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1985 APR 16 AM 10:44

NOTICE OF OPPORTUNITY
TO COMMENT AND PUBLIC HEARING OF WEST VIRGINIA
SECRETARY OF STATE

The Department of Natural Resources is proposing to amend its 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 May 17, 1985. 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 Friday, May 17, 1985, at 2:00 p.m., in Room 674, in the Department of Motor Vehicles Building. Oral comments on the regulations are welcome.



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

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OFFICE OF THE SECRETARY OF STATE

ARCH A. MOORE, JR.
Governor

RONALD R. POTESTA
Director

MICHAEL A. FOTOS
Deputy Director

April 12, 1985

The Honorable Ken Hechler
Secretary of State
Capitol Complex
Charleston, WV 25305

Re: Filing of Proposed Procedural
Regulations Regarding State
Certification Series XIX

Dear Mr. Hechler:

This Department is filing with your office for inclusion into the State Register Procedural Regulations published at Series XIX. These Regulations are proposed to implement the emergency regulations filed on January 11, 1985. The public comment period will expire on May 17, 1985, and we have scheduled a public hearing for May 17, 1985. The public notice is attached.

If you have questions, please call Ron Shipley, Special Assistant to the Director, at 348-2754.

Very truly yours,

Ronald R. Potesta
Director

RRP:cr

Attachments

cc: Ron Shipley
Dennis Treacy

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STATE REGISTER FILING

1985 APR 16 AM 10:44

OFFICE OF THE SECRETARY OF STATE

I, Ronald R. Potesta, Director,
Name Title or Position

Department of Natural Resources hereby submit to record 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
- other - specify .

This filing pertains to

Chapter 20
 Article 1
 Series XIX
 Section 1-10
 Page No. _____

April 12, 1985

Date Submitted

Ronald R. Potesta

Signature of Person
Authorizing this Filing

FILED

WEST VIRGINIA ADMINISTRATIVE REGULATIONS,
Department of Natural Resources
Chapter 20-1
Series XIX
Part II - Procedural Regulations
1985

1985 APR 16 AM 10:45

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

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

Section 1. General

1.01 Scope of Regulations. The purpose of these procedural 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. 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. § 1791 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 hearing 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 public 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 4, 1980 and refiled December 30, 1982 to become effective January 1, 1983. Amendments to these regulations became effective as an emergency filing on June 21, 1984 and were superseded as final regulations on August 8, 1984. On January 11, 1985 amendments to these regulations were filed under the emergency provisions of West Virginia Code § 29A-1-15 and are effective for six months unless otherwise amended or new regulations are issued by the Director. On April 12, 1985, proposed regulations were filed to implement the emergency regulations.

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 AND EFFECT OF CERTIFICATION; NOTIFICATION OF DIRECTOR

3.01 Scope of Certification. (a) 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.

(b) The State may grant, grant with condition, deny or waive state certification.

3.02 Effect of Certification. Certification and any conditions required by the certification shall become a condition on any federal license or permit. If the State denies certification, then the federal license or permit shall not be granted. 33 U.S.C. § 1341(a)(1).

3.03 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.

(b) In order to assure that the Department receives notification in a timely manner, without regard to the obligations of the

United States Environmental Protection Agency, 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.

(c) 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, except for activities covered by Section 9 of these regulations, 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, except for activities covered by Section 9 of these regulations, shall be the Public Notice issued by the Corps of Engineers which describes the activity, notifies the general public of the application 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 letter to the Director requesting certification, completed form Appendix A, 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 from the date of submission of the application.

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. Applicants for other activities, except those covered by Section 9 of these regulations, 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 on any other appropriate requirement of state law. Such appropriate requirements of state law include the factors enumerated in Section 3.01 - 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 the 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 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; Response. 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 I legal advertisement (see W. Va. Code § 59-3-2) in a newspaper in the county where the activity 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 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.

8.01 Standing For Requesting an Appeal Hearing; Requests; Decision. (a) Any person whose property, interest in property, or other constitutionally protected interests (under W. Va. State Constitution Article 3, Section 10) are directly affected by the Department's proposed certification or certification denial, except

for those activities covered by Section 9 of these regulations, 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.

(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.

Section 9. CERTIFICATION OF CORPS OF ENGINEERS GENERAL PERMITS ON STATE REGIONAL, OR NATIONWIDE BASIS.

9.01 General permits on State, Regional or Nationwide Basis.

(a) In carrying out the § 404 dredge or fill permitting program, the Corps of Engineers may issue general permits on a state, regional or nationwide basis. See 33 U.S.C. 1344(e). Activities covered by such general permits do not require individual application to the Corps of Engineers for a Section 404 permit. Any such general permit must be for a category of activities which are similar in nature, will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effect on the environment.

(b) Corps of Engineers general permits require state certification. The State may certify in accordance with Section 3.01 and 3.02 of these regulations.

9.02 Procedures for Certification of Corps of Engineers General Permits. (a) Public Notice. When the Corps of Engineers proposes to issue a general permit, it requests certification from the State. Public notice of the request for certification and the Director's proposed certification decision 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 public notice will describe the category of activities included in the general permit, advise the public of the scope of certification, their rights to comment on the proposed certification decision and to request a public hearing. Such notice will also inform the public to whom they should send their requests and comments.

(b) Public Hearings. Comments and requests for public hearings will be evaluated by the Director pursuant to Section 7 of these regulations. Public hearings will be publicly noticed and conducted in accordance with Section 7 of these regulations.

9.03 Appeal of Certification of Corps of Engineers General Permits. (a) Notice. Prior to conducting any activity authorized by a Corps of Engineers general permit, any such authorized person shall publish a Class I legal advertisement in a qualified newspaper in the county where the activity will take place. Such notice shall describe the activity, advise the public of the scope of the granted certification, their rights to comment on the proposed activity and to request an appeal hearing. Such notice will also inform the public to whom they should send their comments and requests and conform to Appendix C. The applicant must forward a certificate of publication of this notice to the Director prior to conducting any activity authorized by a Corps of Engineers nationwide permit.

(b) Appeal of State Certification. (1) Any person whose property, interest in property or other constitutionally protected interest (under W. Va. State Constitution Article 3 Section (10)) are directly affected by the Department's certification of any individual activity authorized by a certified Corps of Engineers' general permit may request an appeal hearing within 15 days after publication of the notice described in Section 9.03(a) of these regulations.

(2) A person described under subsection (b)(1) shall make such request to the Director. The request for hearing shall identify the interest directly affected and set forth the manner in which it is aggrieved or adversely affected.

(3) The Director shall decide whether to hold such hearing and will conduct the hearing in accordance with Section 8.02(a)-(d) of these regulations.

(4) The Director shall examine the issues presented and notify the parties of his decision to either uphold, modify or withdraw certification for the individual activity.

Section 10. ENFORCEMENT OF CERTIFICATION PROVISIONS

10.01 General. The Clean Water Act provides that any certification condition becomes a term or condition of any federal license or permit. 33 U.S.C. § 1341(d). Certification condition, therefore, are subject to the enforcement mechanisms available for enforcing the terms or conditions of the federal license or permit to which they attach. In addition, other enforcement mechanisms under the Code of West Virginia may be available. See e.g. W. Va. Code §§ 20-1-7(30) and 20-7-5.

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

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, 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 PROPOSED ACTIVITY IN NAVIGABLE WATERS

Publication Date:

TO WHOM IT MAY CONCERN:

I (The), _____ propose to
name of individual organization or company

conduct the activity described below for which a U.S. Army Corps of Engineers general permit has been issued. Certification, as required by Section 401 of the Clean Water Act, has been granted by the West Virginia Department of Natural Resources. Under the terms of the Department's certification, I (we) _____
individual or organization

am (are) required to provide this Class I legal advertisement thirty (30) days before conducting the proposed activity. Any person who is adversely affected or aggrieved by the Department's certification authorizing this activity may request a hearing appealing the Department's certification within fifteen (15) days after publication of this notice.

DESCRIPTION OF THE PROPOSED ACTIVITY: (Give a description of the proposed activity.)

PROJECT LOCATION: (Give location of proposed activity, including mile point and name of the river or stream, nearest post office, and street address if appropriate.)

GENERAL PERMIT AUTHORIZATION: This activity is authorized by U.S. Army Corps of Engineers General Permit No. _____ which covers

(provide the description of your General Permit authorization as

stated in the Corps of Engineers regulations at 33 CFR 330.5.)

SCOPE OF CONDITIONS OF CERTIFICATION: Pursuant to Section 401 of the Federal Clean Water Act, the State has certified with conditions, that the above described 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 considered the impact on water resources, fish and wildlife, recreation, critical habitats, wetlands and other natural resources under its jurisdiction from the category of activities authorized by the general permit and has conditioned its certification by requiring this notice among other conditions.

REQUESTS FOR HEARINGS: Any person adversely affected or aggrieved by the Department's certification authorizing this activity may request a hearing appealing the Department's certification within fifteen days after publication of this notice pursuant to DNR Administrative Regulations, Series XIX. Such request for hearing shall identify the requesting party's interest and the manner in which the interest is aggrieved or adversely affected. Such request shall be sent to:

Director
West Virginia Department of Natural Resources
1800 Washington Street, East
Building 3, Room 669
Charleston, West Virginia 25305