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(Plus all the volunteer
help we can get)

STATE OF WEST VIRGINIA
SECRETARY OF STATE
Charleston 25305

September 23, 1988

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

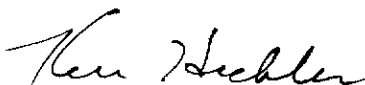
AGENCY: Department of Highways

RULE: Amendment to Section 1; Particular Functions of the
Commissioner of Highways

DATE FILED AS AN EMERGENCY RULE: August 12, 1988

DECISION NO. 18-88

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.



KEN HECHLER
Secretary of State
FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Sept 23, 1988
ADMINISTRATIVE LAW DIVISION



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SECRETARY OF STATE
Charleston 25305

DECISION EMERGENCY RULE DECISION
(ERD 16-88)

AGENCY: Department of Highways
RULE: Amendment to Series 1, Particular Functions of the
Commissioner of Highways
FILED AS AN EMERGENCY RULE: August 12, 1988

- par. 1 The DOH has filed amendments to the above rule as an emergency.
- par. 2 West Virginia 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(a)].
- par. 4 (A) Procedural Compliance: WV 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 DOH (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the ERD 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 DOH has filed this emergency rule with supporting documents with the Secretary of State on August 12, 1988 and with the LRMRC on August 12, 1988.

par. 7 It is the determination of the Secretary of State that the DOH has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §17-2A-8(24) reads in part:

§17-2A-8. Powers, duties and responsibilities of commissioner.

(24) Make and promulgate rules and regulations for the government and conduct of personnel, for the orderly and efficient administration and supervision of the state road program and for the effective and expeditious performance and discharge of the duties and responsibilities placed upon him by law.

par. 9 It is the determination of the Secretary of State that the DOH has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

(g) 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 DOH are as follows:

This filing is being made in order to comply with changes to the Code of Federal Regulations, 49 CFR Part 23 of the U. S. Department of Transportation. The DOT regulations became effective October 21, 1987; therefore, this rule is being filed to comply with a time limitation established by federal statute.

Notable changes include: a renaming of Minority Business Enterprises to Disadvantaged Business Enterprises which, by federal statute, identifies women, like all other currently designated groups, as presumed to be socially and economically disadvantaged for program purposes; a redefining of "small" firms to those with annual billings less than \$7,500.00 over the last three years; and a revising of the Certification Application, EO Form 475 to supply DBE information required by federal statute.

Additionally, references to the Executive Secretary-Planning Manager, formerly an office of the Department, have been deleted and the referenced responsibilities reassigned. Finally, the listings of the Department's Districts and the District Engineers' addresses have been updated.

par. 13 It is the determination of the Secretary of State that this proposal meets the standards for emergency rule.

par. 15 This decision shall be cited as Emergency Rule Decision 18-88 or ERD 18-88 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the DOH, the Attorney General and the Legislative Rule Making Review DOH.

Ken Hechler

KEN HECHLER
SECRETARY OF STATE

FILED IN THE OFFICE OF
THE SECRETARY OF STATE

THIS DATE Sept 23, 1988
ADMINISTRATIVE LAW DIVISION

Entered _____

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July 19, 1989

Fred VanKirk
Acting Division Administrator
Division of Highways
Department of Transportation
State Capitol
Charleston, WV 25301

Dear Mr. VanKirk:

West Virginia Code §29A-3-15(3) states:

"The agency has not previously filed and fails to file the proposed rule with the legislative rule-making review committee within one hundred eighty days of the date the proposed rule was filed as an emergency rule, in which case the emergency rule expires on the one hundred eighty-first day."

In checking my files, I found the Department of Highways, Series 1 Rule, "Regulations Pertaining to Particular Functions of the Commissioner of Highways," was filed on August 12, 1989, but there has not been an Agency Approved rule filed with the Secretary of State and fifteen copies with the Legislative Rule-Making Review Committee. Therefore this emergency rule died February 9, 1989.

The Code further states in 29A-3-15(c) that:

"Once an emergency rule expires due to the conclusion of fifteen months or due to the effect of subdivision (1)(2) (3) or (4), subsection (a) of this section, the agency may not refile the same or similar rule as an emergency rule."

This notice will appear in the Register dated July 21, 1989.

Sincerely,

Judy Cooper, Director
Administrative Law Division