



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

JOHN D. ROCKEFELLER IV
Governor

June 21, 1984

WILLIS H. HERTIG, JR.
Director

RONALD R. POTESTA
Deputy Director

Emergency

The Honorable A. James Manchin
Secretary of State
State Capitol, Suite 157-K
Charleston, West Virginia 25305

Dear Mr. Manchin:

Re: Filing of Emergency and Proposed
Regulations - Series XIX - Procedural
and Interpretive Regulations Regarding
State Certification

The Department is filing with your office for inclusion into the State Register Emergency Regulations which will supercede regulations published at Series XIVa. In addition we are proposing these regulations for public comment and have scheduled a public hearing for Thursday, July 26, 1984 at 2:00. The public comment period will end at the close of business of July 31, 1984.

Please file these emergency and proposed regulations at your earliest convenience. If you have any questions, please call Ron Shipley, Special Assistant to the Director, at 348-2754.

Sincerely,

Willis H. Hertig, Jr.
Willis H. Hertig, Jr.
Director

WHH/rsb

Attachments

cc: Ron Shipley

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

THIS DATE June 21, 1984
Administrative Law Division



STATE OF WEST VIRGINIA
OFFICE OF THE SECRETARY OF STATE
CHARLESTON 25305

JAMES R. MCCARTNEY
SECRETARY OF STATE

STATE REGISTER FILING

I, Willis H. Hertig, Jr., Director
Name Title or Position

Department of Natural Resources hereby submit to record
Department or Division

in the State Register on 8 1/2" x 11" paper two (2) copies of

- () proposed rules and regulations concerning topics or material not covered by existing rules and regulations;
- () proposed rules and regulations superseding rules and regulations already on file;
- () a notice of hearing;
- () findings and determinations;
- () rules and regulations; or
- (X) other - specify (Emergency rules - superceding rules and regulations already on file as Series XIVa.

This filing pertains to

Chapter 20
Article 1
Series XIX
Section 1-8
Page No.

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

THIS DATE 6-21-84
Administrative Law Division

June 21, 1984
Date Submitted

Willis H. Hertig, Jr.
Signature of Person Authorizing this Filing



STATE OF WEST VIRGINIA
OFFICE OF THE SECRETARY OF STATE
CHARLESTON 25305

JAMES R. MCCARTNEY
SECRETARY OF STATE

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material not covered by existing rules and regulations;

(XX) proposed rules and regulations superseding rules and
regulations already on file; (supercedes Series XIVa)

() a notice of hearing;

() findings and determinations;

() rules and regulations; or

() other - specify (

This filing pertains to

Chapter 20

Article 1

Series XIX

Section 1-8

Page No.

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Date Submitted

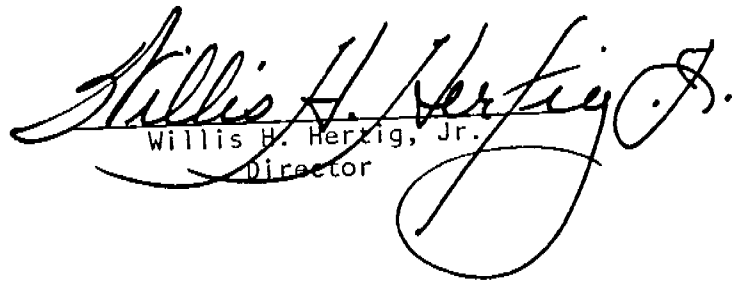
Willis H. Hertig, Jr.
Signature of Person Authorizing this
Filing

DECLARATION OF EMERGENCY

The Director of the Department of Natural Resources declares that an emergency exists under W. Va. Code §29A-3-17 such that a promulgation of emergency rules governing procedural and interpretive Regulations for State Certification of Activities Requiring Federal Licenses and Permits (Chapter 20-1, Series XIX) is necessary to prevent substantial harm to the public interest. As a basis for this emergency, the Director recites the following facts and circumstances constituting the emergency.

1. Under the Federal Clean Water Act, Section 401, 33 USC §1341, anytime an applicant needs a federal license or permit to conduct an activity which will, or may discharge into waters of the United States, the applicant must provide the Federal agency with a "certification" from the State wherein the discharge originates.
2. The State certification evaluates compliance with Sections 301, 302, 303, 306 and 307 of the Clean Water Act, as well as other appropriate requirements of State law. The State may grant, deny or waive certification. If the State does not act on a certification within one year then it may lose its right to certify.
3. Federally permitted activities for which a State certification is necessary include dredging and filling permits under Section 404 of the Clean Water Act which are issued by the U.S. Army Corps of Engineers and hydroelectric licenses issued by the Federal Energy Regulatory Commission.
4. If certification is denied, then the Federal permit or license may not issue. Any conditions that a State places on the activity through certification must be incorporated into the Federal license or permit. State certification therefore is an important procedural and substantive tool that a state may exercise to ensure that federally licensed or permitted activities will comply with State requirements and interests of its public.
5. Regulations governing the certification of Section 404 permits have been in existence since August 14, 1980. These regulations promulgated as Series XIVa, however, did not specifically cover the certification of hydroelectric licenses issued by the Federal Energy Regulatory Commission. Certification of FERC licenses has been occurring on a case-by-case basis without any clear procedures concerning application requirements, public notice and opportunity to comment (required by Section 401(a) of the CWA) and appeal procedures.
6. Due to changes in Federal law during the past six years, there has been a dramatic increase in the number of hydroelectric license applications and a commensurate increase in the number of certifications necessary for these projects.

7. Failure to properly regulate certification from a procedural standpoint may result in applicants and the general public's substantial interests not being protected. For example, proper public notice may not be given in a timely fashion sufficient to allow the public to comment and the State to certify in a timely fashion. The public, therefore, may lose its ability to comment on major projects which affect the natural resources of the State and the State may lose its ability to protect its natural resources and condition activities permitted by the Federal government.
8. In light of the substantial public interest in the licensing of hydroelectric facilities, Regulations for State Certification of Activities Requiring Federal Licenses or Permits are necessary.
9. In addition, there is substantial public interest in continuing to certify Section 404 permits issued by the Corps of Engineers. Permits under this program regulate dredging and filling of the State's waters. Therefore, it is in the public's interest to continue this certification program as well.


Willis H. Hertig, Jr.
Director

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
Department of Natural Resources
Chapter 20-1
Series XIX
Part II - Procedural and Interpretive Regulations
1984

Subject: Regulations for State Certification of Activities Requiring
Federal Licenses and Permits

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FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

THIS DATE 6-21-84
Administrative Law Division

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WEST VIRGINIA ADMINISTRATIVE REGULATIONS
Department of Natural Resources
Chapter 20-1
Series XIX
Part II - Procedural and Interpretive Regulations
1984

Subject: (Proposed) Regulations for State Certification of Activities
Requiring Federal Licenses and Permits

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

Section 1. GENERAL

THIS DATE 6-21-84

1.01 Scope of Regulations. The purpose of these procedural and interpretive regulations is to carry out the procedural responsibilities placed upon the State by Section 401 of the Federal Clean Water Act, 33, U.S.C. §1341(a). Section 401 of the Clean Water Act requires that any applicant for a federal license or permit to conduct an activity which will, or may, discharge into waters of the United States (as defined in the Clean Water Act) must present the federal authority with a certification from the appropriate state agency. Federal permits and licenses issued by the federal government requiring certification include permits issued by the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. §1344 and licenses issued by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. §791 et seq.

In issuing such a certification, the State must establish procedures for public notice of all applications for certification, and to the extent it deems appropriate, procedures for public hearings in connection with specific applications. See 1980 Report and Opinion of Attorney General, p. 191 (February 11, 1980). These regulations establish such procedures for public notice and hearings, as well as other procedures.

These regulations also interpret the scope of the State's certification.

1.02 Authority. Code of West Virginia §20-1-7(30).

1.03 Filing and Effective Date. These regulations were originally filed August 14, 1980 and refiled December 30, 1982 to become effective January 1, 1983. Amendments to these regulations will become effective as an emergency filing on June 21, 1984 and shall remain in effect for six months unless otherwise amended or new regulations are issued by the Director.

Section 2. DEFINITIONS

When used in this rule, the following terms are defined as follows:

- (a) "Certification" means certification as required under Section 401 of the Federal Clean Water Act. 33 U.S.C. §1341.
- (b) "Department" means the Department of Natural Resources.
- (c) "Director" means the Director of the Department of Natural Resources.

Section 3. SCOPE OF CERTIFICATION; NOTIFICATION OF DIRECTOR

3.01 Scope of Certification. Section 401 of the Federal Clean Water Act requires that any applicant for a permit or license from the Federal government to conduct an activity which may discharge into the waters of the United States must present the Federal agency with a certification from the State wherein the discharge originates that such activity will comply with specified sections of Federal law and with any other appropriate requirement of State law. When issuing certification the Department may consider the proposed activity's impact on water resources, fish and wildlife, recreation, critical habitats, wetlands, and other natural resources under the Director's jurisdiction.

2.02 Notification of Director for Certification of Activities Which May Affect Waters of West Virginia.

- (a) Whenever a discharge originating in one state may affect the

quality of water in another state, Section 401(a)(2) of the Clean Water Act requires that, upon receipt of a certification application and certification, the federal licensing or permitting agency must notify the Administrator of the United States Environmental Protection Agency. The Administrator must, within thirty (30) days of the notice of application, notify the state whose water quality will be affected. Such state may comment on the discharge's impact on water quality of that state. Such notification shall be given to the Director by the applicant within thirty (30) days after submission of a complete certification application to the appropriate agency in the state wherein the discharge originates, whenever the quality of West Virginia waters are, or will be, impacted by the activity.

(b) After the permit or license is issued by the federal authority, the applicant shall send a copy of the federal license or permit, including any state certification issued by the state agency from the state in which the discharge originates.

Section 4. APPLICATIONS

4.01 General. Any applicant for certification must present a complete application to the Department. The Department may require additional information, at the request of the Director, to assess the impact which such activities will have on the natural resources under the Director's jurisdiction.

4.02 Corps of Engineers Permits. The application to the Department for certification of activities requiring Section 404 permits issued by the United States Army Corps of Engineers shall be the Public Notice which describes the activity, notifies the general public of the appli-

cation for the 404 permit and state certification and of the public's right to submit comments and requests for public hearings. The applicant need not submit a copy of the public notice if the Department has received a copy of the Public Notice from the Corps of Engineers. If further information is required for project assessment the Department may request it from either the applicant or the Corps.

4.03 Federal Energy Regulatory Commission Licenses.

(a) The application to the Department for certification of an activity requiring a license from the Federal Energy Regulatory Commission (FERC) shall be a completed form (Appendix A) letter to the Director requesting certification, the license application document submitted to and accepted by FERC under 18 C.F.R. §4.1-4.202, the Order from FERC accepting the application, and a certificate of publication from the newspaper publishing the Class II legal advertisement (Appendix B) required by §6.02.

(b) If the project application is altered or modified during the FERC licensing process, prior to FERC's final decision, the applicant shall inform the Department of such changes. The Department may review such alterations or modifications and, if the changes are deemed significant by the Director, the Department may require a new application for certification. The Department will have ninety (90) days to review such changes or until the end of the year review period (see §5.01), whichever is longer, to determine whether to require a new application or to alter its original certification decision. If the Department requires a new application because of a significant application modification, then the Department will have six months to issue its certification decision.

4.04 Activities Requiring More Than One Certification.

(a) Whenever an activity requires more than one certification because two or more licenses or permits are required from the federal

government, the applicant must apply for certification for both federal authorizations.

(b) If the Department desires, it may reissue the certification for the first federal authorization or certify, certify with conditions, waive or deny the additional certification. If changes to the activity or planned activity have occurred and were not previously reviewed by the Department, the Director may withdraw his previous certification.

4.05 Other Activities Requiring Certification. Other activities requiring certification shall submit information to the Department explaining the activity and its environmental impact on the natural resources under the Director's jurisdiction.

Section 5. PROCEDURES FOR CERTIFICATION ISSUANCE.

5.01 Action Within One Year. Upon receipt of a completed application, the Department will act upon the request for certification within one year or such certification may be deemed as being waived.

5.02 Basis For Decision. Any certification decision will be based on compliance with Sections 301, 302, 303, 306, and 307 of the Clean Water Act and with any other appropriate requirement of state law. Such appropriate requirements of state law include the factors enumerated in Section 2.01 - Scope of Certification.

5.03 Distribution of Certification Decision. Copies of the proposed certification decision will be sent to the applicant and all persons who commented or attended the public hearing.

5.04 Dismissal or Denial of Federal Application Moots Need For Certification. If an application for a federal license or permit is dismissed, denied, or otherwise rendered void, then the certification is no longer needed and any state certification proceeding or action is

rendered moot and unnecessary. Any applicant for an activity needing a state certification which was rendered moot and unnecessary must renew its application for certification and the full time period of Section 5.01 is available for departmental review upon resubmission of a complete application.

Section 6. PUBLIC NOTICE

6.01 Corps of Engineers Permits. The Department's procedure for issuing public notice for certification of a Corps of Engineers' permit may be either: (1) A public notice issued jointly with the U.S. Army Corps of Engineers, or (2) a public notice issued by the Department. Such notice will describe the activity, advise the public of the scope of certification, their rights to comment on the proposed activity and to request a public hearing and will also inform the public to whom they should send their requests and comments. (Appendix B) If Department issues the public notice, then the applicant will bear the cost.

6.02 Federal Energy Regulatory Commission Licenses. The Department's procedure for issuing a public notice for certification of a FERC license shall be a Class II-0 legal advertisement (See W. Va. Code §59-3-2(b)) published by the applicant in a newspaper of general circulation in the county in which the activity will take place and in a principle newspaper of regional circulation in the area where the project is located. Such notice will describe the activity, advise the public of the scope of certification, their rights to comment on the proposed activity and to request a public hearing and will also inform the public to whom they should send their requests and comments (Appendix B).

6.03 Public Notice for Other Activities Requiring Certification. Public notice for other activities requiring certification will be published as a Class I legal advertisement (See W. Va. Code §59-3-2(a)) in the county where the proposed activity will take place. The applicant will bear the cost of such advertisement.

6.04 Submission of Comments to Applicant. Any comments and information received by the Department may be forwarded to the applicant so that he may resolve disputes raised, rebut adverse comments and information or supplement such comments and information. The Department will prepare a response to significant comments.

Section 7. PUBLIC HEARINGS

7.01 Purpose. The purpose of the public hearing is to afford persons and organizations the opportunity to present comments and information which will assist the Department in its decision-making process on applications for certification.

7.02 Decision to Hold Public Hearing.

(a) The decision to hold a public hearing lies within the discretion of the Director. The Director will evaluate all requests for a public hearing and make a decision based on such requests. Such requests should explain the need for the public hearing and set forth the kind of information, material or comments expected to be given at the hearing. The Director may also hold a public hearing without request.

(b) When a public hearing is called by the Director he shall send a written notice to all parties receiving the public notice and shall publish a Class 1 legal advertisement (see W. Va. Code §59-3-2) in a newspaper in the county where the facility is located or proposed. Such hearing notice shall be sent at least thirty (30) days prior to the hearing date and shall include all pertinent information including location, date, and time. The applicant shall bear the cost of publishing any notice.

7.03 Conduct of Public Hearing.

(a) If the public hearing is held it may be conducted by a hearing officer who shall be a designee appointed by the Director.

(b) The public hearing will be conducted in an orderly fashion. Anyone having comments and information may present them to the Hearing

Officer subject to reasonable time limitations. If such information and comments are lengthy, the Department encourages the submission of written testimony with attached documents. The oral presentation should summarize the written testimony.

Section 8. APPEAL OF CERTIFICATION.

8.02 Standing For Requesting an Appeal Hearing; Requests; Decision.

(a) Any person whose property, interest in property, or other constitutionally protected interests (W. Va. State Constitution Article 3, Section 10) are directly affected by the Department's proposed certification or certification denial may request a hearing within 15 days after notification of such proposed certification decision.

(b) A person described under subsection (a) shall make such request to the Director. The request for hearing shall identify the interest directly affected and set forth the manner in which the person is aggrieved or adversely affected.

(c) The Director shall decide whether to hold such hearing.

8.02 Appeal Hearing.

(a) If the request for a hearing is granted, the Director, or his designated appointee acting as a hearing examiner, will hold the hearing within 60 days. All hearings will normally be held in Charleston at a place specified by the Director. The Director, however, may hold the hearing at another location or time mutually agreed upon by the parties.

(b) The parties to the proceeding shall be the aggrieved person, who shall be known as the Appellant and the Department of Natural Resources which shall be the Appellee.

(c) In conducting the hearing, the Director or his designated appointee acting as a hearing examiner, shall follow the procedures contained in the West Virginia Code §29A-5-1 et seq. entitled "Contested Cases." Both parties may be represented by counsel.

(d) Parties may seek discovery and may make various motions as outlined in the West Virginia Rules of Civil Procedure Rules 7 - 16 and 26 - 37 which Rules shall generally apply.

(e) After the hearing the Director shall decide the issues presented and shall notify the parties of such decision.

STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
State 401 Certification Request
for Hydroelectric Projects

APPLICANT _____

CONSULTING AGENCY _____

FERC PROJECT NUMBER _____

NAME AND LOCATION OF PROJECT _____

ACCEPTANCE DATE OF LICENSE APPLICATION BY FERC _____

The West Virginia Department of Natural Resources (WVDNR) will consider and evaluate a request for State 401 Certification, as required by the Federal Clean Water Act, at such time as the following are received:

1. Letter of request for State 401 Certification;
2. Seven (7) copies of the FERC license application;
3. FERC Order of acceptance of license application filing; and
4. A certificate of publication from the newspaper in the county wherein the discharge originates publishing a Class II legal advertisement (Attachment I).

The WVDNR has twelve (12) months in which to act upon the State 401 Certification request commencing from the date of receipt of all the above items.

For your information and guidance, enclosed is a copy of the WVDNR State 401 Certification regulations.

TO THE APPLICANT:

(☐) Your completed request for State 401 Certification has been received by WVDNR. The initiation of the 12-month review period is effective _____.

(☐) Your request for State 401 Certification is incomplete and will not be considered until the following is received.

1. _____
2. _____

Director, WV Department of Natural Resources

cc: Federal Energy Regulatory Commission

PUBLIC NOTICE

Publication Date:

Expiration Date : (30 Days After Date
of Initial Publication)

TO WHOM IT MAY CONCERN:

State Certification, as required by Section 401 of the Clean Water Act, has been requested of the West Virginia Department of Natural Resources (WVDNR) for _____
(name of project) by _____ (name of applicant).

Scope of Certification: Pursuant to Section 401 of the Federal Clean Water Act, the State may, either certify, certify with conditions, deny or waive certification that the proposed activity will comply with Sections 301, 302, 303, 306 and 307 of the Federal Clean Water Act and other appropriate requirements of State law. When issuing certification, the WVDNR may consider the proposed activity's impact on water resources, fish and wildlife, recreation, critical habitats, wetlands and other natural resources under its jurisdiction. Procedural and interpretive regulations governing the scope of the Department's certification, public comment, hearings and appeals of certification decisions are published in the State Register as Chapter 20-1, Series XIX (1984).

Description of the Activity: (Give a description which describes the activity and indicates the river or stream to be affected.)

Project Location: (Please provide mile point on the river or stream and nearest post office.)

Information Available: The license application is available for inspection between the hours of 9:00 a.m. and 4 p.m., Monday through Friday, at the following locations:

WV Department of Natural Resources
Environmental Analysis Section
Building 3, Room 825
Capitol Complex
Charleston, WV 25305

or

WVDNR District Office (please provide address)

Comments: Comments and information relating to Section 401 certification for this activity are hereby solicited. Such information on the activity's impact will be considered if postmarked prior to the expiration date of this notice. The need for a public hearing will be determined based on an evaluation of specific requests for such hearing. All comments and information should be mailed to:

Chief of Environmental Analysis
WV Department of Natural Resources
Room 825, 1800 Washington Street, East
Charleston, WV 25305

Comments and information postmarked later than the expiration date may not be considered.

NOTICE OF OPPORTUNITY
TO COMMENT AND PUBLIC HEARING

The Department of Natural Resources is proposing amendment to its Series XIVa Regulations For Open Governmental Proceedings (Clean Water Act Permits). Such regulations are proposed for amendment and will be repromulgated as Series XIX Regulations for State Certification of Activities Requiring Federal Licenses and Permits.

Public comment is invited on these proposed regulations. Comment can be made to the Department until the close of business on July 31, 1984. All comments should be sent to Ron Shipley, Special Assistant to the Director, West Virginia Department of Natural Resources, 1800 Washington Street, East, Building 3, Room 669, Charleston, West Virginia 25305.

A public hearing concerning these proposed regulations will be held on Thursday, July 26, 1984 at 2:00 in Room 674 of the Department of Motor Vehicles Building. Oral comment on the regulations are welcome.