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help we can get)

July 2, 1999

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

**AGENCY: OFFICE OF WATER RESOURCES**


**RULE: SERIES 31, AMENDMENTS, STATE WATER POLLUTION CONTROL REVOLVING FUND PROGRAM RULE**

**DATE FILED AS AN EMERGENCY RULE: MAY 24, 1999**

**DECISION NO. 5-99**

OFFICE OF  
SECRETARY OF STATE  
JUL 2 10 05 AM '99

Following review under WV 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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**EMERGENCY RULE DECISION**  
(ERD 5-99)

**AGENCY:** OFFICE OF WATER RESOURCES  
**RULE:** SERIES 31, AMENDMENTS, STATE WATER POLLUTION CONTROL REVOLVING FUND PROGRAM RULE  
**FILED AS AN EMERGENCY RULE:** MAY 24, 1999

- par. 1 The Office of Water Resources has filed the above amendments to an existing rule as an emergency 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].
- 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 Office of Water Resources filed this emergency rule with supporting documents with the Secretary of State May 24, 1999 and with the LRMRC May 14, 1999.

par. 7 It is the determination of the Secretary of State that the Office of Water Resources 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 §22C-2-3(b)

The director of the division of environmental protection, in consultation with the authority, shall promulgate legislative rules in accordance with the provisions of WV Code §29A-3-1 et seq.

par. 9 It is the determination of the Secretary of State that the Office of Water Resources has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- WV 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.

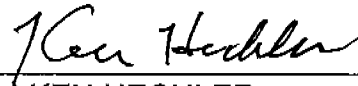
par. 12 The facts and circumstances as presented by the Office of Water Resources are as follows:

When the State Water Pollution Control Revolving Fund Program (the "SRF") was established under the Federal Water Pollution Control Act, as amended by the Water Quality Act of 1987, the US EPA took the position that loans made under the SRF Program was governed by the Clean Water Act, Title VI, Section 603(d)(1) which restricted the loan term to a period not to exceed 20 years from the completion of the project funded by the loan. 47CSR31 incorporated the provisions as mandated by EPA. In November, 1998 it came to the attention of DEP that EPA had approved an extended bond purchase program for the State of Massachusetts under the provisions of the Clean Water Act, Title VI, Section 603(d)(2) whereby the SRF may be used to "buy or refinance the debt obligations of municipalities and interstate agencies within the state as below market rates..." DEP immediately began a dialogue with EPA regarding the requirements for approval of an extended bond purchase program with EPA on December 4, 1998. On December 16, 1998, DEP representatives met with EPA representatives and the EPA region 3 at the EPA headquarters in Washington, DC. EPA requested additional information which

information was provided in a series of responses throughout January, February & early March of 1999. On March 30, 1999, DEP provided the final information in response to EPA's questions regarding the extended bond purchase program. On April 15, 1999, DEP held a public hearing to present the extended bond purchase program to the public. As currently approved, the extended bond purchase program will allow DEP to provide non interest bearing loans to disadvantaged communities for terms tied to the earlier of useful life of the project being financed for 30 years, with a reduced administration fee of ½ %. The DEP has requested EPA's approval of a term up to 40 years. A disadvantaged community is defined as eligible recipient whose user rates following completion of the project would be equal to or in excess of 1.5% of the median household income for the project area based upon a monthly usage of 4,500 gallons. The extended bond purchase program meets goals of the State Revolving Loan Program by (i) achieving clean water by funding additional water pollution control projects; (ii) providing rate relief to certain local governmental entities making their projects affordable; (iii) increasing the capital investment in the SRF Program to increase the sewer construction in WV and (iv) enhancing the Fund's ability to leverage other federal and state dollars. Before a local governmental entity (municipality or psd) can advertise for bids to construct a project, it must have its funding commitments in place. If acceptable bids are received in excess of the funding committed, the local governmental entity must locate additional funds to construct the project. The additional funds come in the form of loan dollars which increase the rates to the users or grant funds which then reduces the amount of grant funds available for other projects. At least 12 projects were scheduled to open bids between April 1 & August 1. Already one local governmental entity has opened bids where the acceptable low bid is in excess of the funding commitments. This project could be funded under the extended bond purchase program without an increase in user rates if the emergency rules are approved expeditiously. Using the extended bond purchase program, the project loan could be extended to 24 years to provide the additional funding without increasing the rates. This Chelyan Public Service District project addresses severe water pollution and health problems in the eastern area of Kanawha County and has received substantial media coverage as well as regulatory review. This emergency rule is necessary for each of the 3 items required, (i) the immediate preservation of public peace, health, safety or welfare - this emergency rule providing for the extended bond purchase program will allow wastewater projects to move forward in a timely manner addressing both public health and safety issues through the preservation of clean water and the abatement of pollution; (ii) will bring the SRF program in compliance with the time limitations allowed under the federal EPA program as approved; and (iii) addresses the prevention of substantial harm to the public interest in that it allows the user rates for customers of wastewater systems to be affordable and not place an over burdensome weight on customers in disadvantaged areas. If DEP were required to follow the regular legislative rules amendment procedures, numerous WV municipalities and public service districts would be denied the ability to maintain affordable rates, abate pollution and improve

the public health through the rapid and economically viable construction of wastewater treatment facilities. This amendment could not have occurred during any earlier legislative rule making processes. The authorization to provide the extended bond purchase program was not received until April 13, 1999.

- 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). . . "public health, safety & welfare"
- par. 14 This decision shall be cited as Emergency Rule Decision 5-99 or ERD 5-99 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 Commission.



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KEN HECHLER  
Secretary of State

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