

OFFICE OF THE SECRETARY OF STATE  
STATE OF WEST VIRGINIA



**Betty Ireland**  
Secretary of State

August 8, 2005

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Division of Natural Resources

RULE: Amendments, 58CSR64, Miscellaneous Permits and Licenses

DATE FILED AS AN EMERGENCY RULE: July 5, 2005

DATE FILED AS AN AMENDMENT TO AN EMERGENCY RULE: August 4, 2005

DATE FILED AS AN AMENDMENT TO AN EMERGENCY RULE: August 8, 2005

DECISION NO. 8-05

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.

  
BETTY IRELAND  
Secretary of State

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EMERGENCY RULE DECISION  
(ERD 9-05)

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- par. 1 The Division of Natural Resources (DNR) 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 DNR filed this amendment to an emergency rule with supporting documents with the Secretary of State August 8, 2005 and with the LRMRC August 8, 2005.
- par. 7 It is the determination of the Secretary of State that the DNR 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 §20-1-7 reads:

***§20-1-7. Additional powers, duties and services of director.***

***In addition to all other powers, duties and responsibilities granted and assigned to the director in this chapter and elsewhere by law, the director is hereby authorized and***

*empowered to:*

- (1) With the advice of the commission, prepare and administer, through the various divisions created by this chapter, a long-range comprehensive program for the conservation of the natural resources of the state which best effectuates the purpose of this chapter and which makes adequate provisions for the natural resources laws of the state;*
- (2) Sign and execute in the name of the state by the "division of natural resources" any contract or agreement with the federal government or its departments or agencies, subdivisions of the state, corporations, associations, partnerships or individuals;*
- (3) Conduct research in improved conservation methods and disseminate information matters to the residents of the state;*
- (4) Conduct a continuous study and investigation of the habits of wildlife, and for purposes of control and protection, to classify by regulation the various species into such categories as may be established as necessary;*
- (5) Prescribe the locality in which the manner and method by which the various species of wildlife may be taken, or chased, unless otherwise specified by this chapter;*
- (6) Hold at least six meetings each year at such time and at such points within the state, as in the discretion of the natural resources commission may appear to be necessary and proper for the purpose of giving interested persons in the various sections of the state an opportunity to be heard concerning open season for their respective areas, and report the results of the meetings to the natural resources commission before such season and bag limits are fixed by it;*
- (7) Suspend open hunting season upon any or all wildlife in any or all counties of the state with the prior approval of the governor in case of an emergency such as a drought, forest fire hazard or epizootic disease among wildlife. The suspension shall continue during the existence of the emergency and until rescinded by the director. Suspension, or reopening after such suspension, of open seasons may be made upon twenty-four hours' notice by delivery of a copy of the order of suspension or reopening to the wire press agencies at the state capitol;*
- (8) Supervise the fiscal affairs and responsibilities of the division;*
- (9) Designate such localities as he or she shall determine to be necessary and desirable for the perpetuation of any species of wildlife;*
- (10) Enter private lands to make surveys or inspections for conservation purposes, to investigate for violations of provisions of this chapter, to serve and execute warrants and processes, to make arrests and to otherwise effectively enforce the provisions of this chapter;*
- (11) Acquire for the state in the name of the "division of natural resources" by purchase, condemnation, lease or agreement, or accept or reject for the state, in the name of the division of natural resources, gifts, donations, contributions, bequests or devises of money, security or property, both real and personal, and any interest in such property, including lands and waters, which he or she deems suitable for the following purposes:*
  - (a) For state forests for the purpose of growing timber, demonstrating forestry, furnishing or protecting watersheds or providing public recreation;*
  - (b) For state parks or recreation areas for the purpose of preserving scenic, aesthetic, scientific, cultural, archaeological or historical values or natural wonders, or providing public recreation;*
  - (c) For public hunting, trapping or fishing grounds or waters for the purpose of providing*

*areas in which the public may hunt, trap or fish, as permitted by the provisions of this chapter, and the rules issued hereunder;*

*(d) For fish hatcheries, game farms, wildlife research areas and feeding stations;*

*(e) For the extension and consolidation of lands or waters suitable for the above purposes by exchange of other lands or waters under his or her supervision;*

*(f) For such other purposes as may be necessary to carry out the provisions of this chapter;*

*(12) Capture, propagate, transport, sell or exchange any species of wildlife as may be necessary to carry out the provisions of this chapter;*

*(13) Sell, with the approval in writing of the governor, timber for not less than the value thereof, as appraised by a qualified appraiser appointed by the director, from all lands under the jurisdiction and control of the director, except those lands that are designated as state parks and those in the Kanawha state forest. The appraisal shall be made within a reasonable time prior to any sale, reduced to writing, filed in the office of the director and shall be available for public inspection. When the appraised value of the timber to be sold is more than five hundred dollars, the director, before making sale thereof, shall receive sealed bids therefor, after notice by publication 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 each county in which the timber is located. The timber so advertised shall be sold at not less than the appraised value to the highest responsible bidder, who shall give bond for the proper performance of the sales contract as the director shall designate; but the director shall have the right to reject any and all bids and to readvertise for bids. If the foregoing provisions of this section have been complied with, and no bid equal to or in excess of the appraised value of the timber is received, the director may, at any time, during a period of six months after the opening of the bids, sell the timber in such manner as he or she deems appropriate, but the sale price shall not be less than the appraised value of the timber advertised. No contract for sale of timber made pursuant to this section shall extend for a period of more than ten years. And all contracts heretofore entered into by the state for the sale of timber shall not be validated by this section if the same be otherwise invalid. The proceeds arising from the sale of the timber so sold, shall be paid to the treasurer of the state of West Virginia, and shall be credited to the division and used exclusively for the purposes of this chapter: Provided, That nothing contained herein shall prohibit the sale of timber which otherwise would be removed from rights-of-way necessary for and strictly incidental to the extraction of minerals;*

*(14) Sell or lease, with the approval in writing of the governor, coal, oil, gas, sand, gravel and any other minerals that may be found in the lands under the jurisdiction and control of the director, except those lands that are designated as state parks. The director, before making sale or lease thereof, shall receive sealed bids therefor, after notice by publication 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 each county in which such lands are located. The minerals so advertised shall be sold or leased to the highest responsible bidder, who shall give bond for the proper performance of the sales contract or lease as the director shall designate; but the director shall have the right to reject any and all bids and to readvertise for bids. The proceeds arising from any such sale or lease shall be paid to the treasurer of the state of West Virginia and shall be*

- credited to the division and used exclusively for the purposes of this chapter;*
- (15) Exercise the powers granted by this chapter for the protection of forests, and regulate fires and smoking in the woods or in their proximity at such times and in such localities as may be necessary to reduce the danger of forest fires;*
  - (16) Cooperate with departments and agencies of state, local and federal governments in the conservation of natural resources and the beautification of the state;*
  - (17) Report to the governor each year all information relative to the operation and functions of the division and the director shall make such other reports and recommendations as may be required by the governor, including an annual financial report covering all receipts and disbursements of the division for each fiscal year, and he or she shall deliver such report to the governor on or before the first day of December next after the end of the fiscal year so covered. A copy of such report shall be delivered to each house of the Legislature when convened in January next following;*
  - (18) Keep a complete and accurate record of all proceedings, record and file all bonds and contracts taken or entered into, and assume responsibility for the custody and preservation of all papers and documents pertaining to his or her office, except as otherwise provided by law;*
  - (19) Offer and pay, in his or her discretion, rewards for information respecting the violation, or for the apprehension and conviction of any violators, of any of the provisions of this chapter;*
  - (20) Require such reports as he or she may deem to be necessary from any person issued a license or permit under the provisions of this chapter, but no person shall be required to disclose secret processes or confidential data of competitive significance;*
  - (21) Purchase as provided by law all equipment necessary for the conduct of the division;*
  - (22) Conduct and encourage research designed to further new and more extensive uses of the natural resources of this state and to publicize the findings of such research;*
  - (23) Encourage and cooperate with other public and private organizations or groups in their efforts to publicize the attractions of the state;*
  - (24) Accept and expend, without the necessity of appropriation by the Legislature, any gift or grant of money made to the division for any and all purposes specified in this chapter, and he or she shall account for and report on all such receipts and expenditures to the governor;*
  - (25) Cooperate with the state historian and other appropriate state agencies in conducting research with reference to the establishment of state parks and monuments of historic, scenic and recreational value, and to take such steps as may be necessary in establishing such monuments or parks as he or she deems advisable;*
  - (26) Maintain in his or her office at all times, properly indexed by subject matter, and also, in chronological sequence, all rules and regulations made or issued under the authority of this chapter. Such records shall be available for public inspection on all business days during the business hours of working days;*
  - (27) Delegate the powers and duties of his or her office, except the power to execute contracts, to appointees and employees of the division, who shall act under the direction and supervision of the director and for whose acts he or she shall be responsible;*
  - (28) Conduct schools, institutions and other educational programs, apart from or in cooperation with other governmental agencies, for instruction and training in all phases of the natural resources programs of the state;*

*(29) Authorize the payment of all or any part of the reasonable expenses incurred by an employee of the division in moving his or her household furniture and effects as a result of a reassignment of the employee: Provided, That no part of the moving expenses of any one such employee shall be paid more frequently than once in twelve months; and*  
*(30) Promulgate rules, in accordance with the provisions of chapter twenty-nine-a of this code, to implement and make effective the powers and duties vested in him or her by the provisions of this chapter and take such other steps as may be necessary in his or her discretion for the proper and effective enforcement of the provisions of this chapter.*

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

The recent discovery of chronic wasting disease (CWD) in a captive cervid pen & in wild white-tailed deer in New York has reemphasized the importance of preventive management of our captive cervid facilities in West Virginia. The disease is especially serious in that there is no live animal test for the facilities & that there is an extended incubation period of up to 5 years. CWD is a transmissible spongiform encephalopathy of the nervous system which is always fatal in cervids. Although there have been no known cases of CWD in humans, the consumption of deer meat infected with the disease is considered a risk.

The recreational hunting & wildlife viewing associated with the deer herd & its economic benefits would be drastically reduced should CWD be discovered in West Virginia. Millions of dollars have been spent & dedicated to the elimination & control of CWD in states where it has occurred. Prevention of the introduction of CWD into WV is the most economically prudent course of action. A recent survey of hunters in Wisconsin where the disease occurs indicated that 36% of hunters may not participate in deer hunting because of their concerns of CWD. A 36% decline in deer hunting in WV would result in a loss of a minimum of \$2.6 million in license sales & a total economic loss of \$89 million to the state. In Colorado all cervids in the endemic area of CWD are tested.

The primary method of spreading CWD has been through the interstate transfer of

deer & elk into captive pens. Since live cervids cannot be tested, the disease could already be in WV. Immediate action must be taken to mark all cervids, inventory herds, provide higher standards for facilities, test dead cervids, and monitor & control movements of captive cervids to reduce the risks associated with this potential crisis in wildlife management.

This rule also addresses the problem associated with bovine tuberculosis in white-tailed deer.

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" & "to prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 8-05 or ERD 8-05 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Natural Resources, the Attorney General and the Legislative Rule Making Review Committee.



BETTY IRELAND  
Secretary of State

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