

OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA



Betty Ireland
Secretary of State

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SECRETARY OF STATE

August 17, 2005

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Division of Highways

RULE: Amendments, 157CSR6, Use of State Road Rights of Way and Adjacent Areas

DATE FILED AS AN EMERGENCY RULE: June 15, 2005

DATE FILED AS AN AMENDMENT TO AN EMERGENCY RULE: July 29, 2005

DATE FILED AS SECOND AMENDMENT TO AN EMERGENCY RULE: August 17, 2005

DECISION NO. 9-05

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.


BETTY IRELAND
Secretary of State

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EMERGENCY RULE DECISION
(ERD 9-05)

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- par. 1 The Division of Highways (Division) has filed the above amendment to an amendment 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 August 17, 2005 and with the LRMRC August 17, 2005.
- 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 §17C-17A-3 reads, in part :

(d) Notwithstanding any provisions of this code to the contrary, the division may propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code which would provide a process for approval by the

commissioner of the division of a special crossing permit and renewals thereof. Special crossing permits authorized by this subsection would authorize the holder of the permit to operate or move a vehicle or combination of vehicles which exceed the maximum weight allowance specified in this chapter or are otherwise not in conformity with the provisions of this chapter on limited sections of public highways under specific circumstances specified in the permit: Provided, That no special crossing permit may allow the operation or movement of any vehicle or combination of vehicles on a public highway for more than one-half of a mile: Provided, however, That no special crossing permit may allow the operation or movement of any vehicle or combination of vehicles on a public highway if the commissioner of the division of highways determines there is an existing alternate off-road route available. Each special crossing permit shall contain the specific section or mileage of the public highway where operation is authorized. Special crossing permits may not exceed a three-year period and may be renewed upon approval by the commissioner of the division of highways as specified in legislative rule. The commissioner of the division may provide for fees for the processing of applications for special crossing permits. As a condition of approval of a special crossing permit, an applicant shall agree to pay for all actual expenditures incurred by the department of transportation for the upgrading or repair of the public highway, including traffic control devices, for which the applicant seeks the special crossing permit. In addition, all holders of special crossing permits shall pay for the restoration of the public highway to its original condition after the permit has expired. The initial rule filed by the division pursuant to this subsection shall be filed as an emergency rule.

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:

This amendment of an existing legislative rule is being filed to incorporate the special crossing permit changes provided by HB 3089, passed April 9, 2005 and in effect 90 days from passage. This bill allows the Commissioner of Highways to propose rules to provide a process for special crossing permits and renewals. A special crossing permit authorizes the holder of the permit to operate or move a vehicle or combination of vehicles exceeding the maximum weight allowance specified in WV Code §17C-17A-3 (120,000 pounds) on a section of public highways up to one half mile in length. This legislation resulted from issues & problems with individuals & business entities crossing public highways with overweight vehicles.

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). . . mandated by HB 3089 to file as an emergency.

par. 14 This decision shall be cited as Emergency Rule Decision 9-05 or ERD 9-05 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.


BETTY IRELAND
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