



STATE OF WEST VIRGINIA
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September 2, 2009

**NOTICE OF EMERGENCY RULE DECISION
BY THE OFFICE OF THE ATTORNEY GENERAL**

AGENCY: Secretary of State

RULE: Title 153 CSR, Series 13
Early Voting in Person Satellite Precincts

DATE FILED AS AN EMERGENCY RULE: August 4, 2009

FILED
2009 SEP -2 AM 11:39
OFFICE OF THE ATTORNEY GENERAL
SECRETARY OF STATE

DECISION NO. 13-09

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

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By 
DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL

**EMERGENCY RULE DECISION
(ERD 13-09)**

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The Secretary of State has filed a new Series 13 as an emergency rule.

W. Va. Code § 29A-3-15b requires the Attorney General to review all emergency rules filed by the Secretary of State after March 8, 1986. This review requires the Attorney General 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.

Following said review, the Attorney General shall issue a decision as to whether or not such an emergency rule should be disapproved [§ 29A-3-15b(a)].

(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).

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 Attorney General shall rule in favor of procedural compliance.

The Secretary of State filed this emergency rule with supporting documents with the LRMRC on July 30, 2009, and with the Secretary of State on August 4, 2009.

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

(B) Statutory Authority -- W. Va. Code § 3-3-2a (2009) provides, in pertinent part:

(a) The county commission shall designate the courthouse or annex to the courthouse as the primary location for early voting and in addition, the commission may designate other locations as provided in subsection (b).

(b) The county commission may, with the approval of the county clerk or other official charged with the administration of elections, and the written agreement of the chairpersons of the county executive committees of the two major political parties, designate additional locations for early voting other than the county courthouse or courthouse annex. The additional locations shall comply with the requirements of this article for early in-person voting and criteria prescribed by the Secretary of State.

(c) The Secretary of State is hereby directed to propose legislative and emergency rules in accordance with the provisions of article three, chapter twenty-nine-a of this code as may be necessary to implement the provisions of this section. The rules shall include establishment of criteria to assure neutrality and security in the selection of additional locations.

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

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

For the purposes of this section, an emergency exists when the promulgation of an emergency rule is necessary (1) for the immediate preservation of the public peace, health, safety or welfare, (2) to comply with a time limitation established by this code or by a federal statute or regulation, or (3) to prevent substantial harm to the public interest.

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 Attorney General that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

The facts and circumstances constituting the emergency as presented by the Secretary of State are as follows:

The rule, as authorized in the 2009 Regular Session of the West Virginia Legislature, impacts the 2010 Primary Election cycle. In order for the affected parties to begin the process outlined in the Agency Approved Rule, an Emergency Rule is needed to be effective until the Legislature can review and approve the Agency Approved Rule.

In W. Va. State Code §3-3-2a(c) the West Virginia Legislature required an Emergency Rule.

It is the determination of the Attorney General that this proposal qualifies under the definition of an emergency as defined in § 29A-3-15(f), “for the immediate preservation of the public peace, health, safety or welfare,” and to “prevent substantial harm to the public interest.” In addition, the Legislature specifically authorized the promulgation of emergency rules to implement the statute by W. Va. Code § 3-3-2a(c), quoted above.

This decision shall be cited as Emergency Rule Decision 13-09 or ERD 13-09 and may be cited as precedent. This decision is available from the Secretary of State or the Attorney General’s Office, and has been filed with the Secretary of State and the Legislative Rule Making Review Committee.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By *Dawn E. Warfield*
DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL

Entered this *2nd* day of September, 2009.

FILED
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OFFICE OF THE CLERK
SECRETARY OF STATE




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CHARLESTON 25305

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MEMORANDUM

TO: Legislative Rule-Making Review Committee

FROM: Dawn E. Warfield
Deputy Attorney General 

DATE: September 2, 2009

RE: Emergency Rule Decision No. 13-09

Enclosed for filing with the Committee is a copy of an Emergency Rule Decision by the Attorney General pursuant to W. Va. Code § 29A-3-15b, regarding the proposed emergency rules, Title 153 CSR, Series 13, filed by the Secretary of State's office on August 4, 2009. The decision has been filed with the Secretary of State for publication in the State Register and for service upon members of the Committee.

Additional copies of the decision are available from this office or from the Secretary of State's office.

Enclosure