issue or be made permanent as prayed for in the petition or in such modified or other form as will afford appropriate relief. An appeal may be taken as in other civil actions.

(c) In addition to the other remedies herein provided, any storage operator or coal operator affected by the provisions of this article may proceed by injunction or other appropriate remedy to restrain violations or threatened violations of the provisions of this article or of orders of the department or the judgments, orders or decrees of any court or to enforce obedience therewith.

(d) Each remedy prescribed in this section shall be deemed concurrent or contemporaneous with any other remedy prescribed herein and the existence or exercise of any one such remedy shall not prevent the exercise of any other such remedy. (1955, c. 106.)

§ 22-7-12. Penalties.

Any person who shall willfully violate any order of the department issued pursuant to the provisions of this article shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding two thousand dollars, or imprisoned in jail for not exceeding twelve months, or both, in the discretion of the court, and prosecutions under this section may be brought in the name of the State of West Virginia in the court exercising criminal jurisdiction in the county in which the violation of such provisions of the article or terms of such order was committed, and at the instance and upon the relation of any citizen of this State. (1955, c. 106.)

CHAPTER 29A.

STATE ADMINISTRATIVE PROCEDURES.

Article
1. Definitions and Application of Chapter, §§ 29A-1-1 to 29A-1-3.
2. State Register, §§ 29A-2-1 to 29A-2-9.
3. Rule Making, §§ 29A-3-1 to 29A-3-17.

W. Va. Law Review. — For a survey of developments in West Virginia administrative law in 1979, see 82 W. Va. L. Rev. 723 (1980).

This chapter reflects an unambiguous legislative commitment to effective public participation in administrative rule making and insures that West Virginia administrative agencies are not permitted the luxury of conducting their rule-making activities insulated from public sentiment and views. Op. Att'y Gen., Oct. 31, 1980, No. 15.

ARTICLE 1.

DEFINITIONS AND APPLICATION OF CHAPTER.

Sec.
29A-1-1. Legislative findings and statement of purpose.
29A-1-2. Definitions of terms used in this chapter.
29A-1-3. Application of chapter; limitations.

Revision of article. — Acts 1982, c. 121 amended and reenacted this article with the following changes. Section 29A-1-1 was added by the 1982 act. Former §§ 29A-1-1 (now § 29A-1-2) and 29A-1-2 (now § 29A-1-3) were transferred to their present locations and were so extensively amended as to make a detailed comparison impossible.

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§ 29A-1-1. Legislative findings and statement of purpose.

The legislature finds and declares that administrative law and the administrative practice and procedure of the various executive and administrative officers, offices and agencies comprises a body of law and policy which is voluminous, often formulated without adequate public participation and collected and preserved for public knowledge and use in an unacceptable and essentially inaccessible fashion. The legislature further finds that the

delegation of its legislative powers to other departments and agencies of government requires of the legislature that the rules and regulations of such other departments and agencies, which have the force and effect of law because of their legislative character, should be carefully and extensively reviewed by the legislature in a manner properly respectful of the separation of powers but in keeping with the legislative force and effect of such rules and regulations. Accordingly the legislature has and by this chapter intends to fix by law uniform and settled administrative practices and procedures, subject only to enumerated exceptions, for the exercise of executive rule-making authority and for the exercise by executive and administrative officers, offices and agencies of lawfully delegated legislative power, with appropriate legislative review of that exercise of such a delegated legislative authority and with established procedures for legislative oversight of the exercise of executive rule-making authority.

In that light chapter twenty-nine-a [§ 29-A-1-1 et seq.] of this Code establishes, with enumerated exceptions, procedures for rule making, declaratory rulings by agencies and the conduct of contested administrative cases, together with a plan for the systematic preparation, public consideration, orderly promulgation, preservation and public availability of the body of law, policy and administrative decisions within the purview of this chapter. (1982, c. 121.)

§ 29A-1-2. Definitions of terms used in this chapter.

For the purposes of this chapter:

(a) "Agency" means any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches;

(b) "Contested case" means a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and does not include rule making;

(c) "Interpretive rule" means every rule, as defined in subsection (i) of this section, adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided. However, an interpretive rule is admissible for the purpose of showing that the prior conduct of a person was based on good faith reliance on such rule. The admission of such rule in no way

affects any legislative or judicial determination regarding the prospective effect of such rule. Where any provision of this Code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions.

(d) "Legislative rule" means every rule, as defined in subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the legislature. Except where otherwise specifically provided in this Code, legislative rule does not include (A) findings or determinations of fact made or reported by an agency, including any such findings and determinations as are required to be made by any agency as a condition precedent to proposal of a rule to the legislature; (B) declaratory rulings issued by an agency pursuant to the provisions of section one [§ 29A-4-1], article four of this chapter; (C) orders, as defined in subdivision (e) of this section; or (D) executive orders or proclamations by the governor issued solely in the exercise of executive power, including executive orders issued in the event of a public disaster or emergency;

(e) "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) by any agency of any matter other than rule making;

(f) "Person" includes individuals, partnerships, corporations, associations or public or private organizations of any character;

(g) "Procedural rule" means every rule, as defined in subsection (i) of this section, which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency;

(h) "Proposed rule" is a legislative rule, interpretive rule, or a procedural rule which has not become effective pursuant to the provisions of this chapter or law authorizing its promulgation;

(i) "Rule" includes every regulation, standard or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, affecting private rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations relating solely to the internal management of the agency, nor regulations of which notice is customarily given to the public by markers or signs, nor mere instructions. Every rule shall be classified as "legislative rule," "interpretive rule" or

"procedural rule," all as defined in this section, and shall be effective only as provided in this chapter;

(j) "Rule making" means the process for the formulation, amendment or repeal of a rule as provided in this chapter. (1964, c. 1; 1982, c. 121.)

Editor's note. — The cases below were decided under this section as it existed prior to the 1982 revision of this article.

Agency action. — The dismissal of a sex discrimination complaint after a finding of probable cause was an agency action affecting the legal rights, duties, interests and privileges of a specific party required to be determined by a hearing and falls squarely within the statutory definition of contested cases. Currey v. State Human Rights Comm'n, W. Va. , 273 S.E.2d 77 (1980).

Cited in Harrison v. Ginsberg, W. Va. , 286 S.E.2d 276 (1982).

§ 29A-1-3. Application of chapter; limitations.

(a) The provisions of this chapter do not apply in any respect whatever to executive orders of the governor, which orders to the extent otherwise lawful, shall be effective according to their terms: Provided, that the executive orders shall be admitted to record in the state register when and to the extent the governor deems suitable and shall be included therein by the secretary of state when tendered by the governor.

(b) Except as to requirements for filing in the state register, and with the legislature or its rule-making review committee, provided in this chapter or other law, the provisions of this chapter do not apply in any respect whatever to the West Virginia board of probation and parole, the public service commission, the board of public works sitting as such, the West Virginia board of education and the West Virginia board of regents: Provided, that rules of such agencies shall be filed in the state register in the form prescribed by this chapter and be effective no sooner than sixty consecutive days after being so filed: Provided, however, that such agencies may promulgate emergency rules in conformity with section fifteen [§ 29A-3-15], article three of this chapter.

(c) The provisions of this chapter do not apply to rules relating to, or contested cases involving, public elections, the conduct of inmates or other persons admitted to public institutions, the conduct of students at public schools or public educational institutions, the open seasons and the bag, creel, size, age, weight and sex limits with respect to the wildlife in this State, the conduct of persons in military service or the receipt of public assistance, but two certified copies of each such rule shall be filed in the state register.

(d) Nothing herein shall be construed to affect, limit or expand any express and specific exemption from this chapter contained in any other statute relating to a specific agency, but such exemptions shall be construed and applied in accordance with the provisions of this chapter to effectuate any limitations on such exemptions contained in any such other statute. (1964, c. 1; 1982, c. 121.)

Editor's note. — The cases below were decided under this section as it existed prior to the 1982 revision of this article.

Proceedings of the board of regents are exempt from the provisions of this chapter. Clarke v. West Virginia Bd. of Regents, W. Va. , 279 S.E.2d 169 (1981).

Certiorari proper where chapter inapplicable. — Certiorari is the proper means for obtaining judicial review of a deci-

sion made by a state agency not covered by the Administrative Procedures Act. State ex rel. Ginsberg v. Watt, W. Va. , 285 S.E.2d 367 (1981).

Decision of commissioner of department of health to suspend pharmacists from participation as vendors of pharmacy services in the Medical Services of the State of West Virginia was one which related to "the receipt of public assistance" and thus was not within the scope of the Administrative Procedures Act. State ex rel. Ginsberg v. Watt, W. Va. , 285 S.E.2d 367 (1981).

ARTICLE 2.

STATE REGISTER.

Sec.
29A-2-1. Duty of the secretary of state.
29A-2-2. State register created.
29A-2-3. Contents of state register.
29A-2-4. Contents of state register deemed a public record.
29A-2-5. Agency rules to be filed in state register; failure to file.
29A-2-6. Format and numbering of agency rules filed in state register.
29A-2-7. Publication of state register.
29A-2-8. Publication of rules by agencies.
29A-2-9. Making orders and records available.

Revision of article. — Acts 1982, ch. 121 amended and reenacted this article. The revision was so extensive as to make impossible a detailed comparison with the former article.

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§ 29A-2-1. Duty of the secretary of state.

It is the nondiscretionary, nondelegable duty of the secretary of state to establish and maintain the state register hereby created, and offer copies for subscription and public distribution in accordance with the provisions of this article. (1982, c. 121.)

§ 29A-2-2. State register created.

There is hereby created in the office of the secretary of state, a public record to be known and denominated as the state register, to be established, compiled, indexed and copied, and such copies offered for subscription and distribution, in accordance with the provisions of this article. (1982, c. 121.)

§ 29A-2-3. Contents of state register.

The secretary of state shall receive and file in the state register:

(a) Every notice of a proposed rule or a public hearing for the finding of facts or public comment on a proposed rule.

(b) The text of every proposed rule and subsequent proposed amendment thereto and fiscal notes attached thereto.

(c) Every determination of fact or judgment tendered by an agency for inclusion therein and every notice of submission to the legislature or its rule-making review committee made in conformity with this chapter.

(d) Every executive order tendered by the governor.

(e) Every notice of and the text of any report or finding of the legislative rule-making review committee and such other material as may be tendered by the clerk or presiding officer of either house of the legislature for filing in the state register.

(f) Such other material related to administrative procedures and actions as an agency may desire to make a public record or the secretary of state may deem appropriate, or where required by law.

(g) Notice of and the text of any action by an agency of the legislature or its committees relative to the process of promulgation of rules tendered to the secretary of state for inclusion in the register.

(h) Every other paper required by law to be filed in such register or which may be filed therein in order to comply with any other provision of law. (1982, c. 121.)

§ 29A-2-4. Contents of state register deemed a public record.

Every paper filed in the state register shall be a public record provable and admissible as evidence if otherwise relevant, of which judicial notice may be taken, either under lawful certification or by reason of duplication and distribution as a copy of the state register in accordance with this article. (1982, c. 121.)

§ 29A-2-5. Agency rules to be filed in state register; failure to file.

(a) Notwithstanding any filing prior to the effective date of this section [May 11, 1982], each agency shall hereafter file in the state register a certified copy of all of its lawfully adopted rules which are in force on the date of such filing and all of its proposed rules which have not become effective prior to the date of such filing. All such rules and proposed rules shall be arranged, compiled, numbered and indexed in accordance with the provisions of section six [§ 29A-2-6] of this article, and shall also include a designation of each rule as either legislative rule, interpretive rule or procedural rule. Any agency desiring to pursue promulgation of a rule proposed prior to the effective date of this section but not then yet effective, shall refile such proposed rule, following the procedure set forth in article three [§ 29A-3-1 et seq.]: Provided, that it shall not be necessary for the agency to again hold a public hearing to determine facts or public comment, but in all other respects the procedures provided for the promulgation of rules under this section shall be complied with. On or before the first day of January, one thousand nine hundred eighty-three, any other agency required by law to file its rules in the state register in order for such rules to be effective shall resubmit and refile such rules in accordance with this section. If any agency fails to file a certified copy of any rule or proposed rule in accordance with this section on or before the first day of January, one thousand nine hundred eighty-three, then such rule or proposed rule not so filed shall be thereafter void and unenforceable and shall

be of no further force and effect except as to enforcement of its effective provisions for actions, causes or matters occurring prior to the first day of January, one thousand nine hundred eighty-three.

(b) Except for such changes in the designation and numbering of a rule, including numerical references within a rule, as are required to comply with the provisions of section six [§ 29A-2-6] of this article, no legislative rule filed under the provisions of this section may be amended in any way prior to such filing unless such amendment is made in compliance with the requirements of article three [§ 29A-3-1 et seq.] of this chapter. (1982, c. 121.)

§ 29A-2-6. Format and numbering of agency rules filed in state register.

(a) Each rule or proposed rule filed by an agency in the state register shall include as its initial provision: (1) A statement identifying such rule as a legislative rule, an interpretive rule, or a procedural rule, as the case may be; (2) a statement of each section, article and chapter of this Code to which such rule or any part thereof relates; and (3) a statement of the section, article and chapter of this Code or any other provision of law which provides authority for the promulgation of such rule. The agency shall be estopped from relying on any authority for the promulgation of such rule which is not stated therein in accordance with the requirements of this subdivision.

(b) An agency which files the rule is required, to the extent practicable, to compile, number and index such rule in sequence according to the number of the section, article and chapter of this Code to which such rule or any part thereof relates.

Each rule when filed to be finally effective shall have attached thereto an abstract of its promulgation history prepared by the agency showing the date of the filing in the state register of the content of, or notice of any procedure relating to, action necessary under this chapter to cause such rule to be finally effective: Provided, that any error or omission in such abstract shall not effect the validity of any rule or action in respect thereto.

(c) The secretary of state may prescribe by legislative rule a standard size and format for rules to be filed in the state register and he may prescribe such procedural or interpretive rules as he deems advisable to clarify and interpret the provisions of this section. The secretary of state shall refuse to accept for filing any rules which do not comply with the specific provisions of this section, and he may refuse to accept for filing any rules which do not comply with the procedural rules issued by him pursuant to this section until the rules sought to be filed are brought into conformity with the secretary of state's procedural rules.

(d) Unless and until the secretary of state prescribes otherwise by rule issued and made effective under the provisions of subsection (c) of this section, each rule filed in the state register shall be on white paper measuring eight and one-half inches by eleven inches, typewritten and single-spaced, with a one inch margin at the top, bottom and each side of each page, and shall be reproduced photographically, or by xerography or other duplication process. The secretary of state may grant specific exceptions to such requirements in

the case of maps, diagrams and exhibits, if the same may not be conveniently folded and fastened with the other pages of rules and in the case of rules which incorporate the promulgation of a federal agency or other organization which could not be submitted in the standard size and format except at undue expense. Materials submitted for inclusion in the state register shall be fastened on the left side by two or more fasteners attached through holes suitable for insertion into ring binders. (1982, c. 121.)

§ 29A-2-7. Publication of state register.

(a) The legislature intends that the secretary of state offer to the public convenient and efficient access to copies of the state register or parts thereof desired by the citizens. The provisions of this section are enacted in order to provide a means of doing so pending any other means provided by law or legislative rule.

(b) Until the first day of January, one thousand nine hundred eighty-three, the secretary of state may use any procedure he adopts to fulfill the objects of this section including any of the procedures provided in this section.

(c) On and after the first day of January, one thousand nine hundred eighty-three, and the refiling of all rules effective on the effective date [May 11, 1982] of this section the body of the rules thus refiled together with (1) those rules made effective from and after the effective date of this section (2) all proposed rules not yet effective on and before the first day of January, one thousand nine hundred eighty-three (3) all notices and other materials related to such proposed rules and (4) the chronological index hereinafter provided shall constitute the first biennial permanent state register and have a publication date of the first day of January, one thousand nine hundred eighty-three.

(d) All materials filed in the state register after the effective date of this section shall be indexed daily in chronological order of filing with a brief description of the item filed and a columnar cross index to (1) agency and (2) section, article and chapter of the Code to which it relates and by which it is filed in the state register and (3) such other information in the description or cross index as the secretary of state believes will aid a citizen in using the chronological index.

(e) The secretary of state shall cause to be duplicated in such number as shall be required, on white paper with two punches suitable for fastening in two-ring binders, the permanent biennial state register, the chronological index and other materials filed in the register, or any part by agency or section, article or chapter for subscription at a cost including labor, paper and postage, sufficient in his judgment to defray the expense of such duplication. The secretary of state shall also offer, at least at monthly intervals, supplements to the published materials listed above. Any subscription for monthly supplements shall be offered annually and shall include the chronological index and materials related to such agency or agencies, or section, article or chapter of the Code as a person may designate. A person may limit the request to notices only, to notices and rules, or to notices and proposed rules, or any combination thereof.

(f) On and after the first day of January, one thousand nine hundred eighty-three, and every two years thereafter, the secretary of state shall offer for purchase succeeding biennial permanent state registers which shall consist of all rules effective on the date of publication selected by the secretary of state, which date shall be at least two years from the last such publication date, and materials filed in the state register relating thereto. The cost of the succeeding biennial permanent state register and for the portion relating to any agency or any section, article or chapter of the Code which may be designated by a person purchasing the same shall be fixed in the same manner specified in subsection (e) of this section.

(g) The secretary of state may omit from any duplication made pursuant to subsections (c) and (f) of this section any rules the duplication of which would be unduly cumbersome, expensive or otherwise inexpedient, if a copy of such rules is made available from the original filing of such rule, at a price not exceeding the cost of duplication, and if the volume from which such rule is omitted includes a notice in that portion of the publication in which the rule would have been located, stating (1) the general subject matter of the omitted rule, (2) each section, article and chapter of this Code to which the omitted rule relates, and (3) the means by which a copy of the omitted rule may be obtained.

(h) All fees and other moneys collected by the secretary of state pursuant to the provisions of this section shall be deposited by him in a separate fund in the state treasury and shall be expended solely for the purposes of this section, unless otherwise provided by appropriation or other action of the legislature.

(i) The secretary of state may propose changes to the procedures outlined in the section above by proposing a legislative rule under the provisions of section nine [§ 29A-3-9], article three, but may promulgate no rules containing such changes unless authorized by the legislature pursuant to article three [§ 29A-3-1 et seq.]. (1982, c. 121.)

§ 29A-2-8. Publication of rules by agencies.

(a) No agency may duplicate copies of its rules for general distribution except in accordance with this section. However, a duly certified copy may be provided by the agency, at the cost of reproduction, if requested and if not presently available from the secretary of state. Whenever an agency desires multiple copies of all or parts of its rules or other materials filed in the state register, it shall purchase the same from the office of the secretary of state: Provided, that when reproduction of the number of copies desired by the agency can be accomplished at a lower cost by the agency, it shall notify the secretary of state in writing of such lower cost and, unless the secretary of state shall within ten days agree to furnish such copies for an equal and lower cost and do so within twenty days thereafter, may proceed at its cost to acquire such copies elsewhere if otherwise authorized to do so by law.

(b) Any published rules may be distributed only to those persons who specifically request a copy of the rules and may not be distributed in any manner to persons who have not requested a copy. The agency may print or otherwise acquire only the number of copies of any rule that it may reasonably anticipate will be requested by members of the general public.

(c) Except as provided in this section, no agency may expend funds to alter the format or presentation of such rules from that provided in the state register (except to adequately fasten and bind the pages) or expend funds to compensate the office of the secretary of state to do so.

(d) Whenever for public convenience an agency deems it appropriate to reproduce one or more rules for general public distribution in some printed form, such as a booklet or other format not provided by copying the state register, the agency shall give written notice to the secretary of state and the legislative auditor of its intention to do so, including therein the anticipated cost and the source or account of appropriations therefor. Such notice shall be recorded in the state register as other notices. After twenty days shall have elapsed, the agency may proceed unless the secretary of state shall have made a finding that such additional publication is unnecessary or unduly expensive. Any such finding shall be served on the agency and the governor and filed in the state register. The governor may, within ten days after receiving such finding, order such publication canceled or order such amendment thereof as is appropriate in his judgment. Any such order of the governor shall be effective until and unless the legislature shall otherwise provide. In the absence of such an order by the governor, the agency may proceed in accord with its original notice of intent. (1982, c. 121.)

§ 29A-2-9. Making orders and records available.

Every agency shall file in the state register or, pursuant to rules adopted in accordance with the provisions of this chapter, make available to public inspection all final orders, decisions and opinions in the adjudication of contested cases except those required for good cause to be held confidential and not cited as precedent. Except as otherwise required by statute, matters of official record shall be made available for public inspection pursuant to rules adopted in accordance with the provisions of this chapter. (1964, c. 1; 1982, c. 121.)

ARTICLE 3.

RULE MAKING.

Sec.

29A-3-1. Rules to be promulgated only in accordance with this article.
29A-3-2. Limitations on authority to exercise rule-making power.
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29A-3-13. Adoption of legislative rules; effective date.
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29A-3-15. Emergency legislative rules; procedures for promulgation; definition.

Sec.
29A-3-16. Legislative review of procedural rules, interpretive rules and existing legislative rules.
29A-3-17. Prior rules.

Revision of article. — Acts 1981, c. 121 amended and reenacted this article. With the exception of present § 29A-3-3 (former § 29A-3-2), which was transferred to its present location without textual change, the revision was so extensive as to make impossible a detailed comparison with the former article.

§ 29A-3-1. Rules to be promulgated only in accordance with this article.

In addition to other rule-making requirements imposed by law and except to the extent specifically exempted by the provisions of this chapter or other applicable law, every rule and regulation (including any amendment of or rule to repeal any other rule) shall be promulgated by an agency only in accordance with this article and shall be and remain effective only to the extent that it has been or is promulgated in accordance with this article. (1982, c. 121.)

§ 29A-3-2. Limitations on authority to exercise rule-making power.

(a) Except when, and to the extent, that this chapter or any other provision of law now or hereafter made expressly exempts an agency, or a particular grant of the rule-making power, from the provisions of this article, every grant of rule-making authority to an executive or administrative officer, office or agency, heretofore provided, shall be construed and applied to be effective only:

(1) If heretofore lawfully exercised in accordance with the prior provisions of this chapter and the resulting rule has not been revoked or invalidated by the provisions hereof or by the agency, or

(2) If exercised in accordance with the provisions hereof.

(b) No executive or administrative agency shall be deemed to have power and authority to promulgate a legislative rule without compliance with this article unless: (1) the provision of this Code, heretofore or hereafter enacted, granting such power and authority, expressly exempts its exercise from legislative rule-making review prior to promulgation or (2) the grant of such power and authority is exempted from the application of this chapter by the express provisions of this chapter. To the extent any such grant of power and authority, not so exempt, shall be deemed to exceed the limits and provisions of this article, such power and authority to promulgate legislative rules is hereby revoked. (1982, c. 121.)

§ 29A-3-3. Rules of procedure required.

In addition to other rule-making requirements imposed by law:

(a) Each agency shall adopt procedural rules governing the formal and informal procedures prescribed or authorized by this chapter. Procedural rules

shall include rules of practice before the agency, together with forms and instructions.

(b) To assist interested persons dealing with it, each agency shall, so far as considered practicable, supplement its rules with descriptive statements of its procedures. (1964, c. 1; 1976, c. 117; 1982, c. 121.)

§ 29A-3-4. Filing of proposed procedural rules and interpretive rules.

(a) When an agency proposes a procedural rule or an interpretive rule, the agency shall file in the state register a notice of its action, including the text of the rule as proposed.

(b) All proposed rules filed under subsection (a) of this section shall have a fiscal note attached itemizing the cost of implementing the rules as they relate to this State and to persons affected by the rules and regulations. Such fiscal note shall include all information included in a fiscal note for either house of the legislature and a statement of the economic impact of the rule on the State or its residents. The objectives of the rules shall be clearly and separately stated in the fiscal note by the agency issuing the proposed rules. No procedural or interpretive rule shall be void or voidable by virtue of noncompliance with this subsection. (1982, c. 121.)

Cross reference. — State register, § 29A-2-1 et seq.

§ 29A-3-5. Notice of proposed rule making.

When an agency proposes to promulgate a rule other than an emergency rule it shall file in the state register a notice of its action, including a text of the rule proposed, a fiscal note as defined in subsection (b) of section four [§ 29A-3-4(b)], and any request for the submission of evidence to be presented on any factual determinations or inquiries required by law to promulgate such rule. If the agency is considering alternative draft proposals it may include the text thereof.

The notice shall fix a date, time and place for the taking of evidence for any findings and determinations which are a condition precedent to promulgation of the proposed rule and contain a general description of the issues to be decided. If no findings and determinations are required as a condition precedent to promulgation, the notice shall fix a date, time and place for receipt of public comment on such proposed rule.

If findings and determinations are a condition precedent to the promulgation of such rule, then an opportunity for public comment on the merits of the rule shall be afforded after such findings and determinations are made. In such event, notice of the hearing, or of the period for receiving public comment on the proposed rule shall be attached to and filed as a part of the findings and determinations of the agency when filed in the state register.

In any hearing for public comment on the merits of the rule, the agency may limit presentations to written material. The time, date and place fixed in the

notice shall constitute the last opportunity to submit any written material relevant to any hearing, all of which may be earlier submitted by filing with the agency.

The agency may also, at its expense, cause to be published as a Class I legal publication in every county of the State, any notice required by this section.

Any citizen or other interested party may appear and be heard at such hearings as are required by this section. (1982, c. 121.)

Cross reference. — State register, § 29A-2-1 et seq.

§ 29A-3-6. Filing findings and determinations for rules in state register; evidence deemed public record.

(a) Incident to fixing a date for public comment on a proposed rule, the agency shall promulgate the findings and determinations required as a condition precedent thereto, and state fully and succinctly the reasons therefor and file such findings and determinations in the state register. If the agency amends the proposed rule as a result of the evidence or comment presented pursuant to section five [§ 29A-3-5], such amendment shall be filed with a description of any changes and a statement listing the reasons for the amendment.

(b) The statement of reasons and a transcript of all evidence and public comment received pursuant to notice are public records and shall be carefully preserved by the agency and be open for public inspection and copying for a period of not less than five years from the date of the hearing. (1982, c. 121.)

Cross reference. — State register, § 29A-2-1 et seq.

§ 29A-3-7. Notice of hearings.

Notices of hearings required by sections five and six [§§ 29A-3-5 and 29A-3-6] of this article shall be filed in the state register not less than thirty nor more than sixty days before the date of such hearing or the last day specified therein for receiving written material. Any hearing may be continued from time to time and place to place by the agency which shall have the effect of extending the last day for receipt of evidence or public comment. Notice of such continuance shall be promptly filed thereafter in the state register. (1982, c. 121.)

Cross reference. — State register, § 29A-2-1 et seq.

§ 29A-3-8. Adoption of procedural and interpretive rules.

A procedural and interpretive rule, other than an emergency rule, shall be considered by the agency for adoption not later than six months after the close of public comment and a notice of withdrawal or adoption shall be filed in the state register within that period. Failure to file such notice shall constitute withdrawal and the secretary of state shall note such failure in the state register immediately upon the expiration of the six-month period.

A procedural or interpretive rule may be amended by the agency prior to final adoption without further hearing or public comment. No such amendment may change the main purpose of the rule. If the fiscal implications have changed since the rule was proposed, a new fiscal note shall be attached to the notice of filing. Upon adoption of the rule (including any such amendment) the agency shall file the text of the adopted procedural or interpretive rule with its notice of adoption in the state register and the same shall be effective on the date specified in the rule or thirty days after such filing, whichever is later. (1982, c. 121.)

§ 29A-3-9. Proposal of legislative rules.

When an agency proposes a legislative rule, other than an emergency rule, it shall be deemed to be applying to the legislature for permission, to be granted by law, to promulgate such rule as approved by the agency for submission to the legislature or as amended and authorized by the legislature by law.

An agency proposing a legislative rule, other than an emergency rule, shall first file in the state register a notice of its proposal, including the text of the legislative rule and including all materials required in the case of a procedural or interpretive rule. The agency shall then proceed as in the case of a procedural and interpretive rule to the point of, but not including final adoption. In lieu of final adoption, the agency shall approve the rule, including any amendments, for submission to the legislature and file such notice of approval in the state register and with the legislative rule-making review committee.

Such approval of the agency for submission to the legislature shall be deemed to be approval for submission to the legislature only and not deemed to give full force and effect until authority to do so is granted by law. (1982, c. 121.)

Cross reference. — State register, § 29A-2-1 et seq.

§ 29A-3-10. Creation of a legislative rule-making review committee.

(a) There is hereby created a joint committee of the legislature, known as the legislative rule-making review committee, to review all legislative rules of the several agencies and such other rules as the committee deems appropriate. The committee shall be composed of six members of the senate, appointed by the president of the senate, and six members of the house of delegates, appointed

by the speaker of the house of delegates. In addition, the president of the senate and the speaker of the house of delegates shall be ex officio nonvoting members of the committee and shall designate the cochairmen. Not more than four of the voting members of the committee from each house shall be members of the same political party. The members shall serve until their successors shall have been appointed as heretofore provided. Members of the committee shall receive such compensation and expenses as provided in article two-a [§ 4-2A-1 et seq.], chapter four of this Code. Such expenses and all other expenses, including those incurred in the employment of legal, technical, investigative, clerical, stenographic, advisory and other personnel shall be paid from an appropriation to be made expressly for the legislative rule-making review committee, but if no such appropriation be made, such expenses shall be paid from the appropriation under "Account No. 103 for Joint Expenses," but no expense of any kind whatever payable under said Account No. 103 for joint expenses shall be incurred unless first approved by the joint committee on government and finance. The committee shall meet at any time, both during sessions of the legislature and in the interim.

(b) The committee may adopt such rules of procedure as it considers necessary for the submission, presentation and consideration of rules. (1982, c. 121.)

§ 29A-3-11. Submission of legislative rules to the legislative rule-making review committee.

(a) When an agency finally approves a proposed legislative rule for submission to the legislature, pursuant to the provisions of section nine [§ 29A-3-9] of this article, the agency shall submit to the legislative rule-making review committee at a regular meeting of such committee fifteen copies of (1) the full text of the legislative rule as finally approved by the agency, with new language underlined and with language to be deleted from any existing rule stricken-through but clearly legible; (2) a brief summary of the content of the legislative rule and description of any rule which the agency proposes to amend or repeal; (3) a statement of the circumstances which require the rule; (4) a fiscal note containing all information included in a fiscal note for either house of the legislature and a statement of the economic impact of the rule on the State or its residents; and (5) any other information which the committee may request or which may be required by law.

(b) The committee shall review each proposed legislative rule and, in its discretion, may hold public hearings thereon. Such review shall include, but not be limited to, a determination of:

(1) Whether the agency has exceeded the scope of its statutory authority in approving the proposed legislative rule;

(2) Whether the proposed legislative rule is in conformity with the legislative intent of the statute which the rule is intended to implement, extend, apply, interpret or make specific;

(3) Whether the proposed legislative rule conflicts with any other provision of this Code or with any other rule adopted by the same or a different agency;

(4) Whether the proposed legislative rule is necessary to fully accomplish the objectives of the statute under which the proposed rule was promulgated;

(5) Whether the proposed legislative rule is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it;

(6) Whether the proposed legislative rule could be made less complex or more readily understandable by the general public; and

(7) Whether the proposed legislative rule was promulgated in compliance with the requirements of this article and with any requirements imposed by any other provision of this Code.

(c) After reviewing the legislative rule, the committee shall recommend that the legislature:

(1) Authorize the agency to promulgate the legislative rule, or

(2) Authorize the agency to promulgate part of the legislative rule, or

(3) Authorize the agency to promulgate the legislative rule with certain amendments, or

(4) Recommend that the rule be withdrawn.

The committee shall file notice of its action in the state register and with the agency proposing the rule: Provided, that when the committee makes the recommendations of subdivision (2), (3) or (4) of this subsection, the notice shall contain a statement of the reasons for such recommendation.

(d) When the committee recommends that a rule be authorized, in whole or in part, by the legislature, the committee shall instruct the office of legislative services to draft a bill authorizing the agency to promulgate all or part of the legislative rule, and incorporating such amendments as the committee desires. If the committee recommends that the rule not be authorized, it shall include in its report a draft of a bill authorizing promulgation of the rule together with a recommendation. Any draft bill prepared under this section shall contain a legislative finding that the rule is within the legislative intent of the statute which the rule is intended to implement, extend, apply or interpret and shall be available for any member to introduce to the legislature. (1982, c. 121.)

Cross reference. — State register, § 29A-2-1 et seq.

§ 29A-3-12. Submission of legislative rules to legislature.

(a) No later than forty days before the sixtieth day of each regular session of the legislature, the cochairman of the legislative rule-making review committee shall submit to the clerk of the respective houses of the legislature copies of all proposed legislative rules which have been submitted to the committee pursuant to the provisions of section eleven [§ 29A-3-11] of this article and which have not been previously submitted to the legislature for study, together with the recommendations of the committee with respect to such rules, a statement of the reasons for any recommendation that a rule or any part of a rule be amended, and a statement that a bill authorizing the legislative rule has been drafted by legislative services pursuant to section eleven of this article. The cochairman of the committee may also submit such rules at

the direction of the committee at any time before or during a special session in which consideration thereof may be appropriate. The committee may withhold from its report any proposed legislative rule which was submitted to the committee fewer than two hundred ten days before the end of a regular session. The clerk of each house shall submit the report to his house at the commencement of the next session.

All bills introduced authorizing the promulgation of a rule may be referred by the speaker of the house of delegates and by the president of the senate to appropriate standing committees of the respective houses for further consideration or the matters may be otherwise dealt with as each house or its rules provide. The legislature may by act authorize the agency to adopt a legislative rule incorporating the entire rule, or may authorize the agency to adopt a rule with any amendments which the legislature shall designate. The clerk of the house originating such act shall forthwith file a copy of any bill enacted in contemplation of this section in the state register and with the agency proposing such rule and the clerk of each house may prepare and file a synopsis of legislative action during any session on any proposed rule submitted to the house during such session for which authority to promulgate was not by law provided during such session.

(b) If the legislature fails during its regular session to act upon all or part of any legislative rule which was submitted to it by the legislative rule-making review committee during such session, no agency may thereafter issue any rule or directive or take other action to implement such rule or part thereof unless and until otherwise authorized to do so.

(c) Nothing herein shall be construed to prevent the legislature by law from authorizing or authorizing and directing an agency to promulgate legislative rules not proposed by the agency or upon which some procedure specified in this chapter is not yet complete.

(d) Whenever the legislature is convened by proclamation of the governor, upon his own initiative or upon application of the members of the legislature, or whenever a regular session of the legislature is extended or convened by the vote or petition of its members, the legislature may by act enacted during such extraordinary or extended session authorize, in whole or in part, any legislative rule whether submitted to the legislative rule-making review committee, or not, if legislative action on such rule during such session is a lawful order of business.

(e) Whenever a date is required by this section to be computed in relation to the end of a regular session of the legislature, such date shall be computed without regard to any extensions of such session occasioned solely by the proclamation of the governor.

(f) Whenever a date is required to be computed from or is fixed by the first day of a regular session of the legislature, it shall be computed or fixed in the year one thousand nine hundred eighty-four, and each fourth year thereafter without regard to the second Wednesday of January of such years. (1982, c. 121.)

§ 29A-3-13. Adoption of legislative rules; effective date.

(a) Except as the legislature may by law otherwise provide, within sixty days after the effective date of an act authorizing promulgation of a legislative rule, the agency shall promulgate the rule only in conformity with the provisions of law authorizing and directing the promulgation of such rule.

(b) A legislative rule authorized by the legislature shall become effective thirty days after such filing in the state register, or on the effective date fixed by the authorizing act or if none is fixed by law, such later date not to exceed ninety days, as is fixed by the agency.

(c) The secretary of state shall note in the state register the effective date of an authorized and promulgated legislative rule, and shall file such legislative rule in the state register in lieu of the proposed legislative rule previously filed pursuant to section six [§ 29A-3-6], article three. (1982, c. 121.)

§ 29A-3-14. Withdrawal or modification of proposed rules.

(a) Any legislative rule proposed by an agency may be withdrawn by the agency any time before passage of a law authorizing or authorizing and directing its promulgation, but no such action shall be construed to affect the validity, force or effect of a law enacted authorizing or authorizing and directing the promulgation of an authorized legislative rule or exercising compliance with such law. The agency shall file a notice of any such action in the state register.

(b) At any time before a proposed legislative has been submitted by the legislative rule-making review committee to the legislature pursuant to the provisions of section twelve [§ 29A-3-12] of this article, the agency may modify the proposed rule to meet the objections of the committee. The agency shall file in the state register a notice of its modifying action including a copy of the modified rule, but shall not be required to comply with any provisions of this article requiring opportunity for public comment or taking of evidence with respect to such modification. If a legislative rule has been withdrawn, modified and then resubmitted to such committee, the rule shall be considered to have been submitted to such committee on the date of such resubmission. (1982, c. 121.)

Cross reference. — State register, § 29A-2-1 et seq.

§ 29A-3-15. Emergency legislative rules; procedures for promulgation; definition.

(a) Any agency with authority to promulgate procedural or interpretive rules or propose legislative rules may, without hearing, find that an emergency exists requiring that emergency rules be promulgated and promulgate the same in accordance with this section. Such emergency rules, together with a statement of the facts and circumstances constituting the emergency, shall be filed in the state register and shall become effective immediately upon such

filing. Such emergency rules may amend or repeal any legislative rule which by law has been specifically authorized by the legislature but the circumstances constituting the emergency requiring such amendment or repeal shall be stated with particularity and be subject to de novo review by any court having original jurisdiction of an action challenging their validity. Fifteen copies of the rules and of the required statement shall be filed forthwith with the legislative rule-making review committee.

Except as provided in subsections (b) and (e) of this section, an emergency rule which is a legislative rule shall be effective until the earlier of (1) the expiration date specified by the agency in a notice filed in the state register or (2) the expiration of one hundred eighty days following the filing of the rule in the state register.

(b) An agency may extend the effective period of any emergency rule which is a legislative rule for an additional period not to exceed one hundred eighty days by filing notice of such extension in the state register if:

(1) Such notice of extension is filed not more than ten days prior to the date on which such emergency rule is otherwise scheduled to expire;

(2) The agency has, within ninety days following the filing of the emergency rule in the state register, initiated rule-making procedures for permission to promulgate a regular legislative rule to replace such emergency rule;

(3) The legislature has not authorized or directed promulgation of an authorized legislative rule dealing with substantially the same subject matter since such emergency rule was first promulgated; and

(4) The legislature has not, by law, disapproved of such emergency rule.

(c) The provisions of this section shall not be used to avoid or evade any provision of this article or any other provisions of this Code, including any provisions for legislative review and approval of proposed rules. Any emergency rule promulgated for any such purpose may be contested in a judicial proceeding before a court of competent jurisdiction.

(d) The legislative rule-making review committee may review any emergency rule to determine (1) whether the agency has exceeded the scope of its statutory authority in promulgating the emergency rule; (2) whether there exists an emergency justifying the promulgation of such rule; and (3) whether the rule was promulgated in compliance with the requirements and prohibitions contained in this section. The committee may recommend to the agency or the legislature such action as it may deem proper.

(e) 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. (1982, c. 121.)

§ 29A-3-16. Legislative review of procedural rules, interpretive rules and existing legislative rules.

The legislative rule-making review committee may review any procedural rules, interpretive rules or existing legislative rules and may make recommendations concerning such rules to the legislature, or to the agency, or to both the legislature and the agency. (1982, c. 121.)

§ 29A-3-17. Prior rules.

Any rule lawfully promulgated prior to the effective date of this chapter [May 11, 1982] shall remain in full force and effect until:

(1) Such rule is expressly made ineffective by the provisions of this chapter, or

(2) Such rule should expire by reason of failure to refile the same as provided in section five [§ 29A-2-5] of article two, or expires pursuant to its own terms and provisions lawfully made before the effective date of this section, or

(3) Such rule is repealed by the lawful act of the agency, in conformity with this chapter, or

(4) Such rule is invalidated by an act of the legislature or the force and effect of another law. (1982, c. 121.)

ARTICLE 4.

DECLARATORY RULINGS AND DECLARATORY JUDGMENTS.

Sec.

29A-4-2. Declaratory judgment on validity of rule.

§ 29A-4-1. Declaratory rulings by agencies.

Quoted in State ex rel. Callaghan v. W. Va. Civil Serv. Comm'n, W. Va. , 273 S.E.2d 72 (1980).

§ 29A-4-2. Declaratory judgment on validity of rule.

(a) Any person, except the agency promulgating the rule, may have the validity of any rule determined by instituting an action for a declaratory judgment in the circuit court of Kanawha County, West Virginia, when it appears that the rule, or its threatened application, interferes with or impairs or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or plaintiffs. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the plaintiff or plaintiffs has or have first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that the rule violates constitutional provisions or exceeds the statutory authority or jurisdiction of the agency or was adopted without compliance with statutory rule-making procedures or is arbitrary or capricious, or that, in the case of an emergency rule adopted pursuant to section fifteen [§ 29A-3-15], article three of this chapter, action under said section fifteen was not justified.

(c) When the invalidity of a rule has been so declared, the agency shall, within thirty days after such declaratory judgment has been entered, acquiesce therein and modify or rescind such invalidiated rule in accord with the require-

ment of such declaratory judgment unless the agency promptly, and in any event within such thirty-day period, notifies the plaintiff or plaintiffs of its intention to apply for an appeal to the supreme court of appeals from such declaratory judgment pursuant to section one [§ 29A-6-1], article six of this chapter. In the event such agency shall thereafter make timely application for such appeal, the acquiescence of the agency in the invalidity of such rule shall not be required until thirty days after timely applications for such appeal have been refused or within thirty days after the appeal has been dismissed or otherwise disposed of in the supreme court of appeals by an affirmance of the judgment invalidating said rule. (1964, c. 1; 1982, c. 121.)

Effect of amendment of 1982. — The amendment, in subsection (b), substituted "an emergency rule" for "a rule" and twice substituted "section fifteen" for "section five.".

Quoted in State ex rel. Callaghan v. W. Va. Civil Serv. Comm'n, W. Va. , 273 S.E.2d 72 (1980).

ARTICLE 5.
CONTESTED CASES.

Applied in Jules, Inc. v. Boggs, W. Va. , 270 S.E.2d 679 (1980).

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§ 29A-5-3. Orders or decisions.

Cited in Kisamore v. Rutledge, W. Va. , 276 S.E.2d 821 (1981).

§ 29A-5-4. Judicial review of contested cases.

When findings sustained. — West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties. West Virginia Human Rights Comm'n v. United Transp. Union, Local 655, W. Va. , 280 S.E.2d 653 (1981).

Grounds for reversal.

Where "evidence" on which Board of Review's decision is based is not part of the record, that decision will be reversed. Surratt v. Rutledge, W. Va. , 280 S.E.2d 726 (1981).

Relief on reversal. — Where a final order of the commissioner of the banking department is clearly wrong, the circuit court may reverse the commissioner and enter an appropriate order accompanied by findings of fact and conclusions of law giving such relief as should have been given by the commissioner in the first instance. Jones v. Mullen, W. Va. , 276 S.E.2d 214 (1981).

Certiorari proper where chapter inapplicable. — Certiorari is the proper means for obtaining judicial review of a decision made by a state agency not covered by the Administrative Procedures Act. State ex rel. Ginsberg v. Watt, W. Va. , 285 S.E.2d 367 (1981).

Applied in Currey v. State Human Rights Comm'n, W. Va. , 273 S.E.2d 77 (1980); Snyder v. Callaghan, W. Va. , 284 S.E.2d 241 (1981).

Cited in State ex rel. Gibson v. Pizzino, W. Va. , 266 S.E.2d 122 (1979); Jules, Inc. v. Boggs, W. Va. , 270 S.E.2d 679 (1980).

29A-5-5. Exceptions.

Stated in Kisamore v. Rutledge, W. Va. , 276 S.E.2d 821 (1981).

ARTICLE 5.

CONTESTED CASES.

Sec.
29A-5-1. Notice required; hearing; subpoenas; witness fees, etc.; depositions; records.
29A-5-2. Rules of evidence; taking notice of facts; correction of transcript.
29A-5-3. Orders or decisions.
29A-5-4. Judicial review of contested cases.
29A-5-5. Exceptions.

W. Va. Law Review. — For survey of administrative procedure for the year 1977, see developments in West Virginia law of 80 W. Va. L. Rev. 113 (1977).

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§ 29A-5-1. Notice required; hearing; subpoenas; witness fees, etc.; depositions; records.

(a) In any contested case all parties shall be afforded an opportunity for hearing after at least ten days' written notice. The notice shall contain the date, time and place of the hearing and a short and plain statement of the matters asserted. If the agency is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application a more definite and detailed statement shall be furnished. An opportunity shall be afforded all parties to present evidence and argument with respect to the matters and issues involved. The required notice must be given as specified in section two [§ 29A-7-2], article seven of this chapter. All of the testimony and evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means. All rulings on the admissibility of testimony and evidence shall also be reported. The agency shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order or default. Each agency shall adopt appropriate rules of procedure for hearing in contested cases.

(b) For the purpose of conducting a hearing in any contested case, any agency which now has or may be hereafter expressly granted by statute the power to issue subpoenas or subpoenas duces tecum or any member of the body which comprises such agency may exercise such power in the name of the agency. Any such agency or any member of the body which comprises any such agency may exercise such power in the name of the agency for any party upon request. Under no circumstances shall this chapter be construed as granting the power to issue subpoenas or subpoenas duces tecum to any agency or to any member of the body of any agency which does not now by statute expressly have such power. When such power exists, the provisions of this section shall apply. Every such subpoena and subpoena duces tecum shall be served at least five days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail, but a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail. All subpoenas and subpoenas duces tecum shall be issued in the name of the agency, as aforesaid, but any party requesting their issuance must see that they are properly served. Service of subpoenas and subpoenas duces tecum issued at the instance of the agency shall be the responsibility of the agency. Any

person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this State; and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this State. All such fees shall be paid by the agency if the subpoena or subpoena duces tecum were issued, without the request of an interested party, at the instance of the agency. All such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay such fees. Any such agency may compel the attendance of witnesses and the production of books, records or papers in response to such subpoenas and subpoenas duces tecum. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held, or the circuit court in which the subpoena duces tecum was served, or the judge of either such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such court, under the West Virginia Rules of Civil Procedure for Trial Courts of Record, could grant, and for any of the same reasons, with respect to a subpoena duces tecum issued from either such court. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by such agency or any member of the body which comprises such agency, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein. Witnesses at such hearings shall testify under oath or affirmation.

(c) Evidentiary depositions may be taken and read as in civil actions in the circuit courts of this State.

(d) All hearings shall be conducted in an impartial manner. The agency, any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do, shall have the power to: (1) Administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) dispose of procedural requests or similar matters, and (6) take any other action authorized by a rule adopted by the agency in accordance with the provisions of article three [§ 29A-3-1 et seq.] of this chapter.

(e) Except where otherwise provided by statute, the hearing in any contested case shall be held in the county selected by the agency.

(f) Notwithstanding the provisions of subsection (a) of this section, upon request to the agency from any party to the hearing all reported testimony and evidence at such hearing shall be transcribed, and a copy thereof furnished to

such party at his expense. The agency shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence, and such transcription shall be accomplished with all dispatch. (1964, c. 1.)

Administrative remedies must be exhausted before courts will act. — The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act, and this principle applies alike to relief at law and relief in equity. Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W. Va. 245, 183 S.E.2d 692 (1971).

But the rule which requires the exhaustion of administrative remedies is inapplicable where no administrative remedy is provided by law. Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W. Va. 245, 183 S.E.2d 692 (1971).

Even though agency cannot award damages. — The rule of exhausting administrative remedies before actions in courts are instituted is applicable, even though the administrative agency cannot award damages, if the matter is within the jurisdiction of the agency. Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W. Va. 245, 183 S.E.2d 692 (1971).

As damages can always be obtained in the courts after the administrative procedures have been followed, if warranted. Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W. Va. 245, 183 S.E.2d 692 (1971).

Hence, proceedings in equity for injunctions cannot be maintained where there is an administrative remedy provided by statute which is adequate and will furnish proper remedy. Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W. Va. 245, 183 S.E.2d 692 (1971).

A controversy involving the discharge of a member of the department of public safety by its superintendent, when heard originally or on appeal by the board of commissioners under §§ 15-2-20 and former 15-2-21, is a contested case within the meaning of this chapter, and does not include regulations relating solely to the internal management of the department. State ex rel. Gooden v. Bonar, 155 W. Va. 202, 183 S.E.2d 697 (1971).

Though no appeal is provided by §§ 15-2-20 and former 15-2-21 from the ruling of the board of commissioners, an appeal lies from the final order of the board of commissioners discharging or refusing to discharge a member of the department of public safety from the service to either the circuit court of Kanawha county or the circuit court of the county in which the petitioner resides or does business and from the judgment of the circuit court to the supreme court of appeals as provided by this article and article 6 of this chapter. State ex rel. Gooden v. Bonar, 155 W. Va. 202, 183 S.E.2d 697 (1971).

Demotion of member of department of public safety. — A member of the department of public safety who, as a disciplinary measure and after a full hearing in accordance with the rules and regulations of the department, is, by the superintendent of the department, demoted from his rank of sergeant to the rank of trooper and transferred to a different post within the State, is not entitled, under the provisions of this chapter, to an appeal to a circuit court from such action of the superintendent. State ex rel. Burchett v. Taylor, 150 W. Va. 702, 149 S.E.2d 234 (1966).

The Administrative Procedures Act does not apply in the case of a state trooper demoted for disciplinary reasons, which case does not involve the public, but rather involves a mere disciplinary action relating solely to the internal management of the department. The article in 66 W. Va. L. Rev. 159 (1964), contains the following language at page 169: "The contested case article of the new act does not provide a right to a hearing but it provides the procedure for a hearing where a hearing is required by other provisions of law or by constitutional right." State ex rel. Burchett v. Taylor, 150 W. Va. 702, 149 S.E.2d 234 (1966).

Cited in Jordan v. Roberts, 246 S.E.2d 259 (W. Va. 1978).

§ 29A-5-2. Rules of evidence; taking notice of facts; correction of transcript.

(a) In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the circuit courts of this State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

Agencies shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record. Any party to any such hearing may vouch the record as to any excluded testimony or other evidence.

(b) All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

(c) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(d) Agencies may take notice of judicially cognizable facts. All parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

(e) Upon motion in writing served by any party as notice may be served pursuant to section two [§ 29A-7-2], article seven of this chapter and therein assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the agency shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing and shall direct that the transcript be corrected and revised in the respects designated by the agency, so as to make it conform to the whole truth. (1964, c. 1.)

§ 29A-5-3. Orders or decisions.

Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. Prior to the rendering of any final order or decision, any party may propose findings of fact and conclusions of law. If proposed, all other parties shall be given an opportunity to except to such proposed findings and conclusions, and the final order or decision shall include a ruling on each proposed finding. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. A copy of the order or decision and accompanying findings and conclusions shall be served upon each party and his attorney of record, if any, in person or by registered or certified mail. (1964, c. 1.)

W. Va. Law Review. — For note discussing requirement that decisions in contested cases be accompanied by findings of fact and conclusions of law, see 80 W. Va. L. Rev. 113 (1977).

Decisions must contain findings of fact and conclusions of law. — Decisions of an administrative agency in administrative hearings conducted under the Banking Act and Administrative Procedures Act must contain findings of fact and conclusions of law. Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W. Va. 245, 183 S.E.2d 692 (1971).

Underlying evidentiary facts must be given. — When this section says: "Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. . . ." the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex, scientific, statistical, or economic evidence was evaluated. In this regard if the conclusion is predicated upon a change of

agency policy from former practice, there should be an explanation of the reasons for such change. Citizens Bank v. West Virginia Bd. of Banking & Fin. Insts., 233 S.E.2d 719 (W. Va. 1977).

The board's simple restatement in its order of the statutory language found in § 31A-4-6 without more does not constitute sufficiently specific findings of fact to comply with the present section. Citizens Bank v. West Virginia Bd. of Banking & Fin. Insts., 233 S.E.2d 719 (W. Va. 1977).

Applied in Workman v. Workmen's Comp. Comm'r, 236 S.E.2d 236 (W. Va. 1977).

Cited in Gooden v. Board of Appeals of W. Va. Dep't of Pub. Safety, 234 S.E.2d 893 (W. Va. 1977).

§ 29A-5-4. Judicial review of contested cases.

(a) Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.

(b) Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha county, West Virginia, or with the judge thereof in vacation, or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency. A copy of the petition shall be served upon the agency and all other parties of record by registered or certified mail. The petition shall state whether the appeal is taken on questions of law or questions of fact, or both. No appeal bond shall be required to effect any such appeal.

(c) The filing of the petition shall not stay enforcement of the agency order or decision or act as a supersedeas thereto, but the agency may stay such enforcement, and the appellant, at any time after the filing of his petition, may apply to such circuit court for a stay of or supersedeas to such final order or decision. Pending the appeal, the court may grant a stay or supersedeas upon such terms as it deems proper.

(d) Within fifteen days after receipt of a copy of the petition by the agency, or within such further time as the court may allow, the agency shall transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case, and a statement of matters officially noted; but, by stipulation of all parties to the review proceeding, the record may be shortened. The expense of preparing such record shall be taxed as a part of the costs of the appeal. The appellant shall provide security for costs satisfactory to the court. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs involved. Upon demand by any party to the appeal, the agency shall furnish, at the cost of the party requesting same, a copy of such record. In the event the complete record is not filed with the court within the time provided for in this section, the appellant may apply to the court to have the case docketed, and the court shall order such record filed.

(e) Appeals taken on questions of law, fact or both, shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant.

Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued. The court or judge shall fix a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, shall not be held sooner than ten days after the filing of the petition, and notice of such date and time shall be forthwith given to the agency.

(f) The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this State in accordance with the provisions of section one [§ 29A-6-1], article six of this chapter. (1964, c. 1.)

W. Va. Law Review. — As to judicial review under West Virginia Administrative Procedure Act not being applicable to agency actions relating solely to internal management, see 69 W. Va. L. Rev. 53 (1966).

For note, "Administrative Procedure — Judicial Review — Abolition of Extraordinary Writs," see 77 W. Va. L. Rev. 548 (1975).

For survey of W. Va. law on judicial review of administrative decisions for the year 1975-1976, see 78 W. Va. L. Rev. 538 (1976).

This section does not vitiate the rule which requires the exhaustion of administrative remedies before resorting to the courts. Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W. Va. 245, 183 S.E.2d 692 (1971).

Chapter applicable to civil service commission. — This chapter, passed by the legislature in 1964 three years after the Civil Service Act was passed, is applicable to the civil service commission. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

Two methods of appeal from decisions of civil service commission. — The sections pertaining to appeals in both the Administrative Procedures Act and the Civil Service Act deal with the same subject and are not repugnant, and can be said to merely provide for two methods of appeal from decisions of the civil service commission. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

There being no express language in the Administrative Procedures Act that repeals the appeal procedure in the Civil Service Act, and inasmuch as the provisions of both acts are not irreconcilable or repugnant and can be employed as two different methods of review of decisions of the civil service commission, the appeal section of the Civil Service Act (§ 29-6-13) is therefore not repealed by implication by the provisions of this chapter. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972); Brown v. Civil Serv. Comm'n, 155 W. Va. 657, 186 S.E.2d 840 (1972).

Grounds for reversal. — An order of an administrative body based upon a finding of facts which is contrary to the evidence, or is not supported by the evidence, or is based upon a

mistake of law, will be reversed and set aside by the supreme court of appeals upon review. Billings v. Civil Serv. Comm'n, 154 W. Va. 688, 178 S.E.2d 801 (1971).

The supreme court of appeals will not reverse a finding of fact by the civil service commission unless it is contrary to the evidence or is based upon a mistake of law. In other words, the finding must be clearly wrong to warrant this judicial interference. Billings v. Civil Serv. Comm'n, 154 W. Va. 688, 178 S.E.2d 801 (1971).

Service of a petition for review upon a member of the board of directors of a corporation is sufficient under this section to make that corporation a party in proceedings before the circuit court upon a petition for review of agency action, provided that the other requirements of this section have been properly met. Citizens Bank v. West Virginia Bd. of Banking & Fin. Insts., 233 S.E.2d 719 (W. Va. 1977).

Cited in Consolidation Coal Co. v. Environmental Protection Agency, 537 F.2d 1236 (4th Cir. 1976); North v. West Virginia Bd. of Regents, 233 S.E.2d 411 (W. Va. 1977).

§ 29A-5-5. Exceptions.

The provisions of this article shall not apply to the workmen's compensation fund, the department of employment security, the state tax commissioner, the state road commissioner, the state road commission, and the teachers' retirement board. (1964, c. 1.)

Applied in Workman v. Workmen's Comp. Comm'r, 236 S.E.2d 236 (W. Va. 1977).

ARTICLE 6.

APPEALS.

Sec.

29A-6-1. Supreme court of appeals.

W. Va. Law Review. — For survey of developments in West Virginia law of administrative procedure for the year 1977, see 80 W. Va. L. Rev. 118 (1977).

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§ 29A-6-1. Supreme court of appeals.

Any party adversely affected by the final judgment of the circuit court under this chapter may seek review thereof by appeal to the supreme court of appeals of this State, and jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally. (1964, c. 1.)

Chapter applicable to civil service commission. — This chapter, passed by the legislature in 1964 three years after the Civil Service Act was passed, is applicable to the civil service commission. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

Two methods of appeal from decisions of civil service commission. — The sections pertaining to appeals in both the Administrative Procedures Act and the Civil Service Act deal with the same subject and are not repugnant, and can be said to merely provide for two methods of appeal from decisions of the civil service commission. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

There being no express language in the Administrative Procedures Act that repeals the appeal procedure in the Civil Service Act, and inasmuch as the provisions of both acts are not irreconcilable or repugnant and can be employed as two different methods of review of decisions of the civil service commission, the appeal section of the Civil Service Act (§ 29-6-13) is therefore not repealed by implication by the provisions of this chapter. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

Appeal from order discharging or refusing to discharge member of department of public safety. — Though no appeal is provided by §§ 15-2-20 and former 15-2-21 from the ruling of the board of commissioners, an appeal lies from the final order of the board of commissioners discharging or refusing to discharge a member of the department of public safety from the service to either the circuit court of Kanawha county or the circuit court of the county in which the petitioner resides or does business and from the judgment of the circuit court to the supreme court of appeals as provided by this article and article 5 of this chapter. State ex rel. Gooden v. Bonar, 155 W. Va. 202, 183 S.E.2d 697 (1971).

Cited in Citizens Bank v. West Virginia Bd. of Banking & Fin. Insts., 233 S.E.2d 719 (W. Va. 1977).

ARTICLE 7.

GENERAL PROVISIONS.

Sec.
29A-7-1. Limitations on certain administrative powers.
29A-7-2. Notice generally.
29A-7-3. Repeals; subsequent legislation.
29A-7-4. Construction and effect; severability of provisions.

W. Va. Law Review. — For survey of developments in West Virginia law of administrative procedure for the year 1977, see 80 W. Va. L. Rev. 113 (1977).

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§ 29A-7-1. Limitations on certain administrative powers.

No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. (1964, c. 1.)

§ 29A-7-2. Notice generally.

Whenever an agency or person is authorized or required to give any notice under this chapter, unless a different method of giving such notice is otherwise expressly permitted or prescribed, such notice shall be given either by personal delivery thereof to the agency or person to be so notified, or by depositing such notice in the United States mail, postage prepaid, in an envelope addressed to such agency or person at the last known address of such agency or person. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the agency, or by affidavit of any person over eighteen years of age, naming the agency or person to which or to whom such notice was given and specifying the time, place and manner of the giving thereof. (1964, c. 1.)

§ 29A-7-3. Repeals; subsequent legislation.

All acts or parts of acts which are inconsistent with the provisions of this chapter are hereby repealed to the extent of such inconsistency, but such repeal shall not affect pending proceedings. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so specifically and expressly. (1964, c. 1.)

The repeal of a statute by implication is not favored in law. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

Hence, a general statute, which does not use express terms or employ words which manifest a plain intention so to do, will not repeal a former statute dealing with a particular subject, and the two statutes will operate together unless the conflict between them is so real and irreconcilable as to indicate a clear legislative purpose to repeal the former statute. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

Section 29-6-13 not repealed by implication. — There being no express language in the Administrative Procedures Act that repeals the appeal procedure in the Civil Service Act, and inasmuch as the provisions of both acts are not irreconcilable or repugnant and can be employed as two different methods of review of decisions of the civil service commission, the appeal section of the Civil Service Act (§ 29-6-13) is therefore not repealed by implication by the provisions of this chapter. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

The sections pertaining to appeals in both this chapter and the Civil Service Act deal with the same subject and are not repugnant, and can be said to merely provide for two methods of appeal from decisions of the civil service commission. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

Chapter applicable to civil service commission. — This chapter, passed by the legislature in 1964 three years after the Civil Service Act was passed, is applicable to the civil service commission. Zigmond v. Civil Serv. Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972).

§ 29A-7-4. Construction and effect; severability of provisions.

Nothing in this chapter shall be held to limit or repeal additional requirements imposed by statute or otherwise recognized by law. No procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of this chapter [July 1, 1964]. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or its application, and to this end the provisions of this chapter are declared to be severable. (1964, c. 1.)

CHAPTER 29B.

FREEDOM OF INFORMATION.

Article

1. Public Records, §§ 29B-1-1 to 29B-1-6.

ARTICLE 1.

PUBLIC RECORDS.

Sec.
29B-1-1. Declaration of policy.
29B-1-2. Definitions.
29B-1-3. Inspection and copying.
29B-1-4. Exemptions.
29B-1-5. Enforcement.
29B-1-6. Violation of article; penalties.

§ 29B-1-1. Declaration of policy.

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy. (1977, c. 147.)

§ 29B-1-2. Definitions.

As used in this article:

(1) "Custodian" means the elected or appointed official charged with administering a public body.

(2) "Person" includes any natural person, corporation, partnership, firm or association.

(3) "Public body" means every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority.

(4) "Public record" includes any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body.

(5) "Writing" includes any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics. (1977, c. 147.)

§ 29B-1-3. Inspection and copying.

(1) Every person has a right to inspect or copy any public record of a public body in this State, except as otherwise expressly provided by section four [§ 29B-1-4] of this article.

(2) A request to inspect or copy any public record of a public body shall be made directly to the custodian of such public record.

(3) The custodian of any public records, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for inspection and examination of the records in his office and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them. The custodian of the records may make reasonable rules and regulations necessary for the protection of the records and to prevent interference with the regular discharge of his duties.

(4) All requests for information must state with reasonable specificity the information sought. The custodian, upon demand for records made under this statute, shall as soon as is practicable but within a maximum of five days not including Saturdays, Sundays or legal holidays:

(a) Furnish copies of the requested information;

(b) Advise the person making the request of the time and place at which he may inspect and copy the materials; or

(c) Deny the request stating in writing the reasons for such denial.

Such a denial shall indicate that the responsibility of the custodian of any public records or public body to produce the requested records or documents is at an end, and shall afford the person requesting them the opportunity to institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.

(5) The public body may establish fees reasonably calculated to reimburse it for its actual cost in making reproductions of such records. (1977, c. 147.)

§ 29B-1-4. Exemptions.

The following categories of information are specifically exempt from disclosure under the provisions of this article:

(1) Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors;

(2) Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance: Provided, that nothing in this article shall be construed as precluding an individual from inspecting or copying his own personal, medical or similar file;

(3) Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination;

(4) Records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement;

(5) Information specifically exempted from disclosure by statute;

(6) Records, archives, documents or manuscripts describing the location of undeveloped historic, prehistoric, archaeological, paleontological and battlefield sites or constituting gifts to any public body upon which the donor has attached restrictions on usage or the handling of which could irreparably damage such record, archive, document or manuscript;

(7) Information contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions, except those reports which are by law required to be published in newspapers; and

(8) Internal memoranda or letters received or prepared by any public body. (1977, c. 147.)

§ 29B-1-5. Enforcement.

(1) Any person denied the right to inspect the public record of a public body may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.

(2) In any suit filed under subsection one of this section, the court has jurisdiction to enjoin the custodian or public body from withholding records and to order the production of any records improperly withheld from the person seeking disclosure. The court shall determine the matter de novo and the burden is on the public body to sustain its action. The court, on its own motion, may view the documents in controversy in camera before reaching a decision. Any custodian of any public records of the public body found to be in noncompliance with the order of the court to produce the documents or disclose the information sought, may be punished as being in contempt of court.

(3) Except as to causes the court considers of greater importance, proceedings arising under subsection one of this section shall be assigned for hearing and trial at the earliest practicable date. (1977, c. 147.)

§ 29B-1-6. Violation of article; penalties.

Any custodian of any public records who shall willfully violate the provisions of this article shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail for not more than ten days, or, in the discretion of the court, by both such fine and imprisonment. (1977, c. 147.)

PROCEDURAL RULES

IMPLEMENTING

THE

AUTHORIZATION BY RULE PROVISION

OF THE

REGULATIONS

FOR THE

WEST VIRGINIA

UNDERGROUND INJECTION CONTROL PROGRAM

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

STATE WATER RESOURCES BOARD

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 1/17/83

Chapter 20-5A-1 and Chapter 29A-3-1

Series X
(1983)

**REGULATIONS IMPLEMENTING THE AUTHORIZATION BY RULE PROVISION OF THE REGULATIONS FOR THE WEST VIRGINIA UNDERGROUND INJECTION CONTROL PROGRAM

WHEREAS, pursuant to the provisions of Chapter 20-5A-1 et seq. and Chapter 29A-3-1 et seq. of the West Virginia Code, 1931, as amended, the Board has approved and filed "Regulations for the West Virginia Underground Injection Control Program", West Virginia Administrative Regulations, Series IX, and

WHEREAS, Section 13.02 of said Regulations provides that certain facilities may be authorized by rule in accordance with the requirements of said section;

NOW, THEREFORE, the Board promulgates the following procedural rules for the implementation of Section 13.02 of the Board's West Virginia Administrative Regulations, Series IX:

1.01 Injection into existing Class I, II, and III wells shall be authorized by rule for periods up to five (5) years from the effective date of these regulations. All such wells must be issued permits within the five (5) year period or close down, at its end, unless the rule is continued under Section 1.02 of these regulations.

1.02 Rules under Section 1.01 of these regulations authorizing Class II and III wells or projects in existing fields or projects shall allow them to continue normal operations until permitted, including construction, operation, and plugging and abandonment of wells provided the owner or operator maintains compliance with all applicable requirements under the Board's West Virginia Administrative Regulations, Series IX.

1.03 Injection into existing Class IV wells shall be authorized for a period not to exceed six (6) months after the effective date of these regulations. Such rules shall apply the requirements of Section 7.03 and Section 11.04 of the Board's West Virginia Administrative Regulations, Series IX.

1.04 Injection into Class V wells shall be authorized for a period of five (5) years, subject to the requirements of Section 13.02(b) and (d) and Section 12.00 of the Board's West Virginia Administrative Regulations, Series IX. However, the Chief has authority to withdraw the authorization if required under Section 13.02 of said Regulations.

1.05 Any facility which is authorized by rule pursuant to these regulations shall meet the requirements contained in Section 13.02(b) of the Board's West Virginia Administrative Regulations, Series IX, no later than one (1) year after authorization by such rules.

1.06 These regulations do not supersede West Virginia Administrative Regulations, Series IX, and are solely intended as procedural regulations for the implementation of the provisions of Section 13.02 of the Board's

West Virginia Administrative Regulations, Series IX, and in the event of any inconsistency or conflict between any provision of these regulations and any provisions of Series IX, the provisions of Series IX shall control.

Adopted this 4th day of January, 1983, by the State Water Resources Board.

Attest:

John C. Ailes
Chairman

These regulations shall become effective upon assumption of the Underground Injection Control Program by the State.

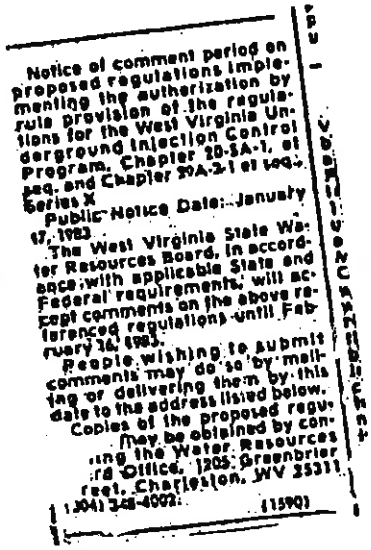
NOTICE OF COMMENT PERIOD ON PROPOSED REGULATIONS IMPLEMENTING THE AUTHORIZATION BY RULE PROVISION OF THE REGULATIONS FOR THE WEST VIRGINIA UNDERGROUND INJECTION CONTROL PROGRAM, CHAPTER 20-5A-1 et seq. and CHAPTER 29A-3-1 et seq., SERIES X

Public Notice Date: January 17, 1983

The West Virginia State Water Resources Board, in accordance with applicable State and Federal requirements, will accept comments on the above referenced regulations until February 16, 1983. People wishing to submit comments may do so by mailing or delivering them by this date to the address listed below.

Copies of the proposed regulations may be obtained by contacting the Water Resources Board Office, 1205 Greenbrier Street, Charleston, WV 25311 (304) 348-4002.

6B The Charleston Gazette, Monday, January 17, 1983 LEGAL ADVERTISEMENT


Notice of comment period on proposed regulations implementing the authorization by rule provision of the regulations for the West Virginia Underground Injection Control Program, Chapter 20-5A-1, et seq. and Chapter 29A-3-1 et seq., Series X

Public Notice Date: January 17, 1983

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(1590)

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 1/17/83

APPENDIX

STATUS

OF THE

WEST VIRGINIA

UNDERGROUND INJECTION CONTROL

REGULATIONS

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHAUNCEY H. BROWNING, JR.
ATTORNEY GENERAL

February 3, 1983

Mr. John Cooper, Esq.
U. S. Environmental Protection Agency
Region III
6th and Walnut Streets
Philadelphia, PA 19106

Re: Status of State
UIC Regulations

Dear Mr. Cooper:

I am writing this letter to explain the status of the State Water Resources Board's "Regulations for the West Virginia Underground Injection Control Program," Series IX and Series X.

Series IX, which consists of the substantive rules for the UIC program, was recently approved by the Water Resources Board (Board) and submitted to the Legislature in accordance with the State Administrative Procedures Act, W.Va. Code § 29A-3-1 et seq. (a copy of which is included in Section 6 of the State's Primacy Application).

You may recall that these same rules had been previously adopted by the Board on April 6, 1982. At that time, there was no statutory requirement that such rules be reviewed by the Legislature, since the legislative rule-making review committee had been declared unconstitutional in 1981 by our State Supreme Court. State ex rel. Barker v. Manchin et. al. (W.Va. 1981).

However, on May 11, 1982, a new Administrative Procedures Act took effect which established new procedures for the legislative review of agency rules. Certain provisions of the Act were subsequently interpreted to mean that all regulations which had been adopted prior to May 11, 1982, but were not then yet effective, were subject to the new procedures of the Act (See, W.Va. Code § 29A-2-5). This of course, included the UIC regulations.

In the course of making preparations for the refiling of the UIC rules in accordance with the new Act, the Division and Board decided that some minor changes should be made to the regulations. After going to public notice on these changes, the Board "approved" the entire Series IX regulations "for submission to the Legislature" on, January 4, 1983. W.Va. Code § 29A-3-11.

On January 10, 1983, the legislative rule-making review committee recommended that the legislature authorize the agency to promulgate the rules. Senate Bill No. 340, which would so authorize the Board, has recently been introduced and referred to the committee on Energy, Industry and Mining.

Assuming passage of the bill, the Board will act immediately to adopt the rules, which will take effect upon the assumption of the program.

At this time, we do not foresee any problems with the passage of Senate Bill No. 340 and expect the State to have legally effective rules upon program assumption. Should the legislature not pass the bill, we will consider promulgation of the rules as "emergency rules" under W.Va. Code § 29A-3-15.

Concerning Series X of the Board's regulations, the Board has proposed this rule to ensure that the authorization by rule provision under Section 13.02 of Series IX takes effect upon program assumption. Since the rule is "procedural," legislative review is not required. W.Va. Code § 29A-3-8. The Board will adopt the rule after considering any public comments which are submitted. This rule will also become legally effective upon program assumption.

We will keep you informed of the progress of Series IX through the Legislature. If you desire any further clarification on the legal status of the Board's rules, please let me know.

Very truly yours,

Karen G. Waston

Karen G. Waston
Assistant Attorney General
Environmental Task Force

KGW/rgf

cc: David W. Robinson, Chief
Division of Water Resources

John C. Ailes, Chairman
State Water Resources Board