



Betty Ireland
Secretary of State

OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

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June 24, 2008

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Environmental Protection Secretary's Office

RULE: Amendments, 60CSR3, Voluntary Remediation & Redevelopment Rule

DATE FILED AS AN EMERGENCY RULE: June 2, 2008

DECISION NO. 3-08

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.


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EMERGENCY RULE DECISION
(ERD 3-08)

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par. 1 The Department of Environmental Protection Secretary's Office (DEP) has filed the above amendments to an existing rule as 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 The DEP filed this emergency rule with supporting documents with the Secretary of State June 2, 2008 and with the LRMRC June 2, 2008.

par. 7 It is the determination of the Secretary of State that the DEP 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 §22-22-3 reads:

§22-22-3. Rule-making authority of the director.

Within one year after the effective date of this section, the director, in accordance with chapter twenty-nine-a of this code, shall propose, and subsequently may amend, suspend or rescind, rules that do the following:

(a) Establish an administrative program for both brownfield revitalization and voluntary remediation, including application procedures;

- (b) Establish procedures for the licensure of remediation specialists, including, but not limited to establishing licensing fees, testing procedures, disciplinary procedures and methods for revocation of licenses;*
- (c) Establish procedures for community notification and involvement;*
- (d) Establish risk-based standards for remediation;*
- (e) Establish standards for the remediation of property;*
- (f) Establish a risk protocol for conducting risk assessments and establishing risk-based standards. The risk protocol shall:
 - (1) Require consideration of existing and reasonably anticipated future human exposures based on current and reasonably anticipated future land and water uses and significant adverse effects to ecological receptor health and viability;*
 - (2) Include, at a minimum, both central tendency and reasonable upper bound estimates of exposure;*
 - (3) Require risk assessments to consider, to the extent practicable, the range of probabilities of risks actually occurring, the range or size of populations likely to be exposed to risk, and quantitative and qualitative descriptions of uncertainties;*
 - (4) Establish criteria for what constitutes appropriate sources of toxicity information;*
 - (5) Address the use of probabilistic modeling;*
 - (6) Establish criteria for what constitutes appropriate criteria for the selection and application of fate and transport models;*
 - (7) Address the use of population risk estimates in addition to individual risk estimates;*
 - (8) To the extent deemed appropriate and feasible by the director considering available scientific information, define appropriate approaches for addressing cumulative risks posed by multiple contaminants or multiple exposure pathways;*
 - (9) Establish appropriate sampling approaches and data quality requirements; and*
 - (10) This protocol shall include public notification and involvement provisions so that the public can understand how remediation standards are applied to a site and provide for clear communication of site risk issues, including key risk assessment assumptions, uncertainties, populations considered, the context of site risks to other risks and how the remedy will address site risks;**
- (g) Establish chemical and site specific information, where appropriate for purpose of risk assessment. Risk assessments should use chemical and site specific data and analysis, such as toxicity, exposure and fate and transport evaluations in preference to default assumptions. Where chemical and site specific data are not available, a range and distribution of realistic and plausible assumptions should be employed;*
- (h) Establish criteria to evaluate and approve methods for the measurement of contaminants using the practical quantitation level and related laboratory standards and practices to be used by certified laboratories;*
- (i) Establish standards and procedures for the utilization of certificates of completion, land use covenants and other legal documents necessary to effectuate the purposes of this article; and*
- (j) Establish any other rules necessary to carry out the requirements and the legislative intent of this act.*

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

The proposed emergency rule amends Table 60-3B, the De Minimis table, to ensure that contaminated properties being remediated over the next year under the Voluntary Remediation and Redevelopment program are cleaned up to levels that will protect the public's health. Recent changes have been made in the toxicity levels of several chemicals listed in the table, and if these new, more stringent levels are not enforced, the public's health may be seriously jeopardized.

The agency expects that several sites will be cleaned up under this program over the next year, and without an emergency rule in place, citizens living in the area may be placed at substantially higher risk than is now known to be scientifically acceptable. Several of the chemicals are known carcinogens, and it is thus critical to implement the proposed changes in the immediate future, as opposed to waiting until the spring of 2009 when the normal rulemaking cycle would permit the finalization of the revisions.

The table attached to the original filing illustrates the proposed changes with comparisons to the current table. It can be seen that the cleanup levels for several chemicals will become significantly more stringent than under the current rule. For the reasons discussed above, the agency's continuing use of the de minimis values in the current rule when it is known that such levels are harmful to human health, would not be in the best interest of the general public.

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). . . "to prevent substantial harm to the public interest"

par. 14

This decision shall be cited as Emergency Rule Decision 3-08 or ERD 3-08 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Department of Environmental Protection Secretary's Office, the Attorney General and the Legislative Rule Making Review Committee.


BETTY IRELAND
Secretary of State

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