

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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AUG 3 2 32 PM '98

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**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 X

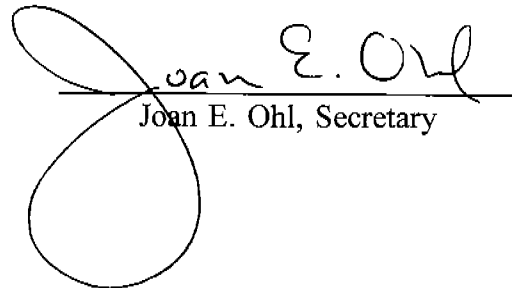
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

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

\$5.40

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: July 28, 1998

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

Division of Health

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, 64

CSR 61.

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

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

July 1, 1998

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

Public Notice was placed in newspapers. Notice was given in the Division's

newsletter (which is sent to all public water systems) and other affiliated

newsletters and organization publications.

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

July 31, 1998

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

Attached _____ No comments received X

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

Aug. 3, 1998

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

Marsha Dadisman, Acting Director

Regulatory Development/Department of Health and Human Resources

Building 3, Room 265, Capitol Complex

Charleston, West Virginia 25305

(304) 558-3223 FAX: (304) 558-1130 MDadisman@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

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.

**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.

**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
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

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

**SERIES 61
PUBLIC WATER SYSTEMS CAPACITY DEVELOPMENT**

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FILED

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

Aug 3 2 32 PM '98

SERIES 61
PUBLIC WATER SYSTEMS CAPACITY DEVELOPMENT

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

1.6. References --

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.

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- 1.6.a. West Virginia Code §16-1-9a.
- 1.6.b. West Virginia Public Water System Regulations, Title 64, Series 3, 1995.
- 1.6.c. West Virginia Drinking Water Treatment Revolving Fund Legislative Rule, Title 64, Series 49, 1998.
- 1.6.d. West Virginia Public Water Supply Operator Regulations, Title 64, Series 4, 1989.
- 1.6.e. West Virginia Water Well Regulations, Title 64, Series 19, 1989.
- 1.6.f. West Virginia Water Well Design Standards, Chapter 16-1, Series 3, 1984.
- 1.6.g. West Virginia Intended Use Plan for the West Virginia Drinking Water Treatment Revolving Fund, 1997.
- 1.6.h. West Virginia Design Standards for Public Water Supply System, Title 64, Series 42, 1970.
- 1.6.i. West Virginia Mobile Home Park Regulations, West Virginia Board of Health, Title 64, Series 40, 1971.
- 1.6.j. West Virginia Public Service Commission Rules and Regulations for the Government of Water Utilities, Title 150, Series 7, 1996.
- 1.6.k. West Virginia Design, Information, and Procedural Manual for Mobile Home Parks, Title 64, Series 41, 1971.

§64-61-2. Application and Enforcement.

2.1. Application - This rule applies to all community water systems and nontransient noncommunity water systems as defined below.

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.

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 designee.

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 came 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 at least twenty-five (25) of the same persons over six (6) months per year.

3.11. Person -- 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 such 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 such system; and

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

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

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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. No person may construct or award a contract for construction of, a public water system without first obtaining a permit from the director. No person shall install or establish any public water system in this state unless that same is installed or established in accordance with plans, specifications, and instructions issued by, or approved in writing by the director or his or her authorized representative.

4.2. Application for a permit to construct shall be made to the director in accordance with the reference 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 will be required to provide proof to the director that the owner has the technical, managerial, and financial capacity to operate and maintain the new system. The director will 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 reference in subdivision 1.6.h. of this rule.

4.5. The director has the authority to 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. Whenever the director or his authorized representative finds upon investigation that any system or method of water supply, whether publicly or privately owned, is such as to endanger the public health or is creating a nuisance that is detrimental to health, the director or his authorized representative shall be empowered to issue an order requiring the owner of the system or method to make such alterations, within a reasonable time, as may be necessary to correct the improper condition.

4.7. 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. A public water system shall be operated in accordance with this rule.

5.2. The director has the authority to develop a program for the issuing of a permit to operate a public water system. The permit may be revoked for failure to comply with the requirements of this rule or the requirements for Public Water Systems, 64 CSR 3. No permit shall be granted until after the director 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.

5.3. The following indicators may be used to assess the capacity of a system:

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

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- 5.3.w. Emergency response plans;
- 5.3.x. Certificates of convenience and necessity (CCN);
- 5.3.y. Review of audit report;
- 5.3.z. Bond issue reviews;
- 5.3.aa. Rate reviews and approvals;
- 5.3.bb. Credit rating services;
- 5.3.cc. Financial assurance mechanisms;
- 5.3.dd. Consumer confidence reports; and
- 5.3.ee. Interviews with personnel familiar with the system.

5.4. In the event of a proposed change in the ownership of a public water system, a written application to transfer the permit to operate shall be made to the director by the new owner at least fifteen (15) calendar days before the proposed change.

5.5. A copy of the current permit to operate shall be posted in a conspicuous place at the public water system's treatment plant. The original shall be kept on file and available to the director or his representative 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 in accordance with the federal regulations adopted in this rule.

6.2. Surveys will be performed with in depth emphasis on capacity development. As a minimum, inspectors will 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 maintain 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.

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7.1. Any person who violates any provision of this rule or orders issued under this rule, is guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than twenty-five dollars (\$25) nor more than two hundred dollars (\$200), with each day's violation constituting a separate offense. In addition, the director or his authorized representative 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. For a willful violation of this rule or orders issued under this rule, a person, upon finding thereof by the circuit court of the county in which the violation occurs, is subject to a civil penalty of not more than five thousand dollars (\$5000), with each day's violation permitting a separate penalty.

§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 Rules of Procedure for Contested Case Hearings and Declaratory Rulings, West Virginia Administrative Rules, Division of Health, 64 CSR 1.

§64-61-9. Severability.

9.1. The provisions of this rule are declared to be severable. If any provision of this rule is held invalid, the remaining provisions remain in effect.

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. Ohi, Secretary
Department of Health and Human Resources

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: Division of Health, Department of Health and Human Resources

Subject: Public Water Systems Capacity Development, 64CSR61

PERTINENT DATES

Filed for public comment: July 1, 1998
Public comment period ended: July 31, 1998
Filed following public comment period: August 3, 1998
Filed LRMRC: August 3, 1998
Filed as emergency:

Fiscal Impact: None

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OFFICE OF THE SECRETARY OF STATE

ABSTRACT

The proposed rule is new. The following is a section by section synopsis of the proposed rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule. It also references various relevant statutes, rules and procedures.

Section 2 states that the proposed rule applies to all community water systems and nontransient noncommunity water systems.

Section 3 defines terms.

Section 4 requires persons desiring to construct a new public water system to obtain a permit from the Director and obtain approval of the plans and specifications from the Director. It requires a new public water system to obtain approval of the Director prior to commencing operation.

Section 5 states that the Director has the authority to develop a program for issuing permits to existing public water systems. It sets forth various indicators which the Director may use to assess the capacity of the system.

Section 6 requires that public water systems be inspected and sanitary surveys conducted by the Director in accordance with federal regulations. It sets forth specific areas which must be addressed during a survey.

Section 7 provides penalties for a violation of the proposed rule.

Section 8 references the appropriate rule for administrative due process.

Section 9 is an necessary severability section.

AUTHORITY

Statutory authority: W.Va. Code, §16-13C-2, which provides, in part, as follows:

...(b) The division of health shall propose rules for legislative approval in accordance with provisions of article three, chapter twenty-nine-a of the code for the purpose of effecting the administration of the provisions of this article. The rules shall include, but are not limited to, establishing requirements for: (1) Capacity development; (2) environmental review; (3) disadvantaged community designation; (4) receipt and disbursement of fund moneys; and (5) establishment of a drinking water treatment revolving fund program to direct the financial management of the fund to water systems and establish the interest rates and repayment terms of the loans...

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes. The proposed rule must be adopted by October 1, 199 under provisions of the federal Safe Drinking Water Act so that State funds are not reduced by 20%.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has technical modifications to suggest. The proposed rule purports to adopt federal regulations by reference, but Counsel was unable to find the reference. It is also not clear whether the Director is permitting existing systems or whether he is just keeping his options open. Existing systems are required to be operated in accordance with the proposed rule, but Counsel cannot determine what the operating requirements are.