

**KEN HECHLER**  
Secretary of State

**MARY P. RATLIFF**  
Deputy Secretary of State

**JAN CASTO**  
Deputy Secretary of State

Telephone: (304) 558-6000  
Corporations: (304) 558-8000  
FAX: (304) 558-0900  
E-Mail: WVSOS@Secretary.State.WV.US



**STATE OF WEST VIRGINIA**

**SECRETARY OF STATE**

Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

**WILLIAM H. HARRINGTON**  
Chief of Staff

**CATHERINE FREROTTE**  
Executive Assistant

**JUDY COOPER**  
Director, Administrative Law

**PENNEY BARKER**  
Supervisor, Corporations

(Plus all the volunteer  
help we can get)

October 29, 1999

**NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE**

**AGENCY:** Environmental Quality Board

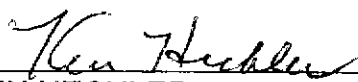
**RULE:** Amendment, Series 1, Requirements Governing Water Quality Standards

**DATE FILED AS AN EMERGENCY RULE:** October 18, 1999

**DECISION NO. 17-99**

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 in part, disapproved in part**. A copy of the complete decision with required findings is available from this office.

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE Oct. 29, 1999 *jc*  
ADMINISTRATIVE LAW DIVISION

  
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**EMERGENCY RULE DECISION**  
(ERD 17-99)

**AGENCY:** Environmental Quality Board  
**RULE:** Amendment, Series 1, Requirements Governing Water Quality Standards

**FILED AS AN EMERGENCY RULE:** October 18, 1999

- par. 1 The Environmental Quality Board (EQB) 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 EQB filed this emergency rule with supporting documents with the Secretary of State October 18, 1999 and with the LRMRC October 18, 1999.

par. 7 It is the determination of the Secretary of State that the EQB 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 §22B-3-4(a) reads:

*In order to carry out the purpose of this chapter and §22-1-1 et seq. of this code, the board shall promulgate legislative rules setting standards of water quality applicable to both the surface waters and groundwaters of this state. Standards of quality with respect to surface waters shall be such as to protect the public health and welfare, wildlife, fish and aquatic life, and the present and prospective future uses of such water for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof.*

par. 9 W. Va. Code §64-3-2 further states:

*The legislative rule filed in the state register on August 3, 1998, authorized under the authority of §22B-3-4 of this code, relating to the environmental quality board (requirements governing water quality standards, 46 CSR 1) is authorized until October 30, 1999: Provided, That the environmental quality board shall review, revise and propose, within this statutory deadline, and in accordance with the provisions of §29A-1-1 et seq. of this code, emergency and legislative rules to address the interpretive differences regarding the designation of category A waters and analyze the need for distance prohibitors for the policies of public drinking water intake.*

par. 10 It is the determination of the Secretary of State that the EQB has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (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. 12 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. 13

The facts and circumstances as presented by the EQB are as follows:

In 1999, the WV Legislature passed HB 2533, which, among other things, approved amendments to the Water Quality Standards rule. §64-3-2 authorized the rule until October 30, 1999 with a proviso that the Board review, revise and propose emergency and legislative rules to address the current designation of category A waters.

The proposed language clarifies that the use category applies to all waters of the state, except where that use has been removed through legislative rulemaking and is listed in section 7.2.d of the rule. This clarified language is consistent with the current application category A by the Office of Water Resources of the Division of Environmental Protection in the National Pollutant Discharge Elimination System (NPDES) permitting program. Additional language is proposed which provides an exemption from the manganese human health criterion above five miles of a known drinking water source. This change has been included to address concerns raised by the coal industry regarding the difficulty of meeting the manganese limit.

In considering the clarification of how Category A is to apply to the state's waters, the Board looked at a number of alternatives to the current implementation protocol. After reviewing a number of options, the Board believes that applying the watershed approach is a valuable way of implementing the public drinking water category. The Board will review the Zones of Critical Concern to be delineated around drinking water intakes as outlined in the Source Water Assessment and Protection Plan prepared by the WV Bureau for Public Health which applies the watershed approach to the waters of the State. The Board will then implement the reassessment of the Public A use category based on those Zones of Critical Concern. The projected completion of the delineations of the ZCC's is July of 1999. Until that time, the Board has determined that the current application of the use category to all streams of the state is appropriate in that it ensures full protection of those waters until a review of the protection zones in the SWAPP can be completed.

par. 14

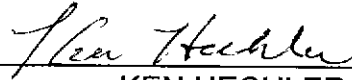
It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f) . . . mandated by the 1999 Legislature with the exception of 6.2.a.

par. 15

It is the determination of the Secretary of State that the proposed 6.2.a. does not qualify under the definition of an emergency as defined in §29A-3-15(f) because the agency exceeded the scope of the mandate found in §64-3-2 and also failed to show that an emergency exists for this section.

par. 16

This decision shall be cited as Emergency Rule Decision 17-99 or ERD 17-99 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Environmental Quality Board, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER  
Secretary of State

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE

THIS DATE Oct 29, 1999 JC

Entered

ADMINISTRATIVE LAW DIVISION