

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

ROBERT E. WILKINSON  
Deputy Secretary of State

CATHERINE FREROTTE  
Executive Assistant

Telephone: (304) 345-4000  
Corporations: 342-8000



## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON  
Chief of Staff

JUDY COOPER  
Director, Administrative Law

DONALD R. WILKES  
Director, Corporations

SHEREE COHEN  
Special Assistant

(Plus all the volunteer  
help we can get)

July 18, 1990

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE July 18, 1990  
ADMINISTRATIVE DIVISION

#### NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: State Water Resources Board

RULE: Amendments, Series 1, Water Quality Standards

DATE FILED AS AN EMERGENCY RULE: June 13, 1990

DECISION NO. 16-90

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved with the exception of Section 7.2.d.30.A, which is disapproved. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script that reads "Ken Hechler".

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#### DECISION      EMERGENCY RULE DECISION (ERD 16-90)

AGENCY: Department of Commerce, Labor & Environmental  
Resources, State Water Resources Board  
RULE: Amendments, Series 1, Water Quality Standards  
FILED AS AN EMERGENCY RULE: June 13, 1990

- par. 1 State Water Resources Board (WRB) has filed emergency amendments to the above rule.
- par. 2 West Virginia 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(a)].
- par. 4 (A) Procedural Compliance: WV 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 WRB filed this emergency rule with supporting documents with the Secretary of State on June 13, 1990 and with the LRMRC on June 13, 1990.

- par. 7 It is the determination of the Secretary of State that the WRB has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- WV Code §20-5 reads in part:  
*§20-5-5(b) In addition to all other powers and duties of the water resources board, as prescribed in this article or elsewhere by law, the board shall have and may exercise the following powers and authority and shall perform the following duties:*  
*(2) To promulgate rules and regulations, in accordance with the provisions of §29A-1-1 et seq. of this Code, to implement and make effective the powers, duties and responsibilities vested in the board and the chief by the provisions of this law and otherwise by law.*
- par. 9 §20-5A of the WV Code further states in part:  
*§20-5A-3a. Standards of water quality and effluent limitations.*  
*(a) In order to carry out the purposes of this article, the board shall promulgate rules and regulations setting standards of water quality and effluent limitations to be applicable to the waters of this State, which standards of quality and effluent limitations shall be such as to protect the public health and welfare, wildlife, fish and aquatic life, and the present and prospective future uses of such waters for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof.*  
*(b) In establishing, amending, revising or repealing rules and regulations relating to the water quality standards and effluent limitations, the board shall follow all procedures by §29A-3-1 et seq. of the Code.*
- par. 10 Section 7.2.d.30.A of this rule states that Water Use Category A and B2 shall not apply to that segment of the East Fork of the Greenbrier River (KNG-78) from the reservoir located at the tannery to the confluence with the West Fork; provided that all trout water (B2) standards shall not be violated in the mainstem Greenbrier River and concentrations in the East Fork shall not exceed 35 ug/l unionized ammonia and 100 ug/l nitrate.
- par. 11 The Federal Environmental Protection Agency (EPA) has not yet implemented enforcement in West Virginia of Ammonia Levels at 35 ug/l and nitrate at 100 ug/l.
- par. 12 Part of the WRB's circumstances for an emergency rule is "these revisions are necessary to meet the requirements of the EPA's water quality standards regulations."
- par. 13 It is the determination of the Secretary of State that the WRB has not exceeded its statutory authority in promulgating this emergency rule, with the exception of Section 7.2.d.30.A.
- par. 14 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

(g) 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.

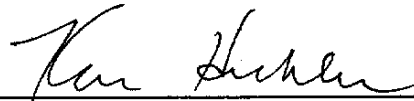
par. 15 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 16 The facts and circumstances as presented by the WRB are as follows:

On September 29, 1989, U.S. EPA disapproves specific portions of Title 46, Series 1, Legislative Rules promulgated by the Water Resources Board. To avoid Federal promulgation of Water Quality Standards for West Virginia, the Water Resources Board has reviewed EPA's disapprovals and agreed to adopt the attached revisions by Emergency Rule. These revisions are necessary to meet the requirements of EPA's Water Quality Standards Regulation (40 CFR Part 131, November 8, 1983.)

par. 17 It is the determination of the Secretary of State that this proposal qualifies under the definition of emergency and should be approved with the exception of Section 7.2.d.30.A which is disapproved.

par. 18 This decision shall be cited as Emergency Rule Decision 16-90 or ERD 16-90 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Water Resources Board, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER  
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THE SECRETARY OF STATE

THIS DATE July 18, 1990  
ADMINISTRATIVE LAW DIVISION

Entered \_\_\_\_\_