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April 23, 2004

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Office of Waste Management

RULE: Amendment, 33CSR31, Underground Storage Tank Fee Assessments

DATE FILED AS AN EMERGENCY RULE: April 8, 2004

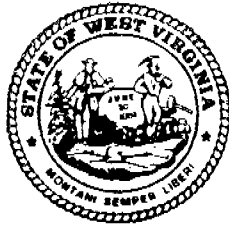
DECISION NO. 3-04

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.

JOE MANCHIN, III
Secretary of State

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OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

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EMERGENCY RULE DECISION
(ERD 3-04)

AGENCY: Office of Waste Management
RULE: Amendments, 33CSR31, Underground Storage Tank Fee Assessments
FILED AS AN EMERGENCY RULE: April 8, 2004

- par. 1 The Office of Waste Management (OWM) 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 OWM filed this emergency rule with supporting documents with the Secretary of State April 8, 2004 and with the LRMRC April 8, 2004.
- par. 7 It is the determination of the Secretary of State that the OWM 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 §22-17-20 reads:
- §22-17-20. Appropriation of funds; underground storage tank administrative fund.*
- (a) The secretary shall collect annual registration fees from owners of underground storage tanks. The registration fee collected under this section shall not exceed sixty-five dollars per tank per year. All such registration fees and the net proceeds of all fines, penalties and forfeitures collected under this article including accrued interest shall be paid into the state treasury into a special revenue fund designated "the underground storage tank administrative fund" to be used to defray the cost of administering this article in accordance with rules promulgated pursuant to section six of this article. The secretary shall promulgate an emergency rule in accordance with article three, chapter twenty-nine-a of this code, implementing the increase in registration fees. This fee of up to sixty-five dollars is effective for the fiscal year ending the thirtieth day of June, two thousand four.*
- (b) The total fee assessed shall be sufficient to assure a balance in the fund not to exceed five hundred thousand dollars at the beginning of each year.*
- (c) Any amount received pursuant to subsection (a) of this section which exceeds the annual balance required in subsection (b) of this section shall be deposited into the leaking underground storage tank response fund established pursuant to this article to be used for the purposes set forth for expenditure of moneys in the fund.*
- (d) The net proceeds of all fines, penalties and forfeitures collected under this article shall be appropriated as directed by article XII, section 5 of the constitution of West Virginia. For the purposes of this section, the net proceeds of such fines, penalties and forfeitures are the proceeds remaining after deducting from the proceeds those sums appropriated by the Legislature for defraying the cost of administering this article. In making the appropriation for defraying the cost of administering this article, the Legislature shall first take into account the sums included in the special fund prior to deducting additional sums as may be needed from the civil fines, civil penalties and forfeitures collected pursuant to this article. At the end of each fiscal year any unexpended balance of the collected civil fines, civil penalties, forfeitures and registration fees shall not be transferred to the general revenue fund but shall remain in the fund.*
- (e) The secretary shall submit an annual report to the joint committee on government and finance on or before the first day of January each year providing information as to the status of the underground storage tank fund, the registration fees or forfeitures collected and any fines and penalties assessed pursuant to this article, the amount of net proceeds of fines, penalties and forfeitures paid into the fund and information as to the progress of the underground storage tank program in the protection of human health and the environment.*
- par. 9 It is the determination of the Secretary of State that the OWM 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.

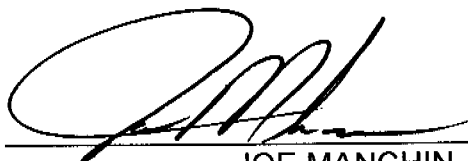
par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the OWM are as follows:

HB 4521 was passed by the 2004 Legislature and requires than an emergency rule be filed so that the amendments may be implemented in state fiscal year 2004. This requires a fee increase that will be used to fund the Underground Storage Tank Program which regulates tanks that contain petroleum & hazardous substances.

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" & "time limitation"

par. 14 This decision shall be cited as Emergency Rule Decision 3-04 or ERD 3-04 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Office of Waste Management, the Attorney General and the Legislative Rule Making Review Committee.



JOE MANCHIN, III
Secretary of State

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