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October 22, 2015

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Water Resources Division

RULE: Amendments, 47CSR2, Requirements Governing Water Quality Standards

DATE THIS EMERGENCY AMENDMENT FILED: SEPTEMBER 21, 2015

DATE ORIGINALLY FILED AS AN EMERGENCY RULE: JUNE 29, 2015

DECISION NO. 11-15

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.

A handwritten signature in black ink that reads "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 11-15)

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- par. 1 The Water Resources Division (Division) has filed the above amendment to an active emergency rule as an emergency.
- 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 Water Resources filed this emergency rule with supporting documents with the Secretary of State September 21, 2015 and with the LRMRC September 21, 2015.
- par. 7 It is the determination of the Secretary of State that the Water Resources 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 §§22-11-6(6) reads:

W. Va. Code §22-11-6(6) established that within twenty-four months from passage, DEP shall propose rules which establish a state-specific selenium standard that protects aquatic life. W. Va. Code §22-11-6(7) established that within 30 days from effective date of SB357, DEP shall promulgate an emergency rule revising aluminum criteria using a hardness-based equation.

par. 9 It is the determination of the Secretary of State that the Water Resources 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 Water Resources are as follows:

The West Virginia Department of Environmental Protection (DEP), Division of Water and Waste Management (DWWM) is proposing an emergency rule to address the aquatic life category B dissolved aluminum criteria and aquatic life category B selenium criteria in the state water quality standards rule "Requirements Governing Water Quality Standards," 47CSR2. This proposed emergency rule is in accordance with the mandates of SB562 (2012) and SB357 (2015), which amended W.Va. Code §22-11-6, and is necessary to prevent substantial harm to the public's interest in economical and meaningful expenditure of resources in environmental regulation. The current water quality standards for these two criteria are in some circumstances overprotective while under protective in others. Due to this situation, the regulated community is subject to DEP permit limits that cause them to incur unnecessary treatment costs and subject some of the State's waters to inclusion on EPA's list of impaired waters when such waters are not actually degraded. Registering waters on the impaired waters list initiates a regulatory process for the DEP that results in the significant expenditure of agency resources in cases where it is unwarranted. This diverts resources

from other programs where protection of water quality is, in fact, essential and vital. In addition, it has been found in low hardness environments, the current dissolved aluminum criteria have been found to be under protective in the safeguarding of the aquatic life uses. Therefore, based on the scientific justification outlined below, DWWM proposes to amend the acute and chronic dissolved aluminum standards from their current limits of 750 up/1 in Category B1 waters (warm water aquatic life) and 750 up/1 acute or 87 up/1 chronic in Category B2 waters (trout streams) to limits based on calculations established by using the equations explained below. DWWM further proposes to amend the chronic selenium standard to include fish whole-body concentration of 8.3 up/g and fish egg/ovary concentration of 20 ug/g, for both Category B1 (warm water aquatic life) and Category B2 (trout streams).

EPA supports the adoption of fish tissue-based selenium criteria, but EPA has several concerns with the values presented. EPA has reviewed the supporting documentation provided, Updated Freshwater Aquatic Life Criteria for Selenium (GEI Consulting Engineers and Scientists, March 2015), as well as WVDEP's "Scientific Justification of Revision of Selenium Standards" submitted to EPA on July 15, 2015. First, EPA requests that WVDEP provide additional justification on the source of its fish tissue-based criteria values proposed for adoption as they do not match the recommendations in the GEI Consultants' report and are not well explained in WVDEP's additional one page justification.

Second, EPA disagrees with several of WVDEP's apparent decisions with respect to the toxicity studies and data used to derive WV's proposed fish tissue criteria. EPA recommends that WVDEP review EPA's draft selenium criteria, published July 27, 2015 with particular attention to EPA's consideration of data for bluegill, brown trout, Dolly Varden and white sturgeon. These species all reside in WV waters (with the exception of Dolly Varden, but this species is a surrogate for brook trout, genus *Salvelinus*), so any criteria that WVDEP adopts should protect these species.

Third, because selenium concentrations in fish tissue are a result of selenium bioaccumulation via dietary exposure, there are two specific circumstances where the fish tissue concentrations do not fully represent potential effects on fish and the aquatic ecosystem: 1) "fishless" waters, and 2) waters with new or increased selenium inputs.

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" and "substantial harm"

par. 14

This decision shall be cited as Emergency Rule Decision 11-15 or ERD 11-15 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Water Resources Division.



NATALIE E. TENNANT
Secretary of State

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