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(Plus all the volunteer
help we can get)

October 25, 2000

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Department of Agriculture

RULE: Amendments, Series 12, Fee Structure for the Pesticide Control Act of 1990

DATE FILED AS AN EMERGENCY RULE: September 15, 2000

DECISION NO. 17-00

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.



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OFFICE OF THE
SECRETARY OF STATE
WEST VIRGINIA

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EMERGENCY RULE DECISION
(ERD 17-00)

AGENCY: West Virginia Department of Agriculture
RULE: Amendments, Series 12, Fee Structure for the Pesticide Control Act of 1990

FILED AS AN EMERGENCY RULE: September 15, 2000

- par. 1 The Department of Agriculture (Department) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Department filed this emergency rule with supporting documents with the Secretary of State September 15, 2000 and with the LRMRC September 15, 2000.

par. 7 It is the determination of the Secretary of State that the Department has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- W. Va. Code §19-16A-4 reads:

The commissioner of agriculture has the power and duty to carry out the provisions of this article and is authorized to:

- (a) Delegate to employees of the department of agriculture the authority vested in the commissioner by virtue of the provisions of this article;*
- (b) Cooperate, receive grants in aid and enter into agreements with any other agency of the state, the United States department of agriculture, United States environmental protection agency or any other federal agency or any other state or agency thereof for the purpose of carrying out the provisions of this article;*
- (c) Contract for research projects;*
- (d) Require that pesticides used in this state are adequately tested and are safe for use under local conditions;*
- (e) Require that individuals who sell, store, dispose or apply pesticides are adequately trained and observe appropriate safety practices;*
- (f) Promulgate rules pursuant to §29A-1-1 et seq. of this code, including, but not limited to, the following:*
 - (1) Licensing of businesses that sell, store, recommend for use, mix or apply pesticides;*
 - (2) Registration of pesticides for manufacture, distribution, sale, storage or use in this state;*
 - (3) Requiring reporting and recordkeeping related to licensing and registration;*
 - (4) Establishing training, testing and standards for certification of commercial application, public application, registered technician and private applicator;*
 - (5) Revoking, suspending or denying licenses, registration and certification or certificate or permits;*
 - (6) Creating advisory committees made up of both pesticide industry representatives and consumers as considered necessary to implement this article;*
 - (7) Establishing a fee structure for licenses, registration and certificate to defray the costs of implementing this article;*
 - (8) Classifying or subclassifying certificate or certificates to be issued under this article. The classification may include, but not be limited to, agricultural, forest, ornamental, aquatic, right-of-way, industrial, institutional, structural or health-related pest control;*
 - (9) Restricting or prohibiting the sale or use and disposal of any pesticide, pesticide container or residue which is extremely hazardous;*
 - (10) Coordinating and supporting pesticide monitoring programs;*
 - (11) Developing a program for registration of persons with health sensitivity to pesticide drift;*
 - (12) Establishing guidelines and requirements, as deemed necessary, for licenses, certificate holders and permittees for the identification of pests and their methods of inspection of property to determine the presence of pests;*
 - (13) Establishing procedures for reporting spills, accidents or incidents; and*
 - (14) Such other rules necessary or convenient to carry out the purpose of this article;*

(g) Design and conduct an appropriate educational program on the use of pesticides and the necessity for care when applying the same; and

(h) Only after consultation with the state board of education, division of human services for child welfare, representatives from the environmental community, and representatives of school and daycare employees, by the first day of July, one thousand nine hundred ninety-five, promulgate emergency rules, pursuant to article three, chapter twenty-nine-a of this code, establishing an integrated pest management program. The emergency and legislative rules for the program established in this subsection shall include, but are not limited to, the following:

(1) The use of least hazardous materials;

(2) That pesticides shall only be applied when monitoring indicates that pest infestations are present;

(3) That students and school and daycare employees, except school, board of education or daycare employees that are certified applicators, shall not be present during application and provide for appropriate reentry times, except that pesticides may be applied to a localized area of infestation when students or school and daycare employees are present if the infestation causes an imminent threat of bodily harm;

(4) A definition of pesticides; and

(5) A system for prior notification to parents and school and daycare employees.

par. 9 It is the determination of the Secretary of State that the Department has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Department are as follows:

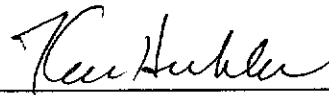
The basic program general revenue dollars available to support the Pesticide Regulatory Programs has not increased since 1990. The Federal Grant dollars available to the program have not increased since 1994. Due to the increased responsibilities and demands upon the legislative mandated pesticide regulatory programs operated by the Department, this increase in funding is needed to cover the rising inflationary costs associated with the program.

The rule is being filed as an emergency rule because the fees collected under this rule expire at the end of each calendar year. As such, the bulk of the money to

support the upcoming fiscal year's budget is collected from November through February of each year. If the fee increase is delayed until after the next legislative session, there will be a deficit in the FY-2002 budget that will result in the reduction of services to the citizens of the state. The loss of personnel, current expense operating money and programs will have an adverse effect on the health, safety and welfare of the state.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "health, safety & welfare"

par. 14 This decision shall be cited as Emergency Rule Decision 17-00 or ERD 17-00 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Department of Agriculture, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
Secretary of State

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OFFICE OF THE SECRETARY OF STATE

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