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June 23, 2011

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Division of Labor

RULE: New Rule, 42CSR10, Zipline and Canopy Tour Responsibility Act

DATE FILED AS AN EMERGENCY RULE: June 8, 2011

DECISION NO. 2-11

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


NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 2-11)

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par. 1 The West Virginia Division of Labor (Labor) has filed the above new rule as an emergency rule.

par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].

par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Labor filed this emergency rule with supporting documents with the Secretary of State June 8, 2011 and with the LRMRC June 11, 2011.

par. 7 It is the determination of the Secretary of State that Labor 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 §21-15-6 et seq. reads:

§21-15-6. Rules.

The division shall promulgate rules for the safe installation, repair, maintenance, use, operation and inspection of all ziplines and canopy tours consistent with ACCT Challenge Course Standards. The rules shall be in addition to any existing applicable safety orders and shall be concerned with the installation, repair, maintenance, use, operation and inspection of ziplines and canopy tours consistent with ACCT Challenge Course Standards. The rules shall be promulgated and designed for the purpose of developing

ziplines and canopy tours as a recreational activity and additional tourist attraction in West Virginia. All rules shall be promulgated in accordance with the provisions of article three, chapter twenty-nine-a of this code.

par. 9 It is the determination of the Secretary of State that Labor 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 Labor are as follows:

The West Virginia Division of Labor proposes an emergency rule, Title 42, Series 10, of the West Virginia Code of State Regulations, in order to implement the provisions of a new article, W. Va. Code § 21-15-1, *et seq.*, the Zipline and Canopy Tour Responsibility Act, which becomes effective June 12, 2011. The emergency rule includes the following provisions:

- It incorporates by reference the Association for Challenge Course Technology ("ACCT") "Challenge Course and Canopy Zip Line Tour Standards," 71h edition, 2008, that are to be used by inspectors and special inspectors to assess the installation, repair, use, operation, and maintenance of zip lines and canopy tours for the safety of the general public.
- It establishes administrative procedures for the registration, inspection, permit application and issuance of permits for zip lines and canopy tours.
- It establishes the qualifications for special inspectors and procedures for the certification of special inspectors.
- It defines terms that are not defined in the ACCT standards or the statute.

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). . . "immediate preservation of public peace, health, safety or welfare" AND "to prevent substantial harm to the public interest"

par. 14

This decision shall be cited as Emergency Rule Decision 2-11 or ERD 2-11 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Division of Labor, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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