



Betty Ireland
Secretary of State

OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

FILED
2007 JUN 14 PM 4:28

OFFICE WEST VIRGINIA
SECRETARY OF STATE

June 14, 2007

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

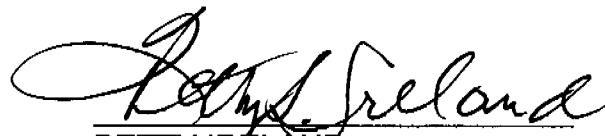
AGENCY: Office of Water Resources

RULE: Amendments, 47CSR2, §8.1, Appendix E, Table 1 on page 30 and footnote "e" at the end of appendix on page 44 only, Requirements Governing Water Quality Standards

DATE FILED AS AN EMERGENCY RULE: June 12, 2007

DECISION NO. 4-07

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 -- only Section 8.1, Appendix E, Table 1 on page 30 and footnote "e" at the end of appendix on page 44.** A copy of the complete decision with required findings is available from this office.


BETTY IRELAND
Secretary of State

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

EMERGENCY RULE DECISION
(ERD 4-07)

AGENCY: Office of Water Resources
RULE: Amendments, 47CSR2, Requirements Governing Water Quality Standards

DATE FILED AS AN EMERGENCY RULE: June 12, 2007

- par. 1 The Office of Water Quality (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 June 12, 2007 and with the LRMRC June 12, 2007.
- 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:

(16) To adopt, modify, repeal and enforce rules, in accordance with the provisions of chapter twenty-nine-a of this code: (A) Implementing and making effective the declaration of policy contained in section one of this article and the powers, duties and responsibilities vested in the director and the chief by the provisions of this article and otherwise by law; (B) preventing, controlling and abating pollution; and (C) facilitating the state's participation in the "National Pollutant Discharge Elimination System" pursuant to the

"Federal Water Pollution Control Act," as amended: Provided, That no rule adopted by the director shall specify the design of equipment, type of construction or particular method which a person shall use to reduce the discharge of a pollutant; and

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 dissolved aluminum criterion in 47CSR2. "The criterion is found in section 8.1, Appendix E, Table 1 on page 30 of the rule & footnote "e", located at the end of the Appendix on page 44 of the rule.

In Section 8.1, the current rule establishes a chronic dissolved aluminum criterion of 87 ug/1 to protect warm water aquatic life but suspends the effective date of that criterion until July 4, 2007, to allow further study of the issue. The rule sets an interim value of 750 ug/1 until the permanent number becomes effective. The DEP now proposes an emergency rule and a legislative rule revision to make this interim number permanent replacing the 87 value with the 750 value. This action is based upon further scientific studies and a 2006 finding by EPA that the 750 value is protective of warm water aquatic life in West Virginia on both a temporary and a permanent basis.

This change was included in the agency-approved rule submitted to the 2007 Legislature; however, the rule was not acted upon by the Legislature, meaning the temporary aluminum criterion will expire July 4, 2007, and the more stringent value will take effect. Should this happen, the regulated community will be subject to limits in the permitting and TMDL process that have been scientifically determined to be overprotective of warm water aquatic life. This will result in unnecessary

treatment costs for a substantial portion of the regulated community, including most of the coal industry, and the inclusion of many waters on the DEP's 303(d) list that are not impaired. The listing of these waters would initiate the TMDL process and result in the significant expenditure of agency resources where completely unwarranted. This will divert resources from other programs where protection of water quality has in fact been determined to be essential. By making the standard permanent, substantial harm to both the regulated community and the agency will be avoided while maintaining the level of protection necessary for warm water aquatic life. 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 only Section 8.1, Appendix E, Table 1 on page 30 & footnote "e" at the end of Appendix on page 44 of this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "to prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 4-07 or ERD 4-07 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.


BETTY IRELAND
Secretary of State

Entered _____

OFFICE OF THE
SECRETARY OF STATE

2007 JUN 14 PM 4:28

FILED