



Office of the Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, West Virginia 25305

**Natalie E. Tennant**  
Secretary of State  
State of West Virginia

Telephone: (304) 558-6000  
Toll Free: 1-866-SOS-VOTE  
Fax: (304) 558-0900  
www.wvsos.com

September 17, 2009

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

**AGENCY:** Division of Highways

**RULE:** Amendment. 157CSR6, Use of State Road Rights of Way and Adjacent Areas

**DATE FILED AS AN EMERGENCY RULE:** September 4, 2009

**DECISION NO. 21-09**

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

A handwritten signature in cursive script, reading "Natalie E. Tennant".

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**NATALIE E. TENNANT**  
Secretary of State

EMERGENCY RULE DECISION  
(ERD 21-09)

AGENCY: Division of Highways  
RULE: Amendment, 157CSR6, Use of State Road Rights of Way and Adjacent Areas

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- 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 September 4, 2009 and with the LRMRC September 4, 2009.
- 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 §17-22-11 reads:

***§17-22-11. Enforcement of provisions by commissioner; rules and regulations.***  
**It shall be the function and duty of the state road commissioner to administer and enforce the provisions of this article, and in the performance of his duties hereunder, he may assign to division engineers, and other employees in his department, such duties as he may deem proper. The commissioner is hereby authorized and empowered to promulgate rules and regulations implementing the provisions of this article, including**

**rules and regulations permitting the state of West Virginia to comply with the provisions of Title 23, United States Code, relating to the payment of bonuses for the regulation of outdoor advertising adjacent to the interstate system, and the terms and provisions of any agreement heretofore entered into pursuant to law by and between the state road commissioner of West Virginia and the secretary of commerce of the United States relating to the payment of such bonuses, any provisions of this article to the contrary notwithstanding.**

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

par. 10 (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. 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 Division are as follows:

The agency began implementation and administration of the rule as amended upon passage of HB 2218, which the agency later learned was not properly enrolled. Requests by the public for agency action authorized by the rule are currently pending. The public peace and welfare will be promoted by the filing of this emergency rule pending corrective action implementing the final rule.

par. 13 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). . . "immediate reservation of public peace, health, safety or welfare"

par. 14

This decision shall be cited as Emergency Rule Decision 21-09 or ERD 21-09 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.



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NATALIE E. TENNANT  
Secretary of State

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