

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

Form #8

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2009 NOV -9 PM 4: 17

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Effective Date

**NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE**

AGENCY: Secretary of State TITLE NUMBER: 153

DATE EMERGENCY RULE WAS ORIGINALLY FILED: August 4, 2009

FIRST EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

SECOND EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

DATE OF FIRST EMERGENCY AMENDMENT: \_\_\_\_\_

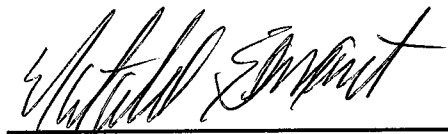
SERIES NUMBER OF RULE: 38

TITLE OF RULE: Vote by Mail Pilot Project Phase 1: Class IV Early Voting by Mail

THE ATTACHED IS AN EMERGENCY AMENDMENT TO AN EXISTING EMERGENCY RULE. THIS EMERGENCY AMENDMENT BECOMES EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY AMENDMENT ARE AS FOLLOWS:

The Emergency Rule is being amended to mirror the Legislative Rule (as modified) as passed by the Legislative Rule Making Review Committee.



Authorized Signature

Use additional sheets if necessary



**EMERGENCY RULE QUESTIONNAIRE**

DATE: November 9, 2009

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Secretary of State

Building 1, Room 157-K  
1900 Kanawha Blvd E  
Charleston, WV 25305                      ATTN: Dave Nichols

EMERGENCY RULE TITLE: Vote-by-Mail Pilot Project Phase 1: Class IV Early Voting by M

1. Date of filing November 9, 2009

2. Statutory authority for promulgating emergency rule:  
3-3A-3

3. Date of filing of proposed legislative rule: July 31, 2009

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? new language

5. Has the same or similar emergency rule previously been filed and expired?  
no

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.  
n/a

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

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n/a

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8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

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n/a

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## Title 153 Series 38 Circumstances and Summary

### Circumstances:

During the 2009 Regular Session of the West Virginia State Legislature, lawmakers passed Enrolled Committee Substitute for House Bill 3134 permitting Class IV municipalities the opportunity to conduct early voting by mail in lieu of opening a precinct and required the Secretary of State to propose an Emergency Rule.

### Summary

This rule clarifies the guidelines to be used by the municipal recorder or other officer authorized by charter or ordinance provisions to conduct voting for any election held entirely within a Class IV municipality to conduct early voting by mail.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Vote-by-Mail Pilot Project Phase 1: Class IV Early Voting by Mail

Rule Title: \_\_\_\_\_

Type of Rule:  Legislative  Interpretive  Procedural

Agency: Secretary of State

Address: Building 1 Room 157-K  
1900 Kanawha Blvd E  
Charleston, WV 25305

Phone Number: 304-558-6000 Email: dnichols@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.

Because municipalities are responsible for the costs of their elections, this Rule will have no impact on state costs or revenues.

**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.

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

Rule Title: \_\_\_\_\_

Rule Title: Vote-by-Mail Pilot Project Phase 1: Class IV Early Voting by Mail

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

n/a


### 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.

Because municipalities are responsible for the costs of their elections, this Rule will have no impact on state costs or revenues.

Date: November 9, 2009

Signature of Agency Head or Authorized Representative



Title 153  
Legislative Rule  
Secretary of State

FILED

2009 NOV -9 PM 4: 17

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SERIES 38  
Vote-by-Mail Pilot Project Phase 1:  
Class IV Early Voting by Mail

**§ 153-38-1. General.**

1.1. Scope. -- This rule governs the West Virginia Vote By Mail Pilot Program, created by the Legislature in regular session, 2009, for Class IV municipalities who choose to conduct early voting by mail. The rule establishes the guidelines which are to be used by the municipal recorder or other officer, hereafter "Clerk", authorized by charter or ordinance provisions to conduct voting for any election held entirely within a Class IV municipality.

1.2. Authority.- W.Va. Code § 3-3A-3.

1.3. Filing Date. --

1.4. Effective Date. --

**§ 153-38-2. Definitions.**

1.1. For the purposes of this rule:

1.1.a. "Assistance in voting" as used in this rule means assistance in physically marking the official early voting by mail ballot for a voter, or reading or directing the voter's attention to any part of the official early voting by mail ballot.

1.1.b. "Class IV municipality" means incorporated town or village with a population of two thousand or less, as defined in W.Va. Code §§8-1-2 and 8-1-3.

1.1.c. "Clerk" means the municipal recorder or other officer authorized by charter or ordinance provisions to conduct voting for any election held entirely within a Class IV municipality.

1.1.d. "Mailed" means delivered by the U.S. Postal Service or by other express delivery service.

1.1.e. "Voting an early voting by mail ballot by personal appearance" means completing the early voting by mail ballot in person at the clerk's office during the early voting period and hand-delivering the ballot to the clerk.

**§ 153-38-3. Intent to Conduct Early Voting by Mail.**

3.1. Each Class IV municipality wishing to conduct early voting by mail shall adopt an ordinance expressing the municipality's intent to conduct early voting by mail in lieu of early in-person absentee voting.

3.2. Each Class IV municipality having adopted vote-by-mail, shall notify the public as prescribed in section 4 of this rule, and, in addition, may give public notice in any other manner considered appropriate by the municipality.

3.3. Each Class IV municipality wishing to conduct early voting by mail shall notify the Secretary of State in writing no later than the end of business on the last day of January of the year in which the election will be held or such notice may be postmarked by midnight on the last day of January in which the election will be held.

3.4. The clerk, or his or her designee, of each Class IV municipality wishing to conduct early voting by mail shall attend mandatory training provided by the Secretary of State or the municipality will forfeit participation in the early voting by mail program.

**§ 153-38-4. Notice of Early Voting by Mail.**

4.1. Notice of early voting by mail shall be mailed to each registered voter in the municipality no more than four weeks nor less than two weeks prior to the start of the early voting period.

4.2. Notice may be included in any utility or service statement or invoice mailed to every household in the municipality or by a postcard sent to all registered voters in the municipality.

4.3. Notice shall include:

4.3.a. “           (municipality name)           ordinance (ordinance reference) provides that early voting will

be conducted by mail instead of voting in person at (usual early voting location).”

4.3.b. The procedure for requesting an early voting by mail ballot including:

4.3.b.1. That a ballot may be requested by contacting the Clerk or his or her designees.

4.3.b.2. Manner in which to contact the Clerk or designee.

4.3.b.3. Notice that voter must fill out and return an early voting by mail ballot application.

4.3.c. The deadline a request for an early voting by mail ballot must be received in the office.

4.3.d. The deadline for casting an early voting by mail ballot.

4.3.e. Any other information necessary to request an early voting by mail ballot.

**§ 153-38-5. Application for Ballot; Required Materials with Ballot; Voting an Early Voting Ballot by Mail.**

5.1. Upon oral or written request, the clerk shall provide to any voter of the municipality, in person, by mail, by electronic mail or by facsimile the appropriate application for voting early by mail as provided in W.Va. Code §3-3A-1 *et seq.*. The voter shall complete and sign the application in his or her own handwriting or, if the voter is unable to complete the application

because of illiteracy or physical disability, the person assisting the voter and witnessing the mark of the voter shall sign his or her name in the space provided.

5.2. Completed applications for voting early by mail are to be accepted when received by the clerk in person, by mail, by electronic mail or by facsimile no more than four weeks prior to the start of early voting, nor less than six days prior to Election Day.

5.3. Upon acceptance of a completed application, the clerk shall determine whether the following requirements have been met:

5.3.a. The application has been completed as required by W.Va. Code §3-3-2(b)(1)-(3);

5.3.b. The applicant is duly registered to vote in the precinct of his or her residence and, in a primary election, is qualified to vote the ballot of the political party requested; and

5.3.c. The applicant is not making his or her first vote after having registered by postcard registration.

5.3.d. The applicant is making his or her first vote after having registered by postcard registration and has provided a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck or other government document that shows the name and address of the voter, submitted with the application.

5.4. If the clerk determines that the required conditions have been met, two representatives that are registered to

vote with different political party affiliations shall sign their names in the places indicated on the back of the official ballot. If the clerk determines the required conditions have not been met, or has evidence that any of the information contained in the application is not true, the clerk shall give notice to the voter that the voter's early voting by mail ballot will be challenged as provided in this rule and shall enter that challenge.

5.5. Within one day after the clerk has received the completed application, the clerk shall mail to the voter at the address given on the application the following items as required and as prescribed by the Secretary of State:

5.5.a. One of each type of official early voting by mail ballot the voter is eligible to vote, prepared according to law;

5.5.b. One envelope, unsealed, which may have no marks except the designation "Early Voter's Ballot Envelope No. 1" and printed instructions to the voter;

5.5.c. One mailing envelope, unsealed, designated "Early Voter's Ballot Envelope No. 2";

5.5.d. Instructions for voting early by mail including:

5.5.d.1. Instructions for marking the ballot, placing it in the secrecy envelope (Envelope No. 1) and the ballot return envelope (Envelope No. 2) and signing the ballot return envelope;

5.5.d.2. A warning that the ballot return envelope must be signed or the ballot will not be counted;

5.5.d.3. A warning that signing someone else's ballot return envelope is illegal;

5.5.d.4. An alternative procedure for any person who is unable to sign a ballot return envelope;

5.5.d.5. A procedure for returning a spoiled ballot should the voter make a mistake or otherwise need a new ballot; and

5.5.d.6. A prominently displayed notice that each ballot must be mailed or brought to the municipal precinct by the close of the early voting period.

5.5.e. For electronic systems, a device for marking by electronically sensible pen or ink, as may be appropriate;

5.5.f. Notice of the amount of postage required to return the ballot using First Class USPS postage;

5.5.g. Notice that a list of write-in candidates is available upon request; and

5.5.h. Any other supplies required for voting in the particular voting system.

5.6. The voter shall mark the ballot alone: *Provided*, That the voter may have assistance in voting according to the provisions of W.Va. Code §3-3-6.

5.7. After the voter has voted the ballot or ballots to be returned by mail, the voter shall:

5.7.a. Place the ballot or ballots in Envelope no. 1 and seal that envelope;

5.7.b. Place the sealed envelope no. 1 in Envelope no. 2 and seal Envelope no. 2;

5.7.c. Complete and sign the forms on Envelope no. 2; and

5.7.d. Return that Envelope to the clerk.

5.8. Early voting by mail ballots returned by United States mail or other express shipping service are to be accepted if:

5.8.a. If the ballot is returned in person or by other express shipping service, the ballot is received by the clerk no later than the close of the early voting period; or

5.8.b. If the ballot is returned by United States Postal Service, the ballot bears a postmark of the United States Postal Service dated no later than the close of the early voting period and the ballot is received by the clerk no later than the hour at which the board of canvassers convenes to begin the canvass.

5.9. Ballots received after the proper time which cannot be accepted are to be placed unopened in an envelope marked for the purpose and kept secure for twenty-two months following the election, after which time

they are to be destroyed without being opened.

5.10. Early voting by mail ballots which are hand delivered are to be accepted if they are received by the clerk no later than the close of the early voting period: *Provided*, That no person may hand deliver more than two early voting by mail ballots in any election and any person hand delivering an early voting by mail ballot assigned to and voted by a voter, who is not the individual delivering the early voting by mail ballot, is required to certify that he or she has not examined or altered the ballot. Any person who makes a false certification violates the provisions of W.Va. Code §3-9-1 et seq. and is subject to those provisions.

5.11. Upon receipt of the sealed envelope, the clerk shall:

5.11.a. Enter onto the envelope any information required for tracking;

5.11.b. Enter the challenge, if any, to the ballot;

5.11.c. Enter the required information into the municipality's voter history record of persons applying for and voting an early voting by mail ballot in person; and

5.11.d. Place the sealed envelope into a ballot box that is secured by two locks with a key to one lock kept by a member of the city council and a key to the other lock kept by the clerk.

**§ 153-38-6. Assistance to Voter in Voting an Early Voting by Mail Ballot.**

6.1. A voter may not receive any assistance in voting an early voting by mail ballot unless he or she makes a declaration at the time he or she applies for an early voting by mail ballot that because of blindness, disability, advanced age or inability to read or write he or she requires assistance in voting an early voting by mail ballot.

6.2. Upon receipt of an early voting ballot by mail, the voter who requires assistance in voting such ballot and who has indicated he or she requires such assistance and the reasons therefore on the application may select any eligible person to assist him or her in voting.

6.3. The person providing assistance in voting an early voting by mail ballot shall make an affidavit on a form as provided by the Secretary of State, that he or she will not in any manner request, or seek to persuade, or induce the voter to vote any particular ticket or for any particular candidate or for or against any public question, and that he or she will not keep or make any memorandum or entry of anything occurring while assisting the voter, and that he or she will not, directly or indirectly, reveal to any person the name of any candidate voted for by the voter, or which ticket he or she had voted, or how he or she had voted on any public question, or anything occurring while assisting the voter, except when required pursuant to law to give testimony as to such matter in a judicial proceeding.

**§ 153-38-7. Delivery of Early Voting by Mail Ballots to Polling Places.**

7.1. Except as otherwise provided in this rule, in municipalities using paper ballot systems or voting machines, the early voting by mail ballots of each precinct, together with the applications for the early voting by mail ballots, the affidavits made in connection with assistance in voting and any forms, lists and records as may be designated by the Secretary of State, are to be delivered in a sealed carrier envelope to the election commissioner of the precinct at the time he or she picks up the official ballots and other election supplies as required by W.Va. Code §3-1-24.

7.2. Ballots received after delivery described in §7.1

7.2.a. Early voting by mail ballots received after the delivery in §7.1, but before closing of the polls, are to be delivered to the designated election commissioner of the precinct by the clerk in person or by messenger before the closing of the polls, provided the ballots are received by the official in time to make the delivery.

7.2.b. Any ballots received by the official after the time that delivery may reasonably be made but within the time required as provided in section five of this rule are to be delivered to the board of canvassers along with the provisional ballots.

#### **§ 153-38-8. Disposition and Counting of Early Voting by Mail Ballots.**

8.1. Upon receipt of an early voting by mail ballot, the clerk or clerk's designee shall mark the voter's record in the poll book indicating the voter has voted in the election. The ballot shall be sorted according to precinct and shall be

placed in the ballot box designated for the precinct to be kept locked until ballots are counted after the polls close on Election Day.

8.2. In municipalities using paper ballots, all early voting by mail ballots shall be processed as follows:

8.2.a. The ballot boxes containing the early voting by mail ballots shall be opened in the presence of the clerk and two representatives of opposite political parties;

8.2.b. The ballots shall be separated by precincts as stated on the sealed envelopes containing the ballots; and

8.2.c. Early voting by mail ballots shall be delivered to the polls to be opened and counted in accordance with W.Va. Code §§ 3-1-33, 3-5-15, and 3-6-6. Disclosure of any results before the voting has been closed and the precinct returns posted on the door of the polling place shall be a *per se* violation of the oath taken by the counting board.

8.3. In municipalities using optical scan systems, the early voting by mail ballots shall be processed as follows:

8.3.a. On election day, the ballot boxes containing the early voting by mail ballots shall be delivered to the central counting center and opened in the presence of the clerk and two representatives of opposite political parties; and

8.3.b. The early voting by mail ballots shall be counted in accordance with W.Va. Code §3-4A-27.

8.4. In municipalities using direct recording elections systems, the early voting by mail ballots shall be counted as follows:

8.4.a. On election day, the ballot boxes containing the paper early voting by mail ballots shall be delivered to the central counting center and opened in the presence of the clerk and two representatives of opposite political parties; and

8.4.b. Each early voting by mail ballot shall be recorded on a direct recording voting terminal designated by the clerk as the terminal for early voting by mail tabulations, after being read aloud by a separate team of two representatives of opposite political parties;

8.4.c. The ballot shall be verified by both teams as being accurately printed on the paper receipt before the ballot is tabulated; and

8.4.d. The procedures set out in W.Va. Code § 3-4A-27(a), (b), (d), and (e) and W.Va. Code § 3-4A-27 (c)(3-6) shall be followed.

8.5. The provisional ballots shall be deposited in a provisional ballot envelope and delivered to the board of canvassers.

8.6. Any election official who determines a person has voted an early voting by mail ballot and has also voted at the polls on election day must report the fact to the prosecuting attorney of the county in which the votes were cast.

#### **§ 153-38-9. Voting in Person After Having Received and After Having Voted an Early Voting by Mail Ballot.**

9.1. Any person who has applied for and received an early voting by mail ballot but has not voted and returned the same to the clerk may vote in person at the polls on election day, provided he or she returns the early voting by mail ballot to the election commissioners at the polling place. Upon return of the early voting by mail ballot, the election commissioners shall destroy the ballot in the presence of the voter, and one of the poll clerks shall make a notation of this fact as directed by instructions issued by the Secretary of State at <http://www.sos.wv.gov/elections/historyre-source/Pages/default.aspx>

9.2. In the event the person does not return the early voting by mail ballot, he or she will have his or her vote challenged by one or more of the election commissioners or poll clerks.

9.3. No person who has voted an early voting by mail ballot may vote in person on the day of the election.

#### **§ 153-38-10. Challenging of Early Voting by Mail ballots.**

10.1. The clerk may challenge an early voting by mail ballot on any of the following grounds:

10.1.a That the application for an early voting by mail ballot has not been completed as required by law;

10.1.b. That any statement or declaration contained in the application for an early voting by mail ballot is not true;

10.1.c. That the applicant for an early voting by mail ballot is not registered to vote in the precinct of his or her residence as provided by law;

10.1.d. That the person voting an early voting by mail ballot by personal appearance in his or her office had assistance in voting the ballot when the person was not qualified for voting assistance because: (A) The affidavit of the person who received assistance does not indicate a legally sufficient reason for assistance; or (B) the person who received assistance did not make an affidavit as required by this rule; or (C) the person who received assistance is not so illiterate as to have been unable to read the names on the ballot or that he or she is not so physically disabled as to have been unable to see or mark the absent voter's ballot; and

10.1.e. That the person who voted an early voting by mail ballot by mail and received assistance in voting the ballot was not qualified under the provisions of this rule for assistance.

10.2. Any one or more of the election commissioners or poll clerks in a precinct may challenge an early voting by mail ballot on any of the following grounds:

10.2.a. That the application for an early voting by mail ballot was not completed as required by law;

10.2.b. That any statement or declaration contained in the application for an early voting by mail ballot is not true;

10.2.c. That the person voting an early voting by mail ballot is not

registered to vote in the precinct of his or her residence as provided by law;

10.2.d. That the signatures of the person voting an early voting by mail ballot as they appear on his or her registration record, his or her application for an early voting by mail ballot, and the early voting by mail ballot envelope are not in the same handwriting;

10.2.e. That the person voting an early voting by mail ballot by personal appearance had assistance in voting the ballot when the person was not qualified for assistance because: (A) The affidavit of the person who received assistance does not indicate a legally sufficient reason for assistance; or (B) the person who received assistance did not make an affidavit as required by this article; or (C) the person who received assistance is not so illiterate as to have been unable to read the names on the ballot or that he or she was not so physically disabled as to have been unable to see or mark the early voting by mail ballot;

10.2.f. That the person voted an early voting by mail ballot by mail and received assistance in voting the ballot when not qualified under the provisions of this rule for assistance;

10.2.g. That the person who voted the early voting by mail ballot voted in person at the polls on election day; and

10.2.h. On any other ground or for any reason for which the ballot of a voter voting in person at the polls on election day may be challenged.

10.3. Forms for challenging an early voting by mail ballot under the

provisions of this rule are to be prescribed by the Secretary of State.

10.4. Early voting by mail ballots challenged by the clerk under the provisions of this rule are to be transmitted by the clerk directly to the board of canvassers. The early voting by mail ballots challenged by the election commissioners and poll clerks under the provisions of this rule may not be counted by the election officials but are to be transmitted by them to the board of canvassers. Action by the board of canvassers on challenged early voting by mail ballots is to be governed by the provisions of W.Va. Code §3-1-41.

**§ 153-38-11. Secretary of State Authority to Conduct Pilot Program**

11.1. The Secretary of State, pursuant to West Virginia Code §3-3A-3, has been given the authority to implement Phase One of the Vote by Mail Pilot Program; therefore, it is the duty of all officials designated to supervise and conduct the vote by mail program, other municipal officials, and all election commissioners and poll clerks to abide by the Secretary of State's rules, orders and instructions and to use the forms, lists and records prescribed by the Secretary of State.