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(Plus all the volunteer
help we can get)

October 9, 1998

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: OFFICE OF AIR QUALITY

RULE: AMENDMENTS, SERIES 36, REQUIREMENTS FOR DETERMINING CONFORMITY OF TRANSPORTATION PLANS, PROGRAMS AND PROJECTS DEVELOPED, FUNDED OR APPROVED UNDER TITLE 23 U.S.C. OR THE FEDERAL TRANSIT LAWS, TO APPLICABLE AIR QUALITY IMPLEMENTATION PLAN (TRANSPORTATION CONFORMITY)

DATE FILED AS AN EMERGENCY RULE: SEPTEMBER 2, 1998

DECISION NO. 12-98

FILED
OCT 9 2 29 PM '98
OFFICE OF THE SECRETARY OF STATE

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 12-98)

AGENCY: OFFICE OF AIR QUALITY
RULE: AMENDMENTS, SERIES 36, REQUIREMENTS FOR DETERMINING CONFORMITY OF TRANSPORTATION PLANS, PROGRAMS AND PROJECTS DEVELOPED, FUNDED OR APPROVED UNDER TITLE 23 U.S.C. OR THE FEDERAL TRANSIT LAWS, TO APPLICABLE AIR QUALITY IMPLEMENTATION PLAN (TRANSPORTATION CONFORMITY)

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- par. 1 The Office of Air Quality (OAQ) 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 filed this emergency rule OAQ with supporting documents with the Secretary of State September 2, 1998 and with the LRMRC September 2, 1998.

par. 7 It is the determination of the Secretary of State that the OAQ 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 §22-5-4(a)(17) reads:

To promulgate legislative rules, in accordance with the provisions of §29A-1-1 et of this code.

par. 9 It is the determination of the Secretary of State that the OAQ 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.

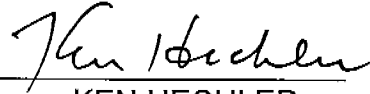
par. 12 The facts and circumstances as presented by the §OAQ are as follows:

40CFR51.390 requires that states adopt criteria and procedures for making transportation conformity determinations that are consistent with the federal transportation conformity rule. Section 51.390 specifies that such adoption be submitted to U.S. EPA by 12 months after publication of amendments to 40 CFR Part 93, Subpart A (last revised August 15, 1997) which is August 15, 1998. Failure to adopt the transportation conformity provisions in a timely manner would probably lead to U.S. EPA issuing a "finding of deficiency" on W. Va's air quality State Implementation Plan (SIP). If the deficiency were left uncorrected, then U.S. EPA would also impose sanctions including withholding federal highway funds.

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). . . federal time limitation.

par. 14

This decision shall be cited as Emergency Rule Decision 12-98 or ERD 12-98 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Office of Air Quality, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
Secretary of State

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OFFICE OF THE SECRETARY OF STATE

OCT 5 2 29 PM '98

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