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OFFICE OF THE SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

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October 16, 2000

NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Russ Rader
Highways, Division of
Capitol Complex
Building 5, Room 350

FROM: Legislative Rule-Making Review Committee

Proposed Rule: Waste Tire Remediation/Environmental Clean-up, 157CSR8

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

- 1. Authorize the agency to promulgate the Legislative rule
(a) as originally filed
(b) as modified by the agency
2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached.
3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.
4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.
5. Recommends that the Legislative rule be withdrawn; a statement of reasons for such recommendation is attached.

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: Division of Highways

Subject: Waste Tire Remediation/Environmental Clean-up, 157CSR8

PERTINENT DATES

Filed for public comment: June 28, 2000
Public comment period ended: July 31, 2000
Filed following public comment period: August 18, 2000
Filed LRMRC: August 18, 2000
Filed as emergency: June 28, 2000

OFFICE OF THE CLERK
SECRETARIAT OF STATE

SEP 8 4 21 PM '00

FILED

Fiscal Impact: During the 2000 Regular Session, a new \$5.00 fee was placed on titling and retitling of motor vehicles, which is to be utilized to clean-up waste tire piles in the state. This fee expires upon completion of remediation of all waste tire piles. This fee is estimated to generate \$3.5 million dollars per year. The Division of Highways is administering the program. The Division estimates overhead of \$525,000 to administer the program, with the remaining \$2,950,000 available annually for waste tire remediation projects.

ABSTRACT

The proposed rule is new. The following is a section-by-section synopsis of the rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule. This section also includes legislative intent, which counsel recommends removing.

Section 2 defines terms.

Section 3 provides the method for identifying waste tire piles for the purpose of determining the order in which individual tire piles will be remediated. Information to be collected includes address and other description of each tire pile, ownership

information, and method of assigning an identification number for each tire pile.

Section 4 prohibits the creation of waste tire piles. This section requires that all tires be handled consistent with Division of Environmental Protection and Public Service Commission requirements. Subsection 4.10 creates an exception to these requirements for the Division of Highways [DOH], or a contractor working for DOH, to accumulate waste tires for the purpose of remediation and proper disposal.

Section 5 provides criteria for entering into contracts with public and private entities for remediation of waste tire piles. These entities include (but are not limited to): Corrections, Regional Jail Authority, National Guard, private contractors and civic groups. Persons who create waste tire piles are not eligible for funding to remediate these piles.

Section 6 provides a right of entry for the DOH to inspect and conduct remediation on properties containing waste tire piles. Section 6.3 provides the method for contacting property owners. If voluntary entry is not obtainable, a right of entry may be obtained, which is valid for up to three years. Tire pile owners are required to allow entry and ingress and egress to the property. Owners of waste tire piles are allowed to initiate cleanup of the tire pile at their own expense as long as their clean-up activities comply with the provisions of this rule for proper handling and disposal.

Section 7 encourages other state agencies participation in remediation projects. Pre-remediation conferences are to be held on each site.

Section 8 provides that the Bureau of Public Health may enforce the public health laws at waste tire piles when an imminent public health problem arises.

Section 9 restates the code, which places liability for the cost of remediation of a waste tire pile on the persons responsible for creating the pile. This liability includes costs of removal, cleanup, transportation and all other costs associated with the remediation project. This section also provides that the Division

may enter into binding arbitration of payments based on each persons responsibility for creating the pile and ability to pay.

Section 10 restates code provisions relating to the notification process to owners of properties containing waste tire piles. Owners may also remediate the site themselves, upon entering a compliance schedule with the Division. The owner must follow the remediation plan and required time-frames to avoid a takeover of the project by the Division. This section establishes methods for serving notice and orders to the tire pile property owners.

Section 11 also restates code provisions on the authority of the Division to take a statutory lien on the waste tire property, authorizing the taking of the property and applying any proceeds from its sale to costs of remediation of the pile.

Section 12 provides that the DOH may seek injunctive relief for violations of this rule, and allows the DOH to prevent or abate creation of tire piles.

Section 13 requires that all records of remediation activities be retained at least five years.

Section 14 requires that all tire transporters of tires associated with a remediation action must provide documentation that they are properly disposing of the tires and must be certified by the PSC to haul tires.

Section 15 established the requirements for owner remediation actions. The owner must establish a plan and schedule that is approved by the DOH, and follow the requirements that all remediation projects must meet. Upon proper completion of a remediation project, the owner will receive a letter of compliance from the DOH.

Section 16 allows the director to temporarily store tires in tire piles while carrying out the provisions of this rule. Temporary storage site requirements are also established. Limitations are also established on locations and sizes and other requirements for these temporary tire piles.

Section 17 establishes disposal requirements for waste tires. All tires must be disposed of or recycled properly. Tires may not be sold as usable tires. The DOH may sale or otherwise dispose of tires, and any proceeds shall be deposited in the remediation fund.

Section 18 restates the code authorization which allows the DOH to establish a tire collection and disposal program for waste tires. No more than 5 tires may be collected from each resident per quarter year.

Section 19 establishes rodent/vector control. When infestation occurs, the DOH may hire professional exterminators to exterminate pests prior to remediation.

Section 20 refers to agency procedural rules for appeals of DOH decisions.

Section 21 provides a priority listing process for establishing the ranking of tire piles to undergo remediation. Consideration of the order of ranking will be determined by funding available, environmental impact, seasonal conditions, disposal site locations and conditions, and other relevant factors. The priority ranking is based upon health issues, potential for water and air contamination/pollution, potential for fires and other special conditions.

Section 22 provides how Tire Remediation Environmental Cleanup Fund monies may be expended. Paying program staff, costs of site remediation, hauling of waste tires, and other activities associated with the tire pile remediation process are authorized.

Section 23 provides that all DOH and contractor employees must receive training on proper remediation procedures. Any contractor undertaking remediation must provide sanitary facilities and appropriate safety equipment for persons doing remediations.

AUTHORITY

Statutory authority: W.Va. Code, §17-24-4, which provides, in part, as follows:

...The commissioner of the division of highways is hereby authorized and empowered:
(i) To propose for legislative promulgation in accordance with article three, chapter twenty-nine-a of this code, emergency and legislative rules necessary to implement the provisions of this article [Waste Tire Remediation]...

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

Section 4.1 prohibits the creation of waste tire piles. The DOH only has authority over remediation of tire piles, all other enforcement authority is through the DEP.

It is unclear what authority the DOH has to allow arbitration of costs (Section 9) due the state from persons creating the waste tire piles. The code provides that persons causing tire piles are responsible for all costs associated with remediation.

Section 12 gives authority to the DOH to initiate injunctive relief to prevent creation of tire piles. There is no authority in the code for this enforcement tool.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISIONS OF THE CODE?

Yes.

VIII. OTHER

There are several provisions of the rule that are restatement of the code, while other provisions that appear unnecessary. Counsel also has technical corrections to suggest.