



FILED

2010 MAR -5 PM 2: 25

Office of the Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

Natalie E. Tennant
Secretary of State
State of West Virginia

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Telephone: (304) 558-6000
Toll Free: 1-866-SOS-VOTE
Fax: (304) 558-0900
www.wvsos.com

March 5, 2010

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Office of Water Resources

RULE: Amendments. 47CSR2, Requirements Governing Water Quality Standards

DATE FILED AS AN EMERGENCY RULE: March 3, 2010

DECISION NO. 2-10

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.

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 2-10)

AGENCY: Office of Water Resources
RULE: Amendment, 47CSR2, Requirements Governing Water Quality Standards
FILED AS AN EMERGENCY RULE: March 3, 2010

- par. 1 The Office of Water Resources (Office) 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 Office filed this emergency rule with supporting documents with the Secretary of State March 3, 2010 and with the LRMRC March 3, 2010.
- par. 7 It is the determination of the Secretary of State that the Office 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 §22-11-4(a)(16) reads:

§22-11-7b. Water quality standards; implementation of antidegradation procedures.
(a) All authority to promulgate rules and implement water quality standards vested in the Environmental Quality Board is hereby transferred from the Environmental Quality Board to the Secretary of the Department of Environmental Protection as of the effective date of the amendment and reenactment of this section during the two thousand five regular session of the Legislature: Provided, That the legislative rule containing the state's

water quality standards shall remain in force and effect as if promulgated by the Department of Environmental Protection until the secretary amends the rule in accordance with the provisions of article three, chapter twenty-nine-a of this code. Any proceedings, including notices of proposed rulemaking pending before the Environmental Quality Board, and any other functions, actions or authority transferred to the secretary shall continue in effect as actions of the secretary.

(b) All meetings with the secretary or any employee of the Department and any interested party which are convened for the purpose of making a decision or deliberating toward a decision as to the form and substance of the rule governing water quality standards or variances thereto shall be held in accordance with the provisions of article nine-a, chapter six of this code. When the secretary is considering the form and substance of the rule governing water quality standards, the following are not meetings pursuant to article nine-a, chapter six of this code: (I) Consultations between the department's employees or its consultants, contractors or agents; (ii) consultations with other state or federal agencies and the department's employees or its consultants, contractors or agents; or (iii) consultations between the secretary, the department's employees or its consultants, contractors or agents with any interested party for the purpose of collecting facts and explaining state and federal requirements relating to a site specific change or variance.

(c) In order to carry out the purposes of this chapter, the secretary shall promulgate legislative rules in accordance with the provisions of article three, chapter twenty-nine-a of this code setting standards of water quality applicable to both the surface waters and groundwaters of this state. Standards of quality with respect to surface waters shall protect the public health and welfare, wildlife, fish and aquatic life and the present and prospective future uses of the water for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof. The water quality standards of the secretary may not specify the design of equipment, type of construction or particular method which a person shall use to reduce the discharge of a pollutant.

(d) The secretary shall establish the antidegradation implementation procedures as required by 40 C.F.R. 131.12(a) which apply to regulated activities that have the potential to affect water quality. The secretary shall propose for legislative approval, pursuant to article three, chapter twenty-nine-a of the code, legislative rules to establish implementation procedures which include specifics of the review depending upon the existing uses of the water body segment that would be affected, the level of protection or "tier" assigned to the applicable water body segment, the nature of the activity and the extent to which existing water quality would be degraded. Any final classification determination of a water as a Tier 2.5 water (Water of Special Concern) does not become effective until that determination is approved by the Legislature through the legislative rulemaking process as provided for in article three, chapter twenty-nine-a of the code.

(e) All remaining variances shall be applied for and considered by the secretary and any variance granted shall be consistent with 33 U.S.C. Section 1311(p) of the Federal Water Control Act. At a minimum, when considering an application for a remaining variance the secretary shall consider the data and information submitted by the applicant for the variance; and comments received at a public comment period and public hearing. The secretary may not grant a variance without requiring the applicant to improve the instream water quality as much as is reasonably possible by applying best available

technology economically achievable using best professional judgment. Any such requirement will be included as a permit condition. The secretary may not grant a variance without a demonstration by the applicant that the coal remining operation will result in the potential for improved instream water quality as a result of the remining operation. The secretary may not grant a variance where he or she determines that degradation of the instream water quality will result from the remining operation.

par. 9 It is the determination of the Secretary of State that the Office 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 Office are as follows:

The DEP is proposing an emergency rule to address the one-half mile zone extending upstream from the intake of a water supply public and the exception that applies to the Ohio River in 47 CSR 2. This proposed rule change is found in paragraph 7.2.a.2 on page 9 of the rule.

The West Virginia water quality standards rule, 47 CSR 2 §7.2.a.2, establishes a segment extending upstream from the intake of a water supply public (Water Use Category A), for a distance of one half (½) mile that must be protected by prohibiting the discharge of any pollutants in excess of the concentrations designated for this Water Use Category in section 8, herein. This rule (half-mile rule) prohibits a mixing zone being granted for any discharge within one-half mile of a public water supply intake and was created as a additional protective zone for public drinking water supplies. The purpose of the Half-Mile Rule was to avoid placing a drinking water supplier in the unfair position of having additional water treatment costs due to discharges by unrelated point sources. 47 CSR 2 §7.2.a.2 also provides a temporary exception to the one-half mile zone until September 1, 2010 for the Ohio River main channel between river mile points 61.0 and 63.5 for the Category A water quality criterion for total iron.

The DEP proposes an emergency rule and a legislative rule revision to make a site-specific exception to the half-mile rule so that it shall not apply to the Ohio River main channel (between Brown's Island and the left descending bank) between river mile points 61.0 and 63.5. All mixing zone regulations found in section 5 of this rule

will apply except 47 CSR 2 §5.2.h.6. The result of this exception is that it allows consideration of mixing zones in the identified section of the Ohio River in accordance with West Virginia mixing zone regulations found in Section 5, and as established in a permit by the Director of the West Virginia Division of Water and Waste Management. Additionally, because the use would be fully attained at the edge of the mixing zone, which would not be allowed to overlap the drinking water intake, this site-specific exemption from the half-mile rule maintains protection of the designated and existing drinking water use by meeting the protective criteria before the intake, thereby ensuring the protection of the designated water uses as set forth in 40 CFR Part 131.

Although the State, through the submittal of this revision, is exempting particular dischargers from the half-mile zone, the approval of the revision does not imply that any mixing zones should be permitted. Whether a mixing zone is appropriate, and the proper size of such zones would need to be considered on a site-specific basis in accordance with the EPA approved West Virginia mixing zone regulation in 47 CSR 2 §5. These regulations require that the mixing zones for human health criteria be sized to prevent significant human health risks, considering the exposure pathway, as per 47 CSR 2 §5.2.c ; see also "Water Quality handbook, Chapter 5, General Policies" pages 5-7, EPA Office of Water, EPA 823-B-94-005a (August 1994). In general, this means that a drinking water intake should not be within a mixing zone, but rather the human health criteria should be met before the intake. Based on the above documents, the State can clearly allow through a permit, a limited mixing zone prior to a drinking water intake present in the specific stretch of the Ohio River, which would require that the human health criteria be met before the intake. Therefore the West Virginia WQS regulations, as modified by this revision, would still be fully protective of the public water supply use in this segment of the Ohio River while eliminating unnecessary treatment costs to the regulated community.

Substantial capital investments by ArcelorMittal Weirton, Inc., that would need to be made to adhere to limits which currently become effective September 1, 2010, can be avoided with this emergency rule. Given the financial performance of ArcelorMittal Weirton Inc. over the past several years and current economic conditions in the area, such investments with no environmental gain cannot be justified. An emergency rule is therefore justified as necessary to prevent substantial harm to the public interest.

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). . ."prevent substantial harm to the public interest"

par. 14

This decision shall be cited as Emergency Rule Decision 2-10 or ERD 2-10 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Office of Water Resources, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

Entered _____

OFFICE OF THE SECRETARY OF STATE

2009 MAR -5 PM 2:26

FILED