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(Plus all the volunteer
help we can get)

August 10, 2000

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: DIVISION OF HIGHWAYS

RULE: SERIES 6, AMENDMENTS, REGS RELATING TO USE OF STATE ROAD RIGHTS OF WAYS AND AREAS ADJACENT THERETO

DATE FILED AS AN EMERGENCY RULE: JULY 12, 2000

DECISION NO. 8-00

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


KEN HECHLER
Secretary of State

OFFICE OF THE
SECRETARY OF STATE
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EMERGENCY RULE DECISION
(ERD 8-00)

AGENCY: DIVISION OF HIGHWAYS
RULE: SERIES 6, AMENDMENTS, REGS RELATING TO THE USE OF STATE ROAD RIGHTS OF WAY AND AREAS ADJACENT THERETO

FILED AS AN EMERGENCY RULE: JULY 12, 2000

- par. 1 The Division of Highways (Division) 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 Division filed this emergency rule with supporting documents with the Secretary of State July 12, 2000 and with the LRMRC July 12, 2000.

par. 7 It is the determination of the Secretary of State that the Division 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 §17-4-17b reads:

(a) Whenever the commissioner of highways determines that any public utility line or facility located upon, across or under any portion of a state highway needs to be relocated in order to accommodate a federal-aid interstate or Appalachian highway project, he or she shall notify the public utility owning or operating the facility which shall relocate the same in accordance with the order of the commissioner. The cost of the relocation shall be paid out of the state road fund in all cases involving the interstate or the Appalachian system where proportionate reimbursement of the cost shall be obtained by the commissioner of highways from the United States pursuant to the "Federal Aid Highway Act of 1956" or the "Appalachian Regional Development Act of 1965", as amended, and all acts amendatory or supplementary thereto: Provided, That the cost of any relocation of municipally owned utility facilities and water or sanitary districts or authorities shall be paid out of state road funds in any case involving any federal-aid system where proportionate reimbursement of such costs shall be obtained by the commissioner of highways from the United States.

(b) For the purposes of this section, the term, "cost of relocation" includes the entire amount paid by the utility, exclusive of any right-of-way costs incurred by the utility, properly attributable to the relocation after deducting therefrom any increase in value of the new facility and salvage value derived from the old facility.

The cost of relocating facilities, as defined in this section, in connection with any federal-aid interstate or Appalachian highway project is hereby declared to be a cost of highway construction.

(c) The commissioner of highways is hereby authorized to include within the cost of highway construction the cost of relocation necessarily incurred by any public utility and any pipeline company subject to the jurisdiction of the federal energy regulatory commission, in relocating any public utility line, pipeline or facility as a result of the construction of any fully or partially controlled access highway as a part of the national highway system as authorized by the "Federal Intermodal Surface Transportation Efficiency Act of 1991", and all acts amendatory and supplementary thereto as of March 12, 1993. The provisions of §21-5A-1 et seq. apply to all work performed pursuant to the provisions of this subsection.

(d) Any notice required by this section is sufficient if given by registered or certified mail, return receipt requested, addressed to any officer of the utility or to an individual if the person to whom the notice is required is an individual.

par. 9 The W. Va. Code further states in §17-20:

(a) Legislative rules proposed pursuant to §17-20-1 of this article shall provide for the placement of markers in a manner that increases public awareness of highway safety and promotes the safe use of the highways and their right-of-way.

par. 10 It is the determination of the Secretary of State that the Division 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 Division are as follows:

The filing is necessary to comply with time limitations established by changes to state code. HB 4049 was passed March 11, 2000 and HB 4063 was passed March 9, 2000. The Governor signed HB 4049 and HB 4063 on March 20, 2000. The effective dates of these bills were 90 days from passage on June 9, 2000 and June 7, 2000, respectively.

Additionally, public safety is a consideration with the code changes of HB 4063, which pertains to the placement of Roadside Memorial Markers. The bill states that "legislative rules proposed pursuant to section one of this article shall provide for the placement of markers in a manner that increases public awareness of highway safety and promotes the safe use of the highways and their rights-of-way.

par. 14. The Amendments of W. Va. Code §17-4-17b went into effect on June 9, 2000. The amendments shifted the responsibility for the costs associated with having to move utilities as a result of highway projects. The rule as it currently exists does not contemplate the "cost shift." According, the Division has sought to amend the rule to comport with the law as it now exists, and while this is a laudable goal, the definition of an emergency contemplates compliance with a time limitation. It does not contemplate the promotion of consistency.

par. 15 It is the determination of the Secretary of State that this proposal does not qualify under the definition of an emergency as defined in §29A-3-15(f) as the Division failed to prove the actuality of an emergency.

par. 16

This decision shall be cited as Emergency Rule Decision 8-00 or ERD 8-00 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Highways, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
Secretary of State

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OFFICE OF THE
SECRETARY OF STATE

AUG 11 2 07 PM '00

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