

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

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Jan 5 8 20 AM '99

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

Form #3

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

Division of Health

AGENCY: Department of Health and Human Resources TITLE NUMBER: 64

CITE AUTHORITY W. Va. Code §§16-13C-2(b) and 16-1-7

AMENDMENT TO AN EXISTING RULE: YES NO

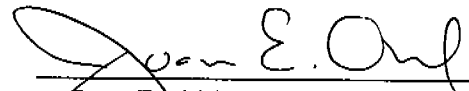
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 61

TITLE OF RULE BEING PROPOSED: Public Water Systems Capacity Development

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Joan E. Ohl, Secretary

\$0.00

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: January 5, 1998

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency name, Address & Phone No.) Department of Health and Human Resources

State Capitol Complex, Building 3, Room 265, Charleston, WV 25305

Telephone: (304) 558-3223

LEGISLATIVE RULE TITLE: Public Water Systems Capacity Development, 64CSR61

1. Authorizing statute(s) citation: WV Code §§ 16-13C-2(b) and 16-1-7

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

July 1 and November 13, 1998

b. What other notice, including advertising, did you give of the hearing?

Public notice was placed in newspapers.

c. Date of Public Hearing(s) or Public Comment Period ended:

July 31 and December 15, 1998

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X

No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing (be exact):

January , 1999

- f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all written correspondence regarding this rule (please type):

L. Arnold, Office of General Counsel

Department of Health and Human Resources

Building 3, Room 265, Capitol Complex

Charleston, West Virginia 25305

(304) 558-8934 FAX: (304) 558-1130 LArnold@WVDHHR.ORG

- g. IF DIFFERENT FROM ITEM 'f', please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule (please type):

Don Kuntz

Director, Environmental Engineering Division

Department of Health and Human Resources

815 Quarrier Street, Suite 418

Charleston, West Virginia 25301 (304) 558-2981

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:
- a. Give the date upon which you filed in the State Register a notice of the time and place a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefore?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

**STATEMENT OF CIRCUMSTANCES
WHICH REQUIRE THE PROPOSED RULE**

The federal government requires each state to have in effect by October 1st 1999 capacity development regulations in order to avoid a 20% reduction to the state in federal funds for the construction of public drinking water systems.

BRIEF SUMMARY OF THE RULE

The proposed legislative rule is a provision of the federal *Safe Drinking Water Act* and is required to be adopted by each state by October 1, 1999 to assure that federal funds are not reduced by 20%. This would result in less loan money being available for the construction of public drinking water systems in West Virginia. This Capacity Development rule is essentially a compilation of excerpts from existing state regulations and demonstrates that the state has sufficient "control points" to assure new water systems have the financial, technical and managerial capability or capacity to properly manage and operate the system. The Conference of State Legislatures is extremely active in assisting states in adopting the rule.

FISCAL NOTE FOR PROPOSED RULES

June 1998

Rule Title: Capacity Development for Public Water Systems

Type of Rule: Legislative Interpretive Procedural

Agency: Division of Health
Department of Health and Human Resources

Address: Capitol Complex Building #3
Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
Estimated Total Cost	\$	\$	\$	\$ 0	\$ 0
Personal Services					
Current Expense					
Repairs & Alterations					
Equipment					
Other					
Revenue				0	0

2. Explanation of above Estimates:

There are no costs or revenues associated with this rule.

3. Objectives of this Rule:

To meet the requirements of the federal *Safe Drinking Water Act*. States must have capacity development regulations in effect by October 1, 1999 to avoid the possibility of losing federal funds for the construction of public water systems.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government:

None.

**B. Economic Impact on Political Subdivisions; Specific Industries;
Specific Groups of Citizens:**


None.

C. Economic Impact on Citizens/Public at Large:

The rule will help assure better management and operation of the state's public water systems.

Date: 6/30/98

Signature of Agency Head or Authorized Representative:


Joan E. Qhl, Secretary
Department of Health and Human Resources

**RESPONSE TO COMMENTS RECEIVED ON
WV Legislative Rule, Title 64, Series 61
Public Water Systems Capacity Development
WV Code §16-13C-2(b)
December 1998**

COMMENTER

Martin & Seibert, L.C. on behalf of
The West Virginia Water Well Association
Letter dated December 14, 1998

Comment #1

§4.5 and 4.6 Commenter opposes these sections due to the possibility that future private landowners may have to abandon a private, individual homeowner water well if a public water system becomes available to them. The possibility of declaring an individual homeowner water well a "nuisance" and ordering abandonment is also raised.

Response

The proposed rule deals only with public water systems and not individual homeowner water wells and landowners. The rule contains no language relating to individual homeowner water wells. Public water systems are typically those which serve municipalities, public service districts, etc. and are regulated by the federal *Safe Drinking Water Act* for which the state has primacy. The term "*nuisance*" (as used in this rule) clearly applies only to public water systems and relates to protecting public health.

Recommendation

WE RECOMMEND THE PRESENT LANGUAGE BE RETAINED.

MARTIN & SEIBERT, L.C.

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Since 1908

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E. Kay Fuller - 262-3209

December 14, 1998

L. Arnold, Office of General Counsel
Department of Health & Human resources
Capitol Complex - Building 3 Room 265
Charleston, WV 25305

Re: Public Water Systems Capacity Development
64 CSR 61; W.Va. Code §16-13C-2(b)

Ladies and Gentlemen:

This firm has been retained to represent the interests of the West Virginia Water Well Association. In that regard, I have reviewed the Department's proposal to the Legislative Rule-Making Review Committee with respect to a proposed amendment to W.Va. Code §16-13C-2(b).

Please be advised that the Water Well Association is opposed to the proposed amendment to the extent it impacts detrimentally on well drillers in this State. The well drillers of this State must meet exceptionally high requirements to become licensed and maintain standards of licensing and professionalism higher than many other professionals operating in West Virginia. The well drillers constantly deal with safe water and other issues that impact every citizen of this State and strive to deliver quality services and most importantly the best drinking water available. The proposed amendment, however, could stymie many of these efforts and verges upon being unconstitutional.

For example, Sections 4.5 and 4.6 grant authority to the director to issue an order requiring a change in the source of water supply and permits the director what appears to be unfettered discretion in determining what constitutes a nuisance in publicly or privately owned water sources. The Association opposes any legislation that could be later interpreted to require private landowners to abandon wells if a public water system becomes available to them. This infringes upon every citizen's right to contract with another and deprives every citizen of this State of constitutionally-protected property rights. Obviously, it detrimentally impacts well drillers economically as well.

Additionally, Section 4.6 permits an investigation and the declaration that a water system is a nuisance. "Nuisance" is a legal term which requires proof to a requisite standard and which

Practicing in West Virginia, Maryland, Virginia, Pennsylvania and the District of Columbia

Summary of Changes After Notice of Public Comment Period

1. Rule references in §§1.6.b through 1.6.k were corrected.
2. A minor change was made at the end of the first sentence of §2.1, and the second and third sentences were added.
3. A grammatical correction was made to §3.3.
4. Section 3.4 was expanded.
5. A grammatical correction was made to §3.8.
6. Subsection 3.10 was rewritten.
7. Grammatical corrections were made to §§3.11, 3.12 and 3.12.a.1.
8. Paragraph 3.12.a.2. was clarified.
9. Subsections 4.1 and 4.2 were rewritten.
10. Minor corrections were made to §§4.4 and 4.5.
11. Subsection 4.6 was deleted, and §4.7 was renumbered §4.6.
12. Subsection 5.1 was deleted, and the remainder of the section was renumbered.
13. Subsections 5.2 and 5.3 were revised.
14. Subdivision 5.3.r was clarified.
15. Subdivision 5.3.y was slightly modified.
16. Subsections 5.4, 5.5 and 6.1 were revised.
17. Subsection 6.2 and §6.2.c were slightly modified.
18. Subsection 7.1 was revised.
19. The citation in §8.1 was corrected.
20. Section 9 was deleted.

**TITLE 64
LEGISLATIVE RULES
DIVISION OF HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

**SERIES 61
PUBLIC WATER SYSTEMS CAPACITY DEVELOPMENT**

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
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**TITLE 64
LEGISLATIVE RULES
DIVISION OF HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

**SERIES 61
PUBLIC WATER SYSTEMS CAPACITY DEVELOPMENT**

TABLE OF CONTENTS

§64-61-1. General.	1
§64-61-2. Application and Enforcement.	2
§64-61-3. Definitions.	2
§64-61-4. Capacity Development of New Public Water Systems.	4
§64-61-5. Capacity Development of Existing Public Water Systems.	5
§64-61-6. Inspections and Sanitary Surveys of Public Water Systems.	6
§64-61-7. Penalties.	6
§64-61-8. Administrative Due Process.	7

64CSR61
TITLE 64
LEGISLATIVE RULES
DIVISION OF HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 61
PUBLIC WATER SYSTEMS CAPACITY DEVELOPMENT

FILED
JUN 9 8 20 AM '99
OFFICE OF THE SECRETARY OF STATE

§64-61-1. General.

1.1. Scope -- This legislative rule establishes state standards and procedures and adopts national safe drinking water standards for capacity development. The 1996 Safe Drinking Water Act amendments require states to ensure that all new community water systems and new nontransient noncommunity water systems demonstrate technical, managerial, and financial capacity to be able to comply with national drinking water regulations. Further, the Safe Drinking Water Act (SDWA) amendments require states to develop a strategy to address the capacity of all public water systems to include:

- 1.1.a. Determining which public water systems need help and in what order of priority;
- 1.1.b. Describing enhancers and inhibitors of developing capacity;
- 1.1.c. Determining a plan of action to help systems in need comply with the SDWA;
- 1.1.d. Establishing a baseline and measuring program; and
- 1.1.e. Identifying, in as much as possible, all persons who are interested in or involved with capacity development.

1.2. Authority -- West Virginia Code §§16-13C-2(b) and 16-1-7.

1.3. Filing date --

1.4. Effective date --

1.5. Administration -- This rule is administered by the division of health of the department of health and human resources.¹

¹The department of health and human resources (DHHR) was created by the Legislature's reorganization of the executive branch of state government in 1989. The department of health was renamed the division of health and made a part of the DHHR (WV Code § 5F-1-1 et seq.). Administratively, within the DHHR, the bureau for public health through its commissioner carries out the public health function of the division of health.

64CSR61

1.6. References --

- 1.6.a. West Virginia Code §16-1-9a.
- 1.6.b. West Virginia Division of Health, Public Water Systems, 64CSR3.
- 1.6.c. West Virginia Division of Health, Drinking Water Treatment Revolving Fund, 64CSR49.
- 1.6.d. West Virginia Division of Health, Public Water Supply Operator Regulations, 64CSR4.
- 1.6.e. West Virginia Division of Health, Water Well Regulations, 64CSR19.
- 1.6.f. West Virginia Division of Health, Water Well Design Standards, 64CSR46.
- 1.6.g. West Virginia Division of Health, Intended Use Plan for the West Virginia Drinking Water Treatment Revolving Fund.
- 1.6.h. West Virginia Division of Health, Design Standards for Public Water Supply System, 64CSR42.
- 1.6.i. West Virginia Division of Health, Mobile Home Parks, 64CSR40.
- 1.6.j. West Virginia Public Service Commission, Rules and Regulations for the Government of Water Utilities, 150CSR7.
- 1.6.k. West Virginia Division of Health, Design, Information, and Procedural Manual for Mobile Home Parks, 64CSR41.

§64-61-2. Application and Enforcement.

2.1. Application - This rule applies to all community water systems and nontransient noncommunity water systems as defined in §3 of this rule. This rule does not apply to private water wells. This rule does not require consumers serviced by private water wells to abandon their wells nor to connect to any new or existing public water system or community water system as defined in §3 of this rule.

2.2. Enforcement - This rule is enforced by the director of the division of health.

§64-61-3. Definitions.

3.1. Capacity -- Capacity refers to a water system's ability to consistently provide safe drinking water for its customers. A water system must have the technical abilities, managerial skills, and financial resources to meet state and federal drinking water regulations.

64CSR61

3.2. Capacity development -- A program and a tool which helps to ensure all community public water systems and nontransient noncommunity water systems demonstrate the technical, managerial, and financial capacity to comply with Safe Drinking Water Act requirements and to benefit their customers.

3.3. Community water system -- A public water system which serves at least fifteen (15) service connections used by year-round residents or regularly serves at least twenty-five (25) year-round residents.

3.4. Director -- The director of the division of health or his or her designees of the division who he or she has charged with enforcement of this rule.

3.5. Existing public water system -- Any community water system or nontransient noncommunity water system which came into existence prior to October 1, 1999.

3.6. Financial capacity -- The financial resources of the water system, including but not limited to the revenue sufficiency, credit worthiness, and fiscal controls.

3.7. Managerial capacity -- The management structure of the water system, including but not limited to ownership accountability, staffing, organization, and effective external linkages.

3.8. New public water system -- Any community or nontransient noncommunity water system which comes into existence on or after October 1, 1999.

3.9. Noncommunity water system -- Any public water system that is not a community water system.

3.10. Nontransient noncommunity water system -- A public water system that is not a community water system and that regularly serves the same twenty-five (25) or more persons over six (6) months per year.

3.11. Person -- An individual, partnership, association, syndicate, company, firm, trust, corporation, county or municipal government, public or private institution, department, division, bureau, agency, federal agency, or any other entity recognized by law.

3.12. Public water system -- A system which provides water to the public for human consumption through pipes or other constructed conveyances, if the system has at least fifteen (15) service connections or regularly serves at least twenty-five (25) individuals.

3.12.a. Public water system includes:

3.12.a.1. Any collection, treatment, storage, and distribution facilities under the control of the operator of a system and used primarily in connection with the system; and

3.12.a.2. Any collection or pretreatment storage facilities not under the control of the operator of the system which are used primarily in connection with the system.

64CSR61

3.12.b. A public water system does not include a system which meets all of the following conditions:

3.12.b.1. It consists only of distribution and storage facilities and does not have any collection and treatment facilities;

3.12.b.2. It obtains all of its water from, but is not owned or operated by, a public water system which otherwise meets the definition;

3.12.b.3. It does not sell water to any person; and

3.12.b.4. It is not a carrier conveying passengers in interstate commerce.

3.13. Safe Drinking Water Act – A federal statute commonly known as the “Safe Drinking Water Act” - 42 USC 300f et seq.

3.14. Sanitary Survey -- An on-site review of the water source, facilities, equipment, operation and maintenance of a public water system for the purpose of evaluating the adequacy of the source, design, facilities, equipment, operation and maintenance for producing and distributing drinking water, as described in the federal regulations adopted in this rule.

3.15. Technical capacity -- The physical infrastructure of the water system, including but not limited to the source water adequacy, the infrastructure adequacy (including wells, source water intakes, or both, treatment, storage, and distribution), and the ability of system personnel to implement the requisite technical knowledge.

§64-61-4. Capacity Development of New Public Water Systems.

4.1. A person shall obtain a permit from the director before constructing or awarding a contract to construct a public water system. A person shall obtain approval in writing from the director before establishing a public water system, and the system shall be installed or established in accordance with the plans, specifications and instructions issued by, or approved in writing by, the director.

4.2. A person seeking a permit to construct shall submit to the director an application in accordance with the rule referenced in subdivision 1.6.b. of this rule. The application shall include an engineering report which provides a detailed discussion of the proposed system's capacity to operate, with an emphasis on financial capacity. The engineer, owner, or both shall provide proof to the director that the owner has the technical, managerial, and financial capacity to operate and maintain the new system. The director shall consult with the public service commission and the water development authority, as well as other affiliated agencies as necessary, concerning the financial and managerial capacity.

4.3. A permit to construct may be revoked by the director for failure of the public water system to comply with this rule.

4.4. The public water system shall be constructed in accordance with the plans and

specifications approved by the director in accordance with the rule referenced in subdivision 1.6.h. of this rule.

4.5. The director may issue an order requiring a change in the source of the water supply for the system or in the manner of collection, treatment, storage, or distribution facilities of the system before delivery to the consumer, as may be necessary to safeguard the public health.

4.6. A new public water system shall not commence operation without written approval to proceed from the director.

§64-61-5. Capacity Development of Existing Public Water Systems.

5.1. The director may develop a program for the issuing of a permit to operate a public water system. The director may revoke a permit for failure of the permittee to comply with the requirements of this rule or the requirements of the rule Division of Health, Public Water Systems, 64CSR3. The director shall not issue a permit until he or she has reasonable assurance that the system has achieved or is actively pursuing the technical, managerial, and financial capacity needed to operate in accordance with this rule.

5.2. The capacity of a system shall be assessed using the following indicators:

- 5.2.a. Compliance data;
- 5.2.b. Construction permits;
- 5.2.c. Sanitary surveys;
- 5.2.d. Annual reports;
- 5.2.e. Water system plans or business plans;
- 5.2.f. Compliance reports;
- 5.2.g. Self-assessment/peer reviews;
- 5.2.h. Regional plans;
- 5.2.i. Criteria used by lenders;
- 5.2.j. Financial viability assessment methods;
- 5.2.k. Operator certification;
- 5.2.l. Financial and managerial training;
- 5.2.m. Permit application data;
- 5.2.n. Capital improvement plans;
- 5.2.o. Comprehensive performance evaluation;
- 5.2.p. Consumer complaint records;
- 5.2.q. State-wide studies of water quality or quantity;
- 5.2.r. State revolving fund loan application;
- 5.2.s. Budgeting worksheets;
- 5.2.t. Annual financial reports;
- 5.2.u. Source water assessment programs;
- 5.2.v. Water conservation plans;
- 5.2.w. Emergency response plans;
- 5.2.x. Certificates of convenience and necessity (CCN);
- 5.2.y. Review of audit reports;

64CSR61

- 5.2.z. Bond issue reviews;
- 5.2.aa. Rate reviews and approvals;
- 5.2.bb. Credit rating services;
- 5.2.cc. Financial assurance mechanisms;
- 5.2.dd. Consumer confidence reports; and
- 5.2.ee. Interviews with personnel familiar with the system.

5.3. A prospective new owner of a public water system shall submit to the director a written application to transfer the permit. The application shall be submitted at least fifteen (15) calendar days before the proposed change of ownership.

5.4. A public water system shall conspicuously post at its treatment plant a copy of the current permit to operate. The original shall be kept on file and available to the director upon request.

§64-61-6. Inspections and Sanitary Surveys of Public Water Systems.

6.1. Public water systems shall be inspected as scheduled by the director, and sanitary surveys shall be conducted by the director.

6.2. Surveys will be performed with in-depth emphasis on capacity development. As a minimum, inspectors shall evaluate the following:

6.2.a. The reliability of the system's overall infrastructure, including source water protection, treatment, distribution system, and storage;

6.2.b. The treatment process schematic diagrams and determination of the appropriateness of the treatments given the sources used and raw water quality;

6.2.c. The distribution system maps and plan, including operation and maintenance schedules and procedures;

6.2.d. Pump operating condition, including the presence of reserve pumps;

6.2.e. The technical competence of the system operator;

6.2.f. Overall management and operations of the system;

6.2.g. Safety practices; and

6.2.h. Records and record keeping.

§64-61-7. Penalties.

7.1. Penalties are as provided in WV Code §16-1-18. In addition, the director may seek injunctive relief in the circuit court of the county in which all or part of the public water system is situated for threatened or continuing violations.

§64-61-8. Administrative Due Process.

8.1. Those persons adversely affected by the enforcement of this rule desiring a contested case hearing to determine any rights, duties, interests, or privileges shall do so in a manner prescribed in the rule, Division of Health, Rules of Procedure for Contested Case Hearings and Declaratory Rulings, 64CSR1.