

Secretary of State's Office  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

*State of West Virginia*  
*Joe Manchin, III*  
*Secretary of State*

Telephone: (304) 558-6000  
Toll Free: 1-866-SOS-VOTE  
Corporations: (304) 558-8000  
FAX: (304) 558-0900  
www.wvsos.com

October 10, 2002

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Environmental Protection, Division of Water Resources

RULE: Amendments, 47CSR26, Water Pollution Control Permit Fee Schedules

DATE FILED AS AN EMERGENCY RULE: October 3, 2002

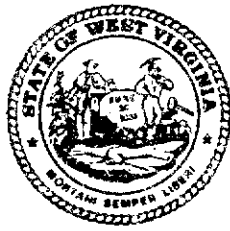
DECISION NO. 22-02

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.

  
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JOE MANCHIN, III  
Secretary of State

STATE OF WEST VIRGINIA  
SECRETARY OF STATE  
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EMERGENCY RULE DECISION  
(ERD 22-02)

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RULE: Amendments, 47CSR26, Water Pollution Control Permit Fee Schedules

FILED AS AN EMERGENCY RULE: October 3, 2002

- par. 1 The Division of Water Resources (Division) 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 Division filed this emergency rule with supporting documents with the Secretary of State October 3, 2002 and with the LRMRC October 3, 2002.

par. 7 It is the determination of the Secretary of State that the Division 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 Division 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 Division are as follows:


Upon reissuance of the construction storm water NPDES permit by the Division in December, 2002, current permit fee rules require a minimum \$700 for projects disturbing 1 to 3 acres. The agency agreed the disadvantage that would cause small homebuilders and proposed a flat \$300 fee for such activities. Comments during public meetings on the reissuance of the permit noted that the lag time between reissuance in December, 2002, and application of the reduced fee would cause many to be subject to the \$700 fee versus the \$300 fee.

The rule is proposed to comply with Federal Clean Water Act & National Pollutant Discharge Elimination System rules which require permits for construction sites of

1 acre or greater. The deadline for reissuance of the current stormwater permit is December 4, 2002. Currently required fees are \$700 for each activities. The emergency rule would make the proposed \$300 fee applicable upon issuance of the permit in December as opposed to after the Legislature acts during the 2003 session.

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" and to "comply with a federal deadline"

par. 14 This decision shall be cited as Emergency Rule Decision 22-02 or ERD 22-02 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Environmental Protection, Division of Water Resources, the Attorney General and the Legislative Rule Making Review Committee.

  
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JOE MANCHIN, III  
Secretary of State

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