

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
Department of Natural Resources

Chapter 20-1
Series XIV
1980

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SECRETARY OF STATE
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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. 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 and other appropriate requirements of State law.

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.

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. § 1341.
- 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

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

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

(b) 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.

6.05 Public Hearing

(a) 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.

(b) 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.

(c) When a public hearing is called by the Director he shall send a written notice to all parties receiving the public notice. 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.

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

(e) 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 Appeal of Certification

(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 may request a hearing within 15 days after notification of such proposed certification.

(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, 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 or time 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.

6.07 Effective Date

The effective date of § 6.0 et seq. shall be August 14, 1980.