

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #7

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FILED

2005 AUG -1 A 10: 27

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: OFFICE OF WATER RESOURCES TITLE NUMBER: 47

CITE AUTHORITY: W. VA. CODE 22-28-9

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 61

TITLE OF RULE BEING PROPOSED: COMMUNITY INFRASTRUCTURE
INVESTMENT PROGRAM

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

W. VA. CODE 22-28-9 AUTHORIZES THE FILING OF THIS RULE AS AN EMERGENCY RULE TO EFFECTUATE THE PURPOSE OF THIS ARTICLE, WHICH IS TO ESTABLISH A PROGRAM TO FACILITATE THE CONSTRUCTION OR EXPANSION OF PROJECT FACILITIES FOR THE PROMOTION OF ECONOMIC DEVELOPMENT AND THE PROTECTION OF PUBLIC HEALTH AND THE ENVIRONMENT.

Use additional sheets if necessary


Authorized Signature

#440

EMERGENCY RULE QUESTIONNAIRE

DATE: August 1, 2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Department of Environmental Protection
Office of Water Resources, 601 57th Street, SE, Charleston, WV 25304
926-0495

EMERGENCY RULE TITLE: Community Infrastructure Investment Program

1. Date of filing August 1, 2005

2. Statutory authority for promulgating emergency rule:
W. Va. Code 22-28-9

3. Date of filing of proposed legislative rule: August 10, 2005

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? _____
New language

5. Has the same or similar emergency rule previously been filed and expired?
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.

N/A

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

As per W. Va. Code 22-28-9, the agency is required to file this emergency rule by

August 1, 2005.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

N/A

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: Community Infrastructure Investment Program Rule

A. AUTHORITY: W. Va. Code §22-28-9

B. SUMMARY OF RULE:

This rule establishes requirements governing the Community Infrastructure Investment Program established pursuant to W. Va. Code §22-28-1 et seq. The purpose of this program is to facilitate the construction or expansion of water and sewer facilities for the promotion of economic development and the protection of public health and the environment. Facilities costing less than \$10 million that are initially built using private funds may be transferred to a public utility, at no cost, pursuant to an investment agreement required by Section 4 of the rule.

C. STATEMENT OF EMERGENCY CIRCUMSTANCES WHICH REQUIRE RULE:

As per §22-28-9 the agency is required to file this emergency rule by August 1, 2005.

D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:

There is no federal counterpart regulation, thus no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitution of West Virginia and the United States of America.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 47CSR61

Type of Rule: Legislative Interpretive Procedural

Agency: Office of Water Resources

Address: 601 57th Street, SE
Charleston, WV 25304

Phone Number: 926-0495 Email: mjohnson@wvdep.org

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The agency does not anticipate any additional costs as a result of this program. Existing staff will be utilized to administer this new program.

This rule will assess a \$3,000 fee per application. At this time the agency is unable to estimate the number of applications per year that may be submitted. We do not expect many applications, maybe twelve (12) per year.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	27,000.00	36,000.00	36,000.00

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

Each application must be submitted with a fee of \$3,000. This is calculated assuming each application will be assigned to a project engineer and financial specialist to review. Each of these reviewers will spend an average of 24 hours reviewing each application. At an average hourly rate of pay of \$28 and \$20 respectively, the total cost of their review will be about \$1,150. Two managers or supervisors will review their recommendations and will do a cursory review of the application package. Assuming 20 hours total for this phase of the review at \$31/hours equals \$620. Assuming clerical support and a final legal review of the investment agreement in each application by attorneys, this will add about \$1,200 to the cost of review for a total rounded off number of \$3,000. The above calculation allows room for travel costs associated with on-site meetings, inspection, etc., if necessary.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

See above

Date: August 1, 2005

Signature of Agency Head or Authorized Representative

47CSR61
TITLE 47
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF WATER RESOURCES

FILED

2005 AUG -1 A 10: 28

**OFFICE WEST VIRGINIA
SECRETARY OF STATE**

SERIES 61
COMMUNITY INFRASTRUCTURE INVESTMENT PROGRAM

§47-61-1. General.

1.1. **Scope and Purpose.** -- This legislative rule establishes requirements governing the Community Infrastructure Investment Program established pursuant to W. Va. Code §22-28-1 et seq. The program will facilitate the construction or expansion of project facilities for the promotion of economic development and the protection of public health and environment in the state.

1.2. **Authority.** -- W. Va. Code §22-28-9.

1.3. **Filing Date.** --

1.4. **Effective Date.** --

§47-61-2. Definitions.

The definitions set forth in W. Va. Code §22-28-2 apply to this rule along with the following definitions.

2.1. **“Act”** means the Community Infrastructure Investment Projects Act, W. Va. Code §22-28-1 et seq.

2.2. **“Agreement”** means the Community Infrastructure Investment Agreement as required by the Act and shall refer to a duly authorized written agreement between a public utility and a person that provides for the transfer of legal title to a project facility from the person to the public utility.

2.3. **“Certificate”** means a certificate of appropriateness issued by the Secretary evidencing approval of a project to be constructed under the provisions of the Act.

2.4. **“Completion and activation”** means the date on which operation of the project is initiated or is capable of being initiated, whichever is earlier.

2.5. "Department" means the Department of Environmental Protection.

2.6. "Person" means any individual, partnership, firm, society, association, trust, corporation or other business entity.

2.7. "Project" means any newly constructed or enlarged and improved project facilities of \$10 million or less that may be transferred to a public utility without cost to the public utility pursuant to the Act.

2.8. "Project cost" means the capital cost of the project to be constructed under the Act and shall not refer to any of the costs or expenses of ordinary operation and maintenance of the project once it becomes operational.

2.9. "Project facilities" means wastewater treatment plants or water treatment plants constructed pursuant to the Act and include, but are not limited to, related storage buildings or structures, meters, hydrants, pump stations, force and gravity main, transmission lines and other such fixtures related to the construction of water and sewer facilities. Project facilities do not refer to the ordinary extension of collection and distribution lines or facilities from or to the project to the property of any user of project facilities.

2.10. "Public utility" means an existing water or sewer utility operated by a municipality, public service district or any other political subdivision that is certificated by the Public Service Commission of West Virginia.

2.11. "Rights of way" means the acquisition of all real property or property rights (easements, etc.) needed for project facility construction.

2.12. "Secretary" means the Secretary of the Department of Environmental Protection or such other person to whom the Secretary has delegated authority or duties pursuant to W. Va. Code §22-1-6 or §22-1-8.

§47-61-3. Community Infrastructure Investment Program.

3.1. Prior to filing a formal application for a certificate, the public utility or the person intending to construct a community infrastructure project must file a "notice of intent" with the Secretary. This notice of intent must demonstrate a desire to construct the project under the provisions of this rule and must state the date the utility expects to file the application. The notice of intent must be filed as soon as possible, but no later than the date of filing of an application for any applicable Department permit or permit modification, whichever is earlier, or the filing of any applicable permit application with the Bureau for Public Health by the person responsible for the construction of the project facilities. If a permit has already been issued or an application for a permit has already been submitted as of the effective date of this rule, the requirement of this section will be waived.

3.2. Application requirements.

3.2.a. A joint application from a person intending to construct a community infrastructure project and the public utility to which the project will be transferred must be filed with the Secretary on a prescribed form and must include all of the following:

3.2.a.1. Completed Form #CIIP-1;

3.2.a.2. Utility's current rate tariff, proposed new tariff for the project, if applicable and annual budget;

3.2.a.3. Utility's most recent two annual independent audited financial statements;

3.2.a.4. Opinion of bond counsel with respect to existing bond covenants being satisfied as a result of transfer of the project;

3.2.a.5. Attorney's preliminary opinion of title transfer that upon completion of the project the transfer will take place;

3.2.a.6. Any applicable permits issued by the Department and/or Bureau for Public Health;

3.2.a.7. An independent certified public accountant's cash flow analysis for the public utility's current operations and projected operations after the transfer of the project;

3.2.a.8. A certified copy of the resolution of the governing body of the public utility authorizing the filing of an application and a certified copy of the minutes of the meeting where the application resolution was adopted;

3.2.a.9. Evidence and documentation of public participation efforts conducted by the public utility, prior to the filing of this application;

3.2.a.10. Proposed Agreement; and

3.2.a.11. The application fee.

3.3. An application for a certificate will not be deemed administratively complete unless all items are contained therein as described in Subdivision 3.2.a..

3.4. Upon completion of his or her review of the application and attachments, the

Secretary may require additional information as deemed appropriate in order to take final action on the application.

§47-61-4. Community Infrastructure Investment Agreements.

4.1. Each proposed Agreement must be submitted to the Secretary for review and approval as part of the application for a certificate, using a standard form of agreement as prescribed by the Secretary.

4.2. Each proposed Agreement must contain the following information:

4.2.a. The project facilities must be engineered and constructed in accordance with the requirements for new construction established by the public utility;

4.2.b. Proof or certification of the financial ability of the public utility to maintain and operate the public facilities;

4.2.c. Certification that upon completion and activation of the project facility or improvements to the project facility, the title to the public facility must be transferred without cost to the public utility;

4.2.d. A finding that the construction of the new public facility, or the substantial improvement or expansion of an existing public facility, either: (i) fosters economic growth by promoting commercial, industrial or residential development; and (ii) improves water quality or otherwise enables the affected territory to achieve compliance with any applicable state or federal health or environmental law;

4.2.e. The public utility will receive or otherwise obtain without cost to the public all necessary rights-of-way for the operation of the public facility;

4.2.f. The rates charged by public utility to new customers to be served by the project facility must be the rates in effect at the time of transfer of the project facility to the utility plus any additional cost of service borne by the public utility as a result of the project facility until such time as new rates may be finally enacted by the public utility and approved by the Public Service Commission and the rates charged by the public utility to existing customers must not be impacted as a result of the obligation of the public utility pursuant to the community infrastructure investment agreement;

4.2.g. Confirmation that the agreement does not violate any of the bond covenants imposed on the public utility;

4.2.h. Proof that necessary permits, where applicable, have been obtained from the Bureau for Public Health and the Department of Environmental Protection;

4.2.i. Evidence that the person responsible for the construction of or improvements to the public facility has provided funding to the public utility for the engagement of an engineer qualified to inspect and certify that the project has been constructed in accordance with plans approved by the Bureau for Public Health and the Department, and that said project has been constructed in a good and workmanlike manner; and

4.2.j. Proof that the person responsible for construction of or improvements to the public facility has obtained a performance bond securing performance for the benefit of the public utility equal to the estimated cost construction: Provided, that the form of the bond required by this section shall be approved by the Secretary and may include, at the option of the Secretary, surety bonding, collateral bonding (including cash and securities), bonding fund participation as established by the Secretary, self-bonding or a combination of these methods.

4.3. In addition to the requirements contained in section 4.2., each Agreement must contain or require the following items:

4.3.a. A one year warranty bond equal to the cost of construction from the person responsible for the construction of the project facilities;

4.3.b. A payment bond equal to the cost of construction from the person responsible for the construction of the project facilities, or a release of liens regarding the system as specified in the Agreement;

4.3.c. The required performance bond will remain in effect until the project facility has been accepted by the public utility; and

4.3.d. The public utility must monitor the construction of the project facilities for quality control.

4.4. In the absence of enough new customers to reasonably shoulder the initial burden of additional operation and maintenance expenses imposed upon the public utility as a result of completion and transfer of the project, the person responsible for the construction may be required to post a bond in a form approved by the Secretary in an amount necessary to cover any monthly revenue shortfalls for a reasonable period of time.

§47-61-5. Permitting Requirements.

Prior to the issuance of a certificate by the Secretary, all necessary permits, where applicable, must have been obtained from the Department and the Bureau for Public Health. Facilities discharging into the Potomac River watershed and its tributaries must be designed to achieve nutrient reductions, for both nitrogen and phosphorus, consistent with West Virginia's participation in the Chesapeake Bay program upon implementation of the Chesapeake Bay standards by the Secretary.

§47-61-6. Time for approval.

The Secretary will approve or reject all applications for a project within thirty (30) days from the date the application is deemed administratively complete. By mutual agreement among all the parties such time period may be extended but in no case will the time period extend beyond ninety (90) days from the date the application is deemed administratively complete. Construction on the project will not be initiated until the certificate has been issued and a copy of the executed Agreement has been returned to the Secretary.

§47-61-7. Fees.

Each application for a certificate must be submitted with a check or money order made payable to the Department of Environmental Protection, Office of Water Resources in the amount of \$3,000.00.