



STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

(304) 558-2021  
FAX (304) 558-0140

September 2, 2009

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

AGENCY: Secretary of State

RULE: Title 153 CSR, Series 38  
Vote-by-Mail Pilot Project Phase 1; Class IV Early Voting by Mail

DATE FILED AS AN EMERGENCY RULE: August 4, 2009

**DECISION NO. 14-09**

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

FILED  
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OFFICE OF THE ATTORNEY GENERAL  
SECRETARY OF STATE

**EMERGENCY RULE DECISION  
(ERD 14-09)**

AGENCY: Secretary of State

RULE: Title 153 CSR, Series 38  
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DATE FILED AS AN EMERGENCY RULE: August 4, 2009

The Secretary of State has filed a new Series 38 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 31, 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 § 3-3A-3 (2009) provides, in pertinent part:

*(a) The Secretary of State is hereby directed to propose emergency and legislative rules in accordance with the provisions of article three, chapter twenty-nine-a of this code necessary to implement phase one of the vote by mail pilot*

*program. In addition to any other provisions the Secretary believes are necessary to provide for the effective, efficient and orderly administration of phase one of the vote by mail pilot program, the rules proposed by the Secretary shall provide for phase one municipal elections the requirements and procedures for conducting an election by mail . . .*

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:

*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.*

*W. Va. Code §3-3A-3 requires 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), because the Legislature specifically authorized the promulgation of emergency rules to implement the statute by W. Va. Code § 3-3A-3(a), quoted above.

This decision shall be cited as Emergency Rule Decision 14-09 or ERD 14-09 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.

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SECRETARY OF STATE



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**MEMORANDUM**

TO: Legislative Rule-Making Review Committee

FROM: Dawn E. Warfield  
Deputy Attorney General *DEW*

DATE: September 2, 2009

RE: Emergency Rule Decision No. 14-09

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 38, 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