

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #3

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2006 JUL 28 A 11:05

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Secretary of State TITLE NUMBER: 153

CITE AUTHORITY: §3-1A-6

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 20

TITLE OF RULE BEING AMENDED: Procedures for Recount of Election Results

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Procedures for Recount of Election Results

Type of Rule: Legislative Interpretive Procedural

Agency: Jason Williams, Manager

Address: Elections
Secretary of State's Office
1900 Kanawha Boulevard E
Charleston WV 25305

Phone Number: 558-6000 Email: jwilliams@wvsos.com

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This rule removes lever voting machines from this rule and has no fiscal impact

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

No impact

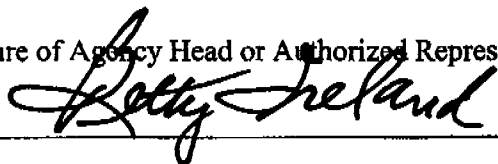
MEMORANDUM

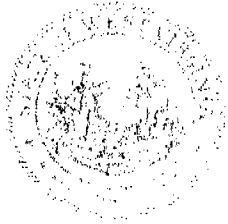
Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

No impact

Date: 6/28/2006

Signature of Agency Head or Authorized Representative





OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

Betty Ireland

Secretary of State

This rule details procedures for the board of canvassers for completing a recount of results of elections conducted with paper ballots or electronically tabulated ballots, including optical scan ballots.

The amendments take out references to lever voting machines & punch card ballots.

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

TITLE 153
LEGISLATIVE RULE
SECRETARY OF STATE

SERIES 20
PROCEDURES FOR RECOUNT OF ELECTION RESULTS

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2006 JUN 28 P 2:30

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§153-20-1. General.

1.1. Scope -- This rule details procedures for the board of canvassers for completing a recount of results of elections conducted with paper ballots, ~~lever voting machines or electronically tabulated ballots, including punch card ballots and optical scan ballots.~~

1.2. Authority. -- W. Va. Code §3-1A-6.

1.3. Filing Date. -- ~~May 8, 1997.~~

1.4. Effective Date. -- ~~May 8, 1997.~~

§153-20-2. Definitions.

2.1. "Board of canvassers" or "board" means:

2.1.a. The county commission of each county for any statewide primary, ~~general or~~ special election held throughout the county, and for any other election conducted in conjunction with a statewide election using the same precincts and election officials;

2.1.b. The county commission of the affected county for any special election ordered by the Commission and held throughout all or part of that county, and for any other election conducted in conjunction with that county election using the same precincts and election officials;

2.1.c. The county commission and the county board of education or other governing board, jointly, for any special levy or bond election ordered by the county board of education or other governing board or a special election ordered by the county board of education or other governing board and not held in conjunction with any other election conducted by the county commission; or

2.1.d. The municipal governing body for any primary, general or special election conducted by the municipal governing body entirely within the city and not held in conjunction with any county or state election.

2.2. "Recount" means the proceeding required by W.Va. Code §3-6-9 in which the tally of

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votes recorded for a specific elected office or on a specific issue in an election is reviewed by counting a second time the ballots containing votes for that office or issue, correcting and officially recording the results.

2.3. "Election" means any primary, general or special election held under the provisions of the West Virginia Code throughout the state or any of its political subdivisions.

2.4. "Electronically tabulated ballots" means ballots authorized under the provisions of W. Va. Code §3-4A-1 et seq., including those ballots referred to as punch-card and optical scan ballots, which are counted by means of electronic scanners or readers.

~~2.5. "Lever voting machines" means those mechanical vote recording devices authorized under the provisions of W. Va. Code §3-4A-1 et seq. in which the votes cast are recorded on counters within the voting machine.~~

2.6. "Paper ballots" means ballots authorized under the provisions of W. Va. Code §3-1-1 et seq. which are counted by hand.

§153-20-3. Requesting a Recount.

3.1. The person requesting a recount for an elected office must be a candidate for the elected office in which the recount is requested. The person requesting a recount for a special issue election must be a voter of the jurisdiction of the election.

3.1.a. The request for a recount shall include all precincts covered by that election unless the person filing the request specifies otherwise.

3.1.b. If the candidate filing the request specifies only specific precincts to be recounted, that candidate cannot afterwards add other precincts to the list to be recounted.

3.2. A candidate shall make a request for recount within forty-eight (48) hours after the canvass. The forty-eight-hour (48) period begins when the board of canvassers publicly declares the results of the election. Saturdays, Sundays and legal holidays are excluded when computing the forty-eight-hour (48) period.

3.2.a. A candidate shall make the request in writing to the county clerk who shall present the request to the board.

3.2.b. The recount request of an elected office shall state the name of the candidate making the request, the elected office for which the recount is requested and the precincts which the candidate is requesting to be recounted.

3.2.c. The recount request for an issue shall state the voter's name and address and the precincts in which the recount is requested.

3.2.d. The person requesting a recount must furnish bond in an amount sufficient to pay for the cost and expenses of the recount if the results do not change. The recount bond shall be set as described in section 4.7 of this rule.

3.3. The board shall give notice of the recount to candidates who filed for the same elected office as one in which a recount has been requested or the governing board that officially requested the special issues election in which a recount has been requested within the twenty-four (24) hours following the meeting held for the purpose of certifying the election. For recount requests of a special issues election, the board shall also post the notice of a recount on the door of the office where the recount is to be held.

3.4. Candidates who filed for the same elected office as one in which a recount has been requested or the governing board that officially requested the special issues election in which a recount has been requested may preserve their right to demand a recount of precincts not recounted in the original recount request or to have the recount continued and completed should the candidate or voter initiating the recount request stop the recount.

3.4.a. The candidate shall file the request to preserve the right to recount in writing to the county clerk who will present the request to the board. This request must be filed within twenty-four (24) hours from the time the notice of recount is served.

3.4.b. The request to preserve the right to recount shall state the name of the candidate(s) or of the governing board filing the request to preserve the right to recount and the intention to preserve the right to request the recount of precincts not originally requested by the initiating candidate or to continue the recount should the initiating candidate or voter stop the recount.

3.4.c. The candidate(s) or the governing board filing the request to preserve the right to recount shall furnish bond in an amount sufficient to pay for any recount cost incurred by request for a continuation of the recount or a recount of additional precincts. The bond must be the same amount as the bond required of the original candidate or voter requesting the recount.

§153-20-4. Preparation.

4.1. If a recount is requested, the governing body constituting the board of canvassers shall certify the results for all offices and issues not subject to the recount at the end of the forty-eight (48) hour period following the declaration.

4.2. The clerk of the county commission for recounts conducted by the county commission and by county commissions jointly with a governing board for special issue elections, or the municipal clerk or recorder for recounts conducted by the municipal governing body, shall assist the board.

4.3. The officers having custody of the materials of the election shall bring before the board at the appropriate time the paper ballots, the electronically tabulated ballots and the record of the tally of votes for all election precincts.

4.4. For a recount conducted by the county commission or a joint recount conducted by the county commission and county board of education or other governing board, the canvass shall be held at the county courthouse.

4.5. For a recount conducted by a municipal governing body, the recount shall be held at city hall.

4.6. Employees of the county commission or county clerk may assist or other persons may be employed to assist in the recount.

4.6.a. No candidate or member of his or her immediate family may assist in the recount.

4.6.b. No member of a governing board which requested a special issue election or any member of a board member's immediate family may assist in the recount.

4.6.c. No voter requesting the recount of a special issue election or member of his or her immediate family may assist in the recount.

4.6.d. All persons participating in the recount proceedings shall work in teams of two (2) persons of opposite political parties, shall be deputized in writing and shall take an oath that they will faithfully perform their duties.

4.6.e. All procedures shall be conducted under the supervision of a quorum of the board.

4.7. The board shall set the amount of bond for a recount "in a reasonable amount with good sufficient surety" but not to exceed three-hundred dollars (\$300.00). The recount bond amount shall be determined during the canvass procedures before any recount request is received.

4.7.a. The bond may be a cash, personal property or other bond.

4.7.b. The costs of the recount shall be paid by the candidate or voter initiating the recount, so long as it continues at his or her request. However, if the outcome of the election is reversed at the conclusion of the recount, the canvassing board shall not assess costs to the candidate or voter requesting the recount.

4.7.c. If the initiating candidate pulls ahead during the recount and stops the recount, the responsibility for costs incurred after that time then shifts to the candidate requesting the continuation, but only if the outcome is not again reversed.

4.7.d. If a recount of a special issue requested by a voter reverses its outcome during the recount and the voter stops the recount, the responsibility for costs incurred after that time then shifts to the governing board requesting the continuation, but only if the outcome is not again reversed.

4.8. The board shall immediately schedule a date for the recount to begin and shall prepare

the proper recount notices to be served on each of the other candidates in the elected office in which the recount has been requested or to the governing board that officially requested the special issue election in which the recount has been requested and at the door of the place where the recount is to be held.

§153-20-5. Notification of Recount.

5.1. The recount notice shall be served in the twenty-four-hour (24) period beginning at the end of the forty-eight (48) hours following the declaration of the election results given at the end of the canvass.

5.1.a. The recount notice shall state the date, time and place of the recount.

5.1.b. The date may not be sooner than three (3) days after the recount notice is delivered.

5.2. The recount notice shall be delivered by the sheriff of the county or the sheriff's designee.

5.2.a. The recount notice shall be delivered to the candidate in person or to the members of the governing board that officially requested a special issue election in person.

5.2.b. If a candidate or member of the governing board is not found to receive the recount notice in person, the notice may be given to the spouse of the candidate or a governing board member or to some other family member over the age of sixteen (16) found at the usual place of residence of the candidate or of a governing board member.

5.2.c. If the notice is given to a person other than the candidate or a governing board member, the sheriff or the sheriff's designee shall inform the person receiving the notice of its purpose and meaning.

5.2.d. If the candidate or a governing board member or appropriate family member is not found to receive the notice, it shall be posted on the front door of the usual place of residence or the candidate or governing board member.

5.2.e. The sheriff or the sheriff's designee who delivers the notice shall record how, to whom and the time each notice is delivered.

5.2.f. If the candidate or a governing board member does not have a usual place of residence in the county where the recount notice is being served, the recount notice shall be delivered to the sheriff of the county in which the candidate or governing board member to be served does have a usual place of residence. The sheriff of that county shall serve the recount notice in the same manner as provided in this section.

§153-20-6. Conducting the Recount.

6.1. A quorum of the board of canvassers, or in the case of a joint board of canvassers as prescribed in subdivision 2.1.c. of this rule, a quorum of each governing body, shall be present at all times during the recount of the ballots and the recount shall be conducted under their supervision.

6.1.a. The presiding officer of the governing board shall act as the presiding officer of the board. In the case of a joint board of canvassers of the county commission and the governing board of a special issue election, the presiding officer of the county commission shall act as the presiding officer of the board.

6.1.b. If a quorum of the board of canvassers is not present, the recount shall stand adjourned until the next business day.

6.1.c. If the recount cannot be completed in one day, the board shall adjourn until the next business day, and so on from day to day until the recount is completed and the results declared.

6.2. The candidate or officially designated representative or voter or officially designated representative initially requesting a recount as well as the candidate(s) or officially designated representative or governing board or a member's officially designated representative who preserve their right to participate in the recount and a reasonable number of the general public shall be freely admitted to the room where the recount is being conducted. The board shall hold the recount in a room of sufficient size and satisfactory arrangement to permit such observation of the recount.

6.2.a. The official representative of a candidate, voter or governing board member shall have a written and signed statement from the candidate, voter or governing board member designating him or her as the official representative. The name of the representative must be included in the statement. Each candidate may appoint only one official representative to act for him or her in the candidate's absence. Each member of a governing board may appoint only one official representative to act in his or her absence. A voter initiating a recount may appoint only one official representative to act in his or her absence.

6.2.b. The official representative shall have the right to observe the recount proceedings including observing each ballot as it is read in a hand count process. They may view and examine the tally sheets and ballots, but may not handle the election material.

6.2.c. The candidate or his or her representative or voter or his or her representative or governing board member or his or her representative has the right to question any ballot during the recount.

6.3. The processing and handling of the ballots in a recount shall be conducted by teams consisting of two (2) persons of opposite political parties who shall be appointed and deputized in writing by the board of canvassers.

6.3.a. If a ballot is questioned, the deputized team shall reexamine that ballot and reach their finding. Any ballot questioned shall be marked to provide for its identification at any future contest of the election.

6.3.b. If a majority of the deputized team cannot agree on the intent of the voter's markings on a ballot, it shall remain questioned and the votes for that ballot shall not be recorded.

6.3.c. Only authorized persons may handle the election materials. These persons include the board of canvassers, the county clerk, the employees of the clerk and persons specifically employed to process the election materials and who have been deputized in writing and who have taken an oath to perform faithfully their duties.

6.4. The evidence considered at a recount shall be only that obtainable from the viewing of the election material as it exists or from relevant evidence from the election commissioners, poll clerks or other persons present at the election in which the recount is being conducted. The board may not consider extraneous evidence.

6.5. When ballots are being counted by hand, one of the deputized teams shall read the ballots together. The votes shall be read aloud so that the deputized team that is recording the vote can hear. Each member of the recording team shall mark separate tally sheets. The recording team should compare their vote count on a scheduled basis (as an example, after every twenty (20) ballots) in order to catch marking errors.

6.6. If a recount has been requested in more than one elected office or special issue, one deputized team may handle only one elected office or special issue recount proceeding at a time. The team shall work with its elected office or special issue recount (one precinct at a time) until that recount is completed. After a recount of a particular elected office or special issue is completed, the teams that worked with the completed recount may be assigned to work with a recount of another elected office or special issue.

6.7. Each team shall count or otherwise work with only one precinct at a time. The precinct materials may not be mixed.

6.7.a. The challenged ballots of each precinct shall be handled as they were during the canvass. The same procedures shall be in place to maintain the secrecy of the ballots and to preserve them for any future contest.

6.8. Each precinct may be recounted only one time. However, if after recounting a precinct, the results do not match the canvass results the ballots and tallies shall be rechecked at that time by one of the deputized teams in order to discover any error in reading the ballots or marking and computing the tally figures.

6.8.a. The candidate or voter who requested the recount has the right to stop the recount at the conclusion of any precinct by withdrawing his or her request. At this time, the candidate(s)

or governing board that has preserved the right to continue may exercise that right.

6.9. Before starting the recount, the board shall determine the order in which the precincts will be recounted. The board shall use a logical means of determining the order, either by drawing or using a sequential order, beginning with the lowest number and continuing to the highest number. The determined order should meet with the agreement of the parties to the recount or their designated representatives.

§153-20-7. Order of Recount Procedures by Voting System.

7.1. For recounts of election conducted with paper ballots, the board shall proceed as outlined in sections 3, 4, 5, 6, 10 and 11 of this rule.

7.2. For recounts of elections conducted with electronically tabulated ballots, the board shall proceed as outlined in sections 3, 4, 5, 6, 9, 10 and 11 of this rule.

7.3. For recounts of election conducted with lever voting machines, the board shall proceed as outlined in sections 3, 4, 5, 6, 8, 10 and 11 of this rule.

~~**§153-20-8. Special Recount Procedures for Elections Conducted with Lever Voting Machines.**~~

~~8.1. A recount of votes cast at an election using lever voting machines shall not include a reexamination of the voting machines.~~

~~8.2. The board shall examine and check the tabulation records of votes cast on each voting machine.~~

~~8.3. If an error is found, the board shall correct the election returns to accurately reflect the votes cast.~~

§153-20-9. Special Recount Procedures for Elections Conducted with Electronically Tabulated Ballots: Hand Counting Five Percent (5%) of Precincts.

9.1. The board shall tally by hand the votes of the elected office or special issue for which the recount has been requested on the ballots of a number of precincts equal to five percent (5%) of the total number of precincts in the jurisdiction, not fewer than one (1) precinct, and with fractions rounded to the nearest whole number, as in the following table.

When the total precincts equal:	Count the ballots of:
1 - 29	One (1) precinct
30 - 49	Two (2) precincts
50 - 69	Three (3) precincts

70 - 89	Four (4) precincts
90 - 109	Five (5) precincts
110 - 129	Six (6) precincts
130 - 149	Seven (7) precincts
150 - 169	Eight (8) precincts
170 - 189	Nine (9) precincts

9.2. The board shall identify the precincts to be counted by random drawing.

9.3. The hand count shall be conducted using the procedures described in 6.4 of this rule.

9.4. After the hand count of each precinct is recorded, the board shall compare the recorded tallies with the electronically tabulated results for the same elected office of the same precincts or the issue in a special issue election.

9.5. If the difference between the electronically tabulated results of the randomly selected precincts and the hand counted results of the same ballots is more than one percent (1%) of the total votes cast for the elected office being examined in the recount proceedings, the board shall hand count all precincts for that elected office or the issue in a special issue elections.

9.6. The board, a candidate or voter requesting a recount or a candidate(s) or governing board preserving their right to recount may demand that the recount of any precinct be conducted by hand count.

§153-20-10. Recount by Step Procedures.

10.1. The Secretary of State shall provide a step procedures manual for the recount of an election's votes cast in an elected office or special issue. The manual shall be used by each governing body responsible for recount procedures.

10.1.a. The manual shall include detailed descriptions of the steps required to review, correct and officially record the results of a designated election office in an election.

10.1.b. The manual shall include worksheets for the board to record their recount procedures and the findings for each precinct recounted.

10.2. In a recount procedure, the board shall perform the step procedures and complete the worksheets for each precinct recounted.

§153-20-11. Certifying the Results.

11.1. The recount is not complete until the board seals the ballots in a suitable container with their endorsement and delivers them to the care of the county or municipal clerk.

11.2. Upon completion of the recount as described in subsection 11.1. of this rule, the board

shall take official action to certify the result of the elected office recounted as it is determined by the recount.

11.3. The board shall prepare duplicate certificates for a primary election for each elected office considered by the recount with total votes for each candidate in the recounted office. The certificates shall be in words and numbers. In a general election, the certificates for federal, statewide, legislative and judicial offices shall be prepared in triplicate originals.

11.4. Each member of the board shall sign each certificate.

11.5. The board of canvassers shall prepare and transmit the certificates for elected offices and special issues involved in the recount as directed in W. Va. Code §§3-6-2-10 and 3-6-11.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 28, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Secretary of State
Elections Division
Suite 157K, Building 1
Charleston WV
558-6000 jwilliams@wvsos.com

LEGISLATIVE RULE TITLE: Procedure for Recount of Election Results

1. Authorizing statute(s) citation §3-1A-6

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 28, 2006

b. What other notice, including advertising, did you give of the hearing?
None

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 28, 2006

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received X

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 28, 2006

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Jason Williams, Manager	jwilliams@wvsos.com
Elections Division	558-6000
Secretary of State	Fax 558-0900
1900 Kanawha Blvd E	
Charleston WV	

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A