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WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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January 20, 2000

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NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Edward L. Kropp
Office of Air Quality
1558 Washington St, East
Charleston, WV 25311

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Ambient Air Quality Standards for Sulfur Oxides and Particulate Matter, 45CSR8**

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 Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached.

ANALYSIS OF PROPOSED LEGISLATIVE RULE

Agency: Office of Air Quality

Subject: Ambient Air Quality Standards for Sulfur Oxides and
Particulate Matter

CSR Cite: 45CSR8

Counsel: JAA

PERTINENT DATES

Filed for public comment: September 1, 1999
Public comment period ended: October 12, 1999
Filed following public comment period: December 22, 1999
Filed LRMRC: December 22, 1999
Filed as emergency: n/a

Fiscal Impact: None.

ABSTRACT

Summary

This rule establishes ambient air quality standards for sulfur oxides and particulate matter. The rule is equivalent to the national primary and secondary ambient air quality standards established by the EPA. The amendments to the rule delete the new particulate matter standard of PM_{2.5} based on the Federal Circuit Court of Appeals for the District of Columbia Circuit decision: American Trucking Ass. U.S. EPA, decided in May of 1999, which disapproves this standard. The amendment to the rule suspends the standard until it is upheld by the U.S. Supreme Court, or otherwise amended by the EPA. The amendment allows the Agency to file a notice of rulemaking in the State Register, and promulgate the revised standard. Section 4.1.b.2 is amended to insert new federal references relating to PM₁₀.

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AUTHORITY

Statutory authority: W.Va. Code, §22-5-4 provides:

(a) The director is authorized...

(4) To promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a of this code not inconsistent with the provisions of this article, relating to the control of air pollution: Provided, That no rule of the director shall specify a particular manufacturer of equipment nor a single specific type of construction nor a particular method of compliance except as specifically required by the "Federal Clean Air Act," as amended, nor shall any such rule apply to any aspect of an employer-employee relationship: Provided, however, That no legislative rule or program of the director hereafter adopted shall be any more stringent than any federal rule or program except to the limited extent that the director first makes a specific written finding for any such departure that there exists scientifically supportable evidence for such rule or program reflecting factors unique to West Virginia or some area thereof....

ANALYSIS

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

No.

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 PROVISION OF THE CODE?

No. The agency amended the rule to provide that portions of the rule are suspended pending the outcome of a pending federal court appeal. The proposed language further provides that if the provisions of the rule to be suspended are upheld in appeal, then the agency would file notice in the State Register, and the suspension would be lifted. This in effect gives the agency promulgation authority to amend a rule based on a future contingency, and violates Chapter §29A. Chapter §29A provides that the appropriate ways to amend an existing legislative rule are by legislative enactment or by emergency rule amendment.

Counsel recommends that these provisions of the rule be deleted. The Committee may choose to direct that the agency be given emergency rulemaking authority to preclude a denial of the emergency by the Secretary of State, if members wish to assure emergency rule authorization of any changes resulting in the case or by federal rulemaking.

VIII. OTHER.

