

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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JUN 22 2 58 PM '98

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Office Of Water Resources
WV Division of Environmental Protection TITLE NUMBER: 47

RULE TYPE: Legislative; CITE AUTHORITY: 22-11-7a

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 4

TITLE OF RULE BEING PROPOSED: "State Certification of Activities Requiring
Nationwide Permits No. 21 and No. 26

DATE OF PUBLIC HEARING: July 22, 1998 TIME: 6:00 p.m.

LOCATION OF PUBLIC HEARING: Division of Environmental Protection
Training Room
#10 McJunkin Road
Nitro, West Virginia 25143-2506

COMMENTS LIMITED TO: ORAL ___ , WRITTEN ___ , BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Same as Above
Attn: Ken Politan

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Carri J. Chambers
Authorized Signature

\$4.60



BUREAU OF ENVIRONMENT

10 McJunkin Road
Nitro, WV 25143-2506

CECIL H. UNDERWOOD
GOVERNOR

Michael P. Miano
COMMISSIONER

June 17, 1998

Ms. Judy Cooper
Director, Administrative Law Division
Office of the Secretary of State
Capitol Complex
Charleston, West Virginia 25305

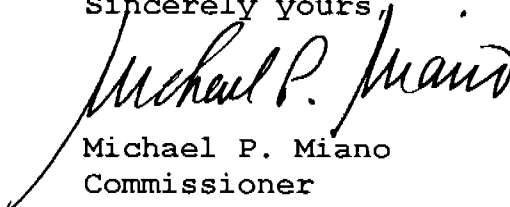
RE: 47CSR4 - "State Certification of Activities
Requiring Nationwide Permits
No. 21 and No. 26 Rule"

Dear Ms. Cooper:

This is to advise that I am giving approval to file the above-referenced legislative rule with your office as notice of public hearing/comment period.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please contact Carrie Chambers in my office at 759-0515.

Sincerely yours,


Michael P. Miano
Commissioner

MPM:cc

cc: Carrie Chambers
Ken Politan, OMR

**BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION**

BRIEFING DOCUMENT

**Rule Title: 47CSR4 - "State Certification of Activities Requiring
Nationwide Permits No. 21 and No. 26"**

AUTHORITY: WV Code - 22-11-7a

B. SUMMARY OF RULE:

**This rule establishes a water certification program for
surface mining operations**

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE
RULE:**

**This rule will implement the provision of SB 145 passed
during the 1998 Session.**

**D. FEDERAL COUNTERPART REGULATIONS -
INCORPORATION BY REFERENCE/DETERMINATION
OF STRINGENCY:**

There is no comparable federal regulation

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3(c), the Director has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

This new rule will be reviewed by the Advisory Council during its July 1998 meeting. Recommendations of the Council, and the Director's response to Council's recommendations, will be included in the August 3, 1998 filing with the Secretary of State's Office and the Legislative Rulemaking Review Committee.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: State Certification of Activities Requiring Nationwide Permits
 No. 21 and No. 26

Type of Rule: **Legislative** **Interpretive** **Procedural**

Agency: Division of Environmental Protection

Address: #10 McJunkin Road
 Nitro, West Virginia 25142-3506

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	\$ -0-	\$ -0-	\$ -0--	\$ -0-	\$ -0-
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

Existing manpower and funding will implement the requirements of the proposed rule

3. Objectives of these rules:

To implement the provisions of SB 145 passed during the Legislative Session (1998)

Rule Title: 47CSR4 - "State Certification of Activities Requiring Nationwide Permits No. 21 and No. 26"

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

N/A

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

N/A

C. Economic Impact on Citizens/Public at Large.

N/A

Date: June 22, 1998

Signature of Agency Head or Authorized Representative

Carrie J. Chambers

TITLE 47
LEGISLATIVE RULES
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF WATER RESOURCES

FILED

JUN 22 2 53 PM '98

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SERIES 4
STATE CERTIFICATION OF ACTIVITIES
REQUIRING NATIONWIDE PERMITS NO. 21 AND NO. 26 RULE

§47-4-1. General.

1.1. Scope. -- The purpose of this legislative rule is to carry out the responsibilities placed upon the state by Section 401 of the Federal Clean Water Act, 33 U.S.C. §1341, and WV Code §22-11-7(a). Section 401 of the Clean Water Act requires that any applicant for a federal 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. This rule is for requests for certifications under Nationwide Permits No. 21 and No. 26 issued by the U. S. Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. §1344.

1.2. Authority. -- WV Code §22-11-7(a)

1.3. Filing Date. --

1.4. Effective Date. --

§47-4-2. Definitions.

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

2.1. "Activity(ies)" are surface coal mining operations satisfying the definition in WV Code §22-3-3 and are eligible for coverage under the U. S. Army Corps of Engineer's Nationwide Permit No. 21 or No. 26, that will impact Waters of the State.

2.2. "Administratively Complete" shall mean the receipt of the following completed items: no practical alternative study if required, delineation of the stream or wetland to be impacted, mitigation/compensation agreement if required, state 401

certification public notice form, authorization from the U. S. Army Corps of Engineers for Nationwide Permit No. 21 or No. 26, and if required, a biological survey of the streams to be impacted.

2.3. "Certification" means certification as required under Section 401 of the Federal Clean Water Act, 33 U.S.C. §1341.

2.4. "Director" means the director of the West Virginia Division of Environmental Protection, or such other person to whom the director has delegated authority or duties.

2.5. "Division" means the West Virginia Division of Environmental Protection.

2.6. "Isolated Water(s)" shall mean Waters of the State not permanently displaced by the placement of a permanent structure, but isolated as a result of a permanent structure.

2.7. "Ordinary High Water Mark" - as defined by 33 CFR, Part 329.11, is that line on the stream bank established by the fluctuation of water levels and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in soil characteristics, destruction or limits of terrestrial vegetation, and the presence of litter and debris. The acreage of stream disturbed or impacted must be calculated. Acreage equals the length of the disturbed or impacted stream times the width. Length = the length (in feet) of the stream from the uppermost point of disturbance or impact to the furthest downstream point of disturbance or impact. Width = average stream width (in feet) at the ordinary high water mark.

2.8. "Permanent Structure(s)" shall mean any structure placed in Waters of the State that will remain in place after final bond release in accordance with WV Code §22-3 et. seq. Such structures are, but not limited to: valley fills, refuse piles, culverts, stream crossings, and impounding structures including slurry.

2.9. "Stream(s)" or "Wetlands" means any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this

state, or bordering this state and within its jurisdiction, and includes, without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds (except farm ponds, industrial settling basins and ponds and water treatment facilities), impounding reservoirs, springs, wells, watercourses and wetlands.

§47-4-3. Scope and Effect of Certification: Notification of Director.

3.1. Scope of Certification.

3.1.a. Section 401 of the Federal Clean Water Act requires that any applicant for a permit 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 Division 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.

3.1.b. The state may grant, grant with conditions, deny or waive state certification.

3.2. Effect of Certification. -- Certification and any conditions required by the certification shall become a condition of the U. S. Army Corps of Engineer's Nationwide Permit. If the state denies certification, then the federal permit shall not be granted. 33 U.S.C. §1341(a)(1).

§47-4-4. Applications, Procedures for Certification Issuance.

4.1. General. -- Any applicant for water quality certification must present a complete application to the Division. The Division 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.

4.1.a. The director shall have twenty (20) working days to determine whether the request is administratively

complete or provide written notification of specific deficiencies.

4.1.b. The director shall, within sixty (60) working days, issue, issue with condition(s), waive, or deny the administratively complete request for a water quality certification.

4.2. Application requirements. The certification request shall contain three (3) copies of the following:

4.2.a. No practical alternative demonstration containing, but not limited to the following:

4.2.a.1. There are no practical alternatives to the location and operation of the proposed activity. In many cases, changes in design and/or engineering can minimize and even eliminate any substantial loss of aquatic habitat, and loss of productivity;

4.2.a.2. There is no practical alternative to the location of such activity in Waters of the State;

4.2.a.3. Treatment facilities will be located as close as practical to the source(s) with which it is associated; and

4.2.a.4. Such activity will impact on no more Waters of the State than is necessary to accommodate its proper construction and operation.

4.2.b. Biological survey of the stream. Minimum of two (2) stations, preferably three (3), shall be established in the stream. One above the proposed activity, one at the proposed activity, and one downstream of the proposed activity. The survey requirement may be waived with the West Virginia Division of Environmental Protection concurrence;

4.2.c. Delineation of the stream or wetland to be impacted;

4.2.d. Mitigation/Compensation Agreement to be executed, if required;

4.2.e. State 401 certification public notice form; and

4.2.f. Authorization from the U.S. Army Corps of Engineers that the proposed activity is covered under Nationwide Permit No. 21 or No. 26.

§47-4-5. Public Notice, Informal Conferences, Appeals.

5.1. Public Notice.

5.1.a. Upon the certification request being deemed administratively complete, the applicant shall place the advertisement in a local newspaper of general circulation in the county of the proposed activity at least once a week for four (4) consecutive weeks. Each advertisement will contain at a minimum the following:

5.1.a.1. The surface mining and National Pollutant Discharge Elimination System (NPDES) permit application numbers;

5.1.a.2. A clear and accurate location map of a scale and detail found in the West Virginia General Highway Map. The map size will be at a minimum four inches (4") x four inches (4"). Longitude and latitude line and north arrow will be indicated on the map and such lines will cross at or near the center of the certification request activity;

5.1.a.3. The name and business address of the applicant to include a street address or route number;

5.1.a.4. A narrative description clearly describing the location of the certification request activity;

5.1.a.5. The name(s) of the receiving stream(s) into which discharge of fill material will be placed;

5.1.a.6. The location where a copy of the certification request is available for public review;

5.1.a.7. The name and address of the West Virginia Division of Environmental Protection Office where written comments or requests for informal conferences on the

certification request may be submitted;

5.1.a.8. The type of operation; and

5.1.a.9. The Nationwide Permit No. as authorized by the U.S. Army Corps of Engineers.

5.1.b. The advertisement and publication dates for the certification request shall be certified and notarized by the publishing newspaper. The certificate of publication shall be made a part of the approved application no later than four (4) weeks after the last date of publication.

5.1.c. Any person having an interest which is or may be adversely affected, has the right to file written comments or objections to the certification request with the director within thirty (30) days after the last publication of the advertisement required in subdivision 5.1.a. of this section.

5.1.d. Such comments or objections shall be immediately transmitted to the applicant by the director and shall be made available to the public.

5.2. Informal Conferences.

5.2.a. If written objections are filed, and an informal conference requested within thirty (30) days of the last publication of the above notice, the director shall hold a conference in the locality of the proposed activity within three (3) weeks after the close of the public comment period.

5.2.b. Those requesting the conference shall be notified, and the date, time and location of the informal conference shall also be advertised by the director in a newspaper of general circulation in the locality at least two (2) weeks prior to the scheduled conference date.

5.2.c. An electronic or stenographic record shall be made of the conference proceeding unless waived by all parties. Such record shall be maintained and shall be accessible to the parties at their respective expense.

5.2.d. The director's authorized agent will preside over the conference.

5.2.e. In the event all parties requesting the informal conference stipulate agreement prior to the conference and withdraw their request, a conference need not be held.

5.2.f. If an informal conference has been held, the director shall issue and furnish the applicant for a certification request, and persons who were parties to the informal conference, with written finding granting or denying the certification request, in whole or in part, and stating the reasons therefore within thirty (30) days of the informal conference.

5.3. Appeal.

5.3.a. Within thirty (30) days after the applicant is notified of the director's decision, the applicant or any person with an interest which is or may be adversely affected, may request, in writing, a hearing before the director.

§47-4-6. Certifications.

6.1. Activities that will impact Waters of the State that are wetlands may be certified with conditions including, but not limited to the following:

6.1.a. The discharge of fill material into a wetland is authorized based upon the following criteria: Reference Federal Register, Volume 61, No. 241, Friday, December 13, 1996, titled "Final Notice of Issuance, Reissuance and Modification of Nationwide Permits".

6.1.a.1. 0 to 1/3 acre of wetland impact requires a report to the U.S. Army Corps of Engineers within thirty (30) days following completion of the work. The amount of fill in a wetland, wetland complex or wetland system without mitigation is not to cumulatively exceed 1/3 acre.

6.1.a.2. 1/3 to 1 acre of wetland impact requires Pre-Construction Notice (PCN) to the U. S. Army Corps of Engineers along with a proposed plan for mitigation.

6.1.a.3. 1 to 3 acres of wetland impact requires full coordination, Pre-construction Notice (PCN) and mitigation.

6.1.a.4. 3 acres and above of wetland impact require an individual permit.

6.2. In-kind replacement mitigation is to be accomplished at the following ratios:

6.2.a. Impacts to open water wetlands are to be replaced at a ratio of 1 acre created for each acre impacted;

6.2.a.1. Impacts to wet-meadow-type wetlands are to be replaced at a ratio of 2.0 acres created for each acre impacted;

6.2.a.2. Impacts to scrub-shrub-type wetlands are to be replaced at a ratio of 3.0 acres created for each acre impacted; and

6.2.a.3. Impacts to forested wetlands are to be replaced at a ratio of 3.0 acres created for each acre impacted.

6.3. Activities that will impact Waters of the State less than a 480 acre watershed as measured above the toe of the furthest downstream permanent structure may be certified with conditions including, but not limited to the following:

6.3.a. The permittee will investigate for water supply intakes or other activities immediately downstream which may be affected by suspended solids and turbidity increases caused by work in the watercourse. The permittee will give notice to operators of any such water supply intakes and such other water quality dependent activities as necessary before beginning work in the watercourse in sufficient time to allow preparation for any changes in water quality.

6.3.b. Excavation, dredging or filling in the watercourse will be done only to the extent necessary to achieve the project's purpose.

6.3.c. Upon completion of earthwork operations, all fills in the watercourse or onshore, and all other areas onshore disturbed during construction, will be properly stabilized to prevent soil erosion. When possible, stabilization shall incorporate revegetation using bioengineering as an alternative to rip rap. If rip rap is utilized, it is to be of such weight

and size that bank stress or slump conditions will not be created due to its placement. Fill is to be clean, nonhazardous and of such composition that it will not adversely affect the biological, chemical or physical properties of the receiving waters. To reduce potential slope failure and/or erosion behind the material, fill containing concrete must be of near equal dimensions (i.e., length and width shall be similar to material thickness).

6.3.d. Discharges from retention/detention ponds must comply with permit requirements of the NPDES permit program of the West Virginia Division of Environmental Protection, Office of Water Resources.

6.3.e. Best Management Practices for Sediment and Erosion Control, as described in the U. S. Department of Agriculture, Natural Resources Conservation Services (NRCS), "Sediment and Erosion Control Handbook for Developing Areas of West Virginia", or similar documents prepared by the West Virginia Division of Highways, or West Virginia Division of Environmental Protection's Office of Mining and Reclamation, may be used where the proposed land disturbance is less than three (3) acres in size. These handbooks are available from the respective agency offices.

6.3.f. Green concrete will not be permitted to enter the watercourse unless contained by tightly sealed forms or cells. Concrete handling equipment shall not discharge waste washwater into wetlands or watercourses at any time without adequate wastewater treatment as approved by the West Virginia Division of Environmental Protection, Office of Water Resources.

6.3.g. Removal of mature riparian vegetation not directly associated with project construction is prohibited. Disturbances and removal of vegetation from the project construction area is to be avoided, where possible, and minimized when necessary. Removal of vegetation shall not be allowed where stream bank stability under flow conditions would be compromised.

6.3.h. The permittee will comply with water quality standards as contained in 46CSR1, "Requirements Governing Water Quality Standards."

6.3.i. Activities permitted under the Nationwide

Permit Program require that a West Virginia Public Lands Corporation Right of Entry be obtained. Application for this permit should be made to the West Virginia Division of Natural Resources, Office of Real Estate Management, Capitol Complex, Building 3, Room 643, Charleston, West Virginia 25305.

6.4. Activities that will impact Waters of the State equal to or greater than a 480 acre watershed as measured above the toe of the farthest downstream permanent structure may be certified with conditions including, but not limited to the following:

6.4.a. All the conditions in subdivisions 6.3. a. - 6.3.i. of this rule.

6.4.b. Permanent loss of Waters of the State on the permitted area, except for Waters of the State isolated as a result of the permanent structure may compensate at a ratio of two acres for every one acre lost.

6.4.c. Isolated loss of Waters of the State as a result of a permanent structure shall compensate at a ratio of five-tenths acre for every one acre isolated.

6.4.d. As an alternative to subdivisions 6.4.b. and 6.4.c. of this rule, monetary compensation of two hundred twenty-five thousand dollars (\$225,000) per acre of stream disturbed. The stream acreage measured shall be the acreage of Waters of the State impacted by the surface coal mining operation measured from the furthest downstream disturbance. A payment plan over three (3) years is acceptable. Where payment or in-kind projects are deferred, then the applicant shall post a payment bond in a form satisfactory to the director, to be effective until compensation is made or the in-kind project is satisfactory completed.

§47-4-7. Enforcement of Certification Provisions.

7.1. 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, is subject to the enforcement mechanisms available for enforcing the terms or conditions of the federal permit to which they attach. In addition, other enforcement mechanisms under the WV Code may be available.