



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

A. JAMES MANCHIN
SECRETARY OF STATE

STATE REGISTER FILING

I, David C. Callaghan, Director,
Title or Position

Department of Natural Resources, hereby submit to record in
Department or Division

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

- proposed rules and regulations concerning topics of material not covered by existing rules and regulations;
- proposed rules and regulations superseding rules and regulations already on file;
- notice of hearing;
- findings and determinations;
- rules and regulations; or
- other - specify (declaration of emergency) .

This filing pertains to procedure governing the Director's certification of §404 and §10 permits.

Chapter 20
Article 1
Series XIV
Section 6
Page No. _____

- proposed rules and regulations are required to go to Legislative Rule Making Committee;
- proposed rules and regulations are excluded from Legislative Rule Making Committee;

April 18, 1980
Date Submitted

D. C. Callaghan
Signature of Person Authorizing
this Filing

FILED IN THE OFFICE OF
SECRETARY OF STATE OF
WEST VIRGINIA

THIS DATE 4-18-80



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

DAVID C. CALLAGHAN
Director

April 18, 1980

The Honorable A. James Manchin
Secretary of State
State Capitol
Charleston, West Virginia

Dear Mr. Manchin:

I am hereby transmitting the enclosed documents to accomplish two purposes:

- (1) promulgation of temporary procedural regulations under West Virginia Code § 29A-3-14, and
- (2) filing of the same procedural regulations as proposed rules under West Virginia Code § 29A-3-7.

Accordingly, I hereby transmit the following documents for promulgation of temporary rules under West Virginia Code § 29A-3-14:

- (a) transmittal letter, and
- (b) Declaration of Emergency which provides a statement of the facts and circumstances constituting an emergency and justifying the regulations immediate promulgation, and
- (c) the Regulations for Procedure Governing the Director's Certification of § 404 and § 10 Permits.

In addition to the above material, I am also transmitting the following documents to begin the procedural rulemaking process outlined by West Virginia Code §§ 29A-3-7 through 29A-3-10:

- (d) transmittal letter,
- (e) Proposed Regulations for Procedure Governing the Director's Certification of § 404 and § 10 Permits,
and,

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A. James Manchin
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Page Two

- (f) Notice of opportunity to submit data, evidence, views and comments on the proposed rules.

This filing of temporary regulations and proposed final rulemaking replaces the Department's prior submittal of March 27, 1980. The reason for the re-submittal is to amend the previous regulations to provide for property interest protection. Please note that the hearing originally proposed for May 20, 1980 in our previous submittal is still scheduled for that date.

Very truly yours,



David C. Callaghan
Director

DCC:bss

Enc.



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

DAVID C. CALLAGHAN
Director

April 18, 1980

The Honorable A. James Manchin
Secretary of State
State Capitol
Charleston, West Virginia

Dear Mr. Manchin:

Attached please find the Department of Natural Resources' Regulations for procedure Governing the Director's Certification of § 404 and § 10 Permits. These regulations are to be filed as amendments to the Department's existing regulations, Series XIV.

I am promulgating these rules as temporary regulations under West Virginia Code § 29A-3-14. Therefore, also please find enclosed a Declaration of Emergency which provides an explanation of the facts and circumstances constituting the emergency.

These regulations are effective immediately upon filing with the State Register and will be effective for no longer than ninety (90) days, unless the Department complies with the applicable provisions of West Virginia Code §§ 29-3-5 through 29A-3-9.

I hereby file the Declaration of Emergency and our Regulations for Procedure Governing the Director's Certification of § 404 and § 10 Permits with the State Register.

Very truly yours,

David C. Callaghan
Director

DCC:bss

Att.

DECLARATION OF EMERGENCY FOR THE PROMULGATION
OF REGULATIONS GOVERNING THE DIRECTOR'S CERTIFICATION
OF § 404 AND § 10 PERMITS

WHEREAS, pursuant to West Virginia Code § 29A-3-14 any agency may find that an emergency exists which requires that temporary rules or regulations be promulgated, and

WHEREAS, pursuant to West Virginia Code § 29A-3-14 such temporary rules or regulations must be filed with a statement of the facts and circumstances constituting the emergency.

NOW, THEREFORE, The Director of the Department of Natural Resources hereby does find and declare that:

An emergency exists which requires the promulgation of Regulations for Procedure Governing the Director's Certification of § 404 and § 10 Permits.

The facts and circumstances constituting such emergency are as follows:

Section 401 of the Federal Clean Water Act, 33 U.S.C. § 1341, in its present form since December 27, 1977 (PL 95-217) requires that any applicant for a federal permit or license from a federal agency 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 §§ 301, 302, 303, 306 and 307 of the Federal Clean Water Act and with any other appropriate requirement of State law.

The term "waters of the United States" is defined broadly enough to include all surface waters of our State, including wetlands. Thus the scope of regulation envisioned by the Federal Clean Water Act, 33 U.S.C. § 1251 et seq. and § 401 (33 U.S.C. § 1341) in particular is very broad.

The scope of regulation concerning certification of § 404 permits, 33 U.S.C. § 1344 and § 10 permits, 33 U.S.C. § 403 generally covers the dredging and filling of the State's waters and the obstruction of the State's waters which are classified as navigable under federal law.

Thus, certification of § 404 and § 10 permits covers many activities, including: commercial dredging of the State's waters, filling of the State's waters, construction of barge cells, construction of loading docks, construction of recreational boating docks and commercial boating docks, filling for dams, construction of settling ponds, construction of recreational ponds, placement of piers and bridges and filling of wetlands.

Failure of the State to grant certification within a reasonable time period (which can not exceed one year) constitutes a waiver of the State's right to certify. A waiver constitutes the State giving up its right to insure that federal permits or licenses for activities which may discharge contain provisions adequate to protect state waters.

No federal license or permit can be granted until certification is made or waived. If certification is denied, then the federal permit or license may not issue.

Section 401 requires that the State adopt procedures governing public notice of all applications for certification submitted to it, and to the extent it deems appropriate, procedures for a public hearing or specific applications.


The Director was made aware that such procedures were necessary on February 11, 1980. On that date an Attorney General's opinion was issued informing the Director that such regulations were required.

Without such regulations, the State's certification might be declared invalid. Such a declaration might result in the State waiving a valuable right or in subjecting the federal permit holder to litigation under the Federal Clean Water Act.

The Director therefore declares that an emergency exists sufficient to require immediate promulgation of Regulations for Procedure Governing the Director's Certification of § 404 and § 10 Permits because:

1. Certification is required for numerous activities conducted by the people of this State which are necessary for their continued productivity and enjoyment of their property;
2. Failure to promulgate such regulations might indiscriminately waive the State's right to insure that federal permits will adequately protect the waters, associated recreational and commercial values and the natural resources of this state;
3. Failure to promulgate such regulations might subject the people of our State who are future federal permit holders to needless litigation;
4. The Director wishes to protect the interests of the State and its people as quickly as he can.

WHEREFORE, the Director hereby promulgates Regulations for Procedures Governing the Director's Certification of § 404 and § 10 Permits as an amendment to the Department's existing regulations entitled West Virginia Administrative Regulations, Department of Natural Resources, Chapter 20-1, Series XIV, 1979.


David C. Callaghan, Director
Department of Natural Resources

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
Department of Natural Resources

Chapter 20-1
Series XIV
1980

Subject: Regulations for Open Governmental Proceedings

Section 6. Regulations for Procedure Governing the Director's
Certification of § 404 and § 10 Permits

6.01 Purpose and Authority to Promulgate Rules

These rules are promulgated pursuant to the authority of the Director of the Department of Natural Resources under West Virginia Code 20-1-7(30). Their purpose 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), as it relates to permits issued by the Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

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.

In issuing such a certification, the State must establish procedures for public notice of all applications for certification by it, and to the extent it deems appropriate, procedures for public hearings in connection with specific applications.

These regulations establish such procedures for public notice and public hearings.

6.02 Definitions

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

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

6.03 Applications

The application to the Department for certification shall be the Public Notice which describes the activity and is issued by the U. S. Army Corps of Engineers.

6.04 Public Notice

The Department's procedure for issuing public notice shall be either:

- (a) A joint notice issued with the U. S. Army Corps of Engineers, or
- (b) public notice issued by the Department which describes the activity, advises the public of the scope of certification and their right to request a public hearing and which informs the public to whom they should send their comments and requests.

6.05 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. Generally the Director will grant a hearing if:

1. A public hearing is requested; and
2. the person requesting the public hearing presents an issue the Director deems significant to our duties under § 401 or;
3. the person requesting the public hearing offers information relevant to the Department's duties under Section 401 which the Department does not have and which the Director determines should be recieved at a public hearing or;
4. the Director believes that a public hearing will assist in making a decision on such certification application.

(b) The public hearing is conducted for the purpose of gathering information to assist the Department in its decision making process on applications for certification.

(c) The public hearing shall be conducted by the hearing officer which shall be a designee appointed by the Director.

(d) The public hearing shall be conducted in an orderly fashion. Anyone having comments and information may present same to the Hearing Officer subject to reasonable time limitations. If such information and comments are lengthy, the Department encourages the submission of written testimony and documents with an oral presentation which summarizes such written material.

6.06 Due Process Hearings

(a) Any person entitled to a hearing because of an infringement upon an interest protected by the State Constitution Article 3, Section 10 may request a hearing within 30 days of the Department's issuance of the proposed certification.

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

(c) The Director, or his designated appointee acting as a hearing examiner, shall hold the hearing within 60 days at a mutually decided upon time. 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 mutually agreed upon by the parties.

(d) 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.

(e) 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.

(f) 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.

(g) 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
CHARLESTON 25305

DAVID C. CALLAGHAN
Director

April 18, 1980

The Honorable A. James Manchin
Secretary of State
State Capitol
Charleston, West Virginia 25305

Dear Mr. Manchin:

Enclosed please find the Department of Natural Resources' proposed Regulations for Procedure Governing the Director's Certification of § 404 and § 10 Permits. These regulations are to be filed as amendments to the Department's existing regulations, Series XIV.

These regulations, being purely procedural, are promulgated under West Virginia Code 29A-3-7. In accordance with the West Virginia Administrative Procedures Act, § 29A-3-8 I am also attaching a Notification of Opportunity to submit comments. Said notification complies with § 29A-3-8 and allows the public to submit data, objections, suggested amendments, views, evidence and arguments orally or in writing concerning the proposed regulations. Said notice allows the public to submit comments up until May 20, 1980 at which time oral comments will be received. The opportunity for oral comments will take place on May 20, 1980 at 1:00 o'clock p.m. until 4:00 o'clock p.m. in Room 674, 1800 Washington Street, East, Charleston, West Virginia.

I hereby file our proposed Regulations for Procedure Governing the Director's Certification of § 404 and § 10 Permits.

Very truly yours,

David C. Callaghan
Director

DCC:bss

Enc.

NOTICE OF PROPOSED RULEMAKING AND
OPPORTUNITY TO SUBMIT COMMENTS

The Director of the Department of Natural Resources hereby notifies the public of an opportunity to submit data, objections, suggested amendments, views, evidence, and arguments orally or in writing on the attached proposed Regulations for Procedure Governing the Director's Certification of § 404 and § 10 Permits.

Written comments may be made at any time up until May 20, 1980. An opportunity to present oral comments will be provided on May 20, 1980 at 1:00 o'clock p.m. until 4:00 o'clock p.m. in Room 674, 1800 Washington Street, East, Charleston, West Virginia.

All written comments submitted before that time should be sent to:

Mr. H. G. Woodrum
Environmental Analysis Section
Room 822
West Virginia Department of Natural Resources
1800 Washington Street, East
Charleston, West Virginia 25305

Attn: Certification Regulations



DAVID C. CALLAGHAN, DIRECTOR
Department of Natural Resources

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
Department of Natural Resources

Chapter 20-1
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