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October 17, 2012

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Department of Agriculture

RULE: New Rule, 61CSR28, Poultry Litter and Manure Movement into Primary Poultry Breeder Rearing Areas

DATE FILED AMENDMENT TO AN EMERGENCY RULE: September 13, 2012

DATE ORIGINALLY FILED AS AN EMERGENCY RULE: July 11, 2012

DECISION NO. 21-12

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.

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 21-12)

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- par. 1 The West Virginia Department of Agriculture (Agriculture) has filed the above amendment to 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 Agriculture filed this emergency rule with supporting documents with the Secretary of State September 13, 2012 and with the LRMRC September 13, 2012.
- par. 7 It is the determination of the Secretary of State that Agriculture 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 §19-9-2 reads:

§19-9-2. Duties and powers of commissioner.

It shall be the duty of the commissioner, and he shall have authority:

(a) To prevent, suppress, control and eradicate any communicable diseases of animals or poultry;

- (b) To make and enforce such rules and regulations as may be necessary to effectuate the provisions of this article;*
- (c) To collect and disseminate information and statistics by means of circulars and bulletins on the prevalence and control of animal and poultry diseases and their treatment, the proper care and sanitation of stables and other buildings, so as to prevent the existence and spread of communicable diseases among such animals and poultry, and such other information relative thereto as will be of value to the stock industry of the state;*
- (d) To make or cause to be made any investigations he may deem advisable regarding the causes and methods of preventing, controlling and eradicating diseases of animals or poultry, and exercise such other powers and perform such other duties as may be proper or necessary to prevent the spread of, eradicate or control any communicable disease among animals or poultry, including the power to promulgate, issue, and enforce regulations prohibiting the feeding of garbage to swine unless said garbage has been thoroughly heated to a temperature of at least 212 degrees F for at least thirty minutes or treated in some other manner equally effective for the prevention of swine diseases and the protection of public health, such regulations not to apply to any individual who feeds only his own household garbage to swine which are raised for such individuals' own use;*
- (e) To prohibit the importation into this state of animals and poultry, when necessary to prevent the spread of disease;*
- (f) To cause general or special quarantine of premises and of animals and poultry to be established and maintained;*
- (g) To cause the disinfection of any premises;*
- (h) To cause the destruction of diseased animals, when such animals are deemed diseased as a result of physical examination or an approved test, and of infected personal property, and to regulate and prohibit the moving or transportation of such animals or property from one place to another in this state;*
- (i) To have charge of the enforcement of the provisions of this article and the laws of the state relating to diseases of animals and poultry, and the manufacture, preparation, storage, sale and offering for sale of the food and food products derived from diseased animals and poultry.*

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

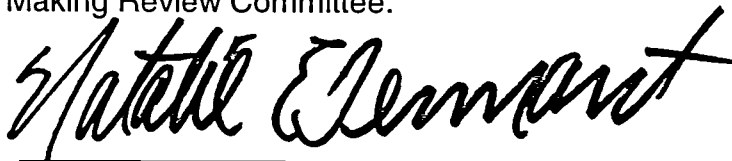
par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by Agriculture are as follows:

This rule is eminent to protect the primary breeder industry and protect their integrity for strict export and import requirements, by instilling protocols to ensure disease prevention. This primary breeder industry employs almost 200 personnel in a rural farming community, which would shut down this operation if the risk of infection or disease was not strictly controlled by regulating litter movement into the primary poultry breeder rearing areas. Local farmers can more readily have access to the fertilizer and nutrient enhancements provided by the tested litter at a much lower cost than commercial product. The required testing and prescribed methods of testing helps eliminate the presence of pathogens capable of causing harm to poultry or people.

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 "prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 21-12 or ERD 21-12 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Department of Agriculture, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

Entered 10/17/2012