

Rule Title: Title 47 Series 5A

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:
Less than \$12,500 annual impact to State Government.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of
Citizens:
Estimated 50 applications totaling \$12,500.

C. Economic Impact on Citizens/Public at Large.
N/A

Date: _____

Signature of Agency Head or Authorized Representative:

STATEMENT OF CIRCUMSTANCES TO 47CSR5A

This legislative rule supersedes the previous procedural 47CSR5a rule. All the language is new.

SUMMARY OF CHANGES TO 47CSR5A

This legislative rule supersedes the previous procedural 47CSR5a rule. All the language is new.

TITLE 47
LEGISLATIVE RULES
DEPARTMENT OF ENVIRONMENTAL PROTECTION
WATER RESOURCES
SERIES 5A
RULES FOR INDIVIDUAL STATE CERTIFICATION OF
ACTIVITIES REQUIRING A FEDERAL PERMIT

FILED

2001 JUN -6 P 5:13

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§47-5A-1. General

1.1. Scope. — The purpose of these legislative rules 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) and 22-1-6(d)(6). Section 401 of the Clean Water Act requires that any applicant for a federal permit to conduct an activity that 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. These rules establish the procedures and criteria for the application, processing and review of individual state water quality certifications which require a federal permit from the United States 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) and 22-1-6(d)(6).

1.3. Filing Date. — ~~January 12, 1999~~

1.4. Effective Date. — ~~February 15, 1999~~

§47-5A-2. Definitions.

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

2.1. Activity(ies) are applicants for a U. S. Army Corps of Engineers 404 permit that discharge into waters of the U. S. and require an individual state 401 water quality certification.

2.2. Aquatic resources include but are not limited to wildlife, fish, recreational uses, critical habitats, wetlands, and other natural resources under the Secretary's jurisdiction.

2.3. Complete means that the application package submitted by the applicant for a State 401 Water Quality Certification contains all information necessary to initiate processing and public review.

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

2.5. Compensatory mitigation is the compensation to the State for unavoidable impacts to aquatic resources in Waters of the U.S. by replacing those aquatic resources through creation, restoration, enhancement, or monetary compensation as set forth below in this rule.

2.6. Condition means limitations and monitoring requirements which assures that any applicant for a federal license or permit will comply with all applicable federal and state laws including water quality standards.

2.7. Department means the Department of Environmental Protection.

2.8. Forested Wetlands are characterized by woody vegetation that is six (6) meters tall or taller.

2.9. Ordinary high water mark 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, changed 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 impacted stream times the width. Length = the length (in feet) of the stream from the uppermost pint of disturbance or the impact to the furthest downstream pint of disturbance or impact. Width = average stream width (in feet) at the ordinary high water mark.

2.10. Open Water Wetlands are ponds, lakes, and reservoirs. vegetation may or may not be present, and covers less than 10% of the surface area.

2.11. Permanent Impacts are considered unavoidable loses of aquatic resources that result from a permanent structure or activities that cause physical stream loss or impairment.

2.12. Permanent Structure(s) shall mean any structure placed in or a disturbance in Waters of the U.S. that will remain in place for twelve (12) months or longer.

2.13. Scrub-shrub Wetlands are areas dominated by woody vegetation less than six (6) meters tall. The species include true shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions.

2.14. Secretary means the secretary of the Department of Environmental Protection or such other person to whom the secretary has delegated authority or duties.

2.15. Wet Meadow Wetlands are along streams or in depressions often saturated with water. Their vegetation is more than 50% herbaceous, and grasses with rich variety of forbs dominate.

§47-5A-3. Scope and Effect of Certification

3.1. Certifications may impose State standard conditions and any special conditions necessary so as to comply with applicable state and federal laws.

3.2. Certifications may require compensatory mitigation.

3.3. 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).

§47-5A-4. Applications, Procedures for Certification Issuance.

4.1. General.

4.1.a. Any applicant for an individual state 401 water quality certification shall submit five copies of a complete application to the secretary on the forms prescribed by the secretary. The applicant shall submit an application fee in the amount of two hundred and fifty dollars (\$250).

4.1.a.1. The secretary shall have sixty (60) days upon receipt to determine if an application package is complete.

4.1.a.2. Upon notification of the secretary further information may be requested to facilitate an evaluation of the certification request.

4.1.b. The Director shall, within one year after an application is deemed complete, issue, waive or deny the request for a water quality certification.

4.2. Contents of application. Application for state 401 water quality certification shall include the form prescribed by the Secretary and the following:

4.2.a. This subsection is only applicable to activities that meet the definition of a surface mining operation as defined in section 3, article 3, chapter 22 of the West Virginia Code. This information shall accompany the state 401 water quality certification application.

4.2.a.1. A No Practical Alternative Demonstration. A demonstration containing, but not limited to, the following:

4.2.a.1.i. Demonstrate that there is not a practical alternative to the location of the preferred alternative in Waters of the U.S.

4.2.a.1.ii. That treatment facilities will be located as close as practical to the source(s) with which it is associated.

4.2.a.1.iii. Such activity will impact no more Waters of the U.S. than is necessary to accommodate its proper construction and operation.

4.2.a.1.iv. Maps, plans, specifications, and design analyses for the preferred alternative to the project.

4.2.a.2. An Impact Analysis. A detailed analysis of the potential impacts, to the extent applicable, of the proposed project on water quality and quantity, fish and wildlife, aquatic habitat, parks, recreation, in-stream and downstream water uses.

4.2.a.3. A Biological survey of the stream. Applicant will follow established and accepted protocols for collection, analysis, documentation, and presentation of biological data from Waters of the U.S., i.e., U.S. Environmental Protection Agency's Rapid Bioassessment Protocols for Use in Wadeable Streams and Rivers. Station locations shall be one above the proposed activity, one at the proposed activity, and one downstream of the proposed activity. The secretary may, at his discretion, request from the applicant certain state preferred biologic indices to facilitate review. The survey requirement can be waived with the departments concurrence.

4.2.a.4. A Delineation of the stream to be impacted. The length, width, and depth of the stream segment impacted shall be measured. Width and depth measurements shall be made at 100-foot intervals. The stream delineation shall indicate the ephemeral and intermittent/perennial segments to be impacted. The stream shall be measured from the farthest downstream disturbance, excluding stream crossings associated with haul roads for surface mining operations, upstream to the beginning of an intermittent stream, as defined in Title 46, Series 1, Section 2.9 and/or Title 38, Series 2, Section 2.71.

4.2.a.4.i. Submit all findings in an appendix to the report including, but not limited to the following

4.2.a.4.ii. Name of person(s) and their qualifications conducting the delineation (WVDEP representative, company representative, consultant, biologist, etc).

4.2.a.4.iii. Date delineation was conducted.

4.2.a.4.iv. Weather Conditions (recent and day of delineation)

4.2.a.4.v. A statement verifying the October 1999 WVDEP Stream Delineation Memorandum was followed in the determination process.

4.2.a.4.vi. Type of method used for determination ("Post-hole" or Benthic)

4.2.a.4.vii. Include a copy of field notes, photographs, and a stream delineation map that indicates the results in relation to the proposed activity if possible.

4.2.b. A Wetlands Delineation. Wetlands shall be identified using the 1987 Corps Manual for wetland delineation, or by accepted methods approved by the WV Division of Natural Resources, and their function and value assessed and documented.

4.2.c. A Stream Restoration Plan. Any activity in waters of the U. S. shall include a Stream Restoration Plan, which outlines fluvial geo-morphological methods to address impacts and return the stream back to natural conditions.

4.2.d. A Mitigation/Compensation Agreement to be executed in accordance with section 6.2.

4.2.e. The Public Notice Form for State 401 Certification.

4.2.f. A statement affirming that all information above submitted for review is accurate and true to the best of applicant's knowledge.

§47-5A-5. Public Notice, Public Hearings.

5.1. Public Notice.

5.1.a. Upon the Certification application being deemed complete, the applicant shall place a one time Class I legal advertisement in a qualified newspaper of general circulation in the county of the proposed activity. There will be a thirty (30) day comment period from the date of publication. Each advertisement will contain at a minimum the following:

5.1.a.1. The surface mining and NPDES permit numbers, if applicable.

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 the 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 Department of Environmental Protection Office where written comments or requests for a public hearing on the certification request may be submitted.

5.1.a.8. The type of operation.

5.1.a.9. The type of federal permit being sought.

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 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 that is or may be adversely affected, has the right to file written comments or objections to the certification request with the secretary within thirty (30) days after the publication date of the advertisement required in subsection 5.1.a. of this section.

5.2. Public Hearings.

5.2.a. The decision to hold a public hearing lies within the discretion of the secretary. The secretary will evaluate all requests for a public hearing and make a decision based on such requests.

5.2.b. Requests made to the secretary 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.

5.2.c. The secretary, if determined necessary, may also hold a public hearing without a request.

5.2.d. The secretary shall send a written notice to all parties requesting the public hearing. The applicant shall publish a Class I legal advertisement in a qualified newspaper of general circulation in the county where the proposed activity shall occur. Such hearing notice shall be sent and published at least thirty (30) days prior to the hearing date and shall include all pertinent information including, location, date and time.

5.2.e. The applicant shall bear the cost of publishing any notice.

§ 47-5A-6. Compensatory Mitigation.

6.1. The Division may require the applicant, as a condition of certification, to compensate for aquatic resources lost through compensatory mitigation and/or monetary compensation.

6.2. Compensatory Mitigation Requirements.

6.2.a. The Division has established a hierarchy for compensation of lost aquatic resources. The first option should be fully investigated before consideration of the next option.

6.2.a.1. On-site/In-kind: replacing habitat value losses on the site where the project has taken place with similar habitat values, allowing populations of species associated with that habitat may remain stable over time by (a) physical modification of replacement habitat to convert it to the same type lost; (b) restoration or rehabilitation or previously altered habitat; (c) increased management of similar replacement habitat so that the in-kind value of the lost habitat is replaced, or (d) a combination of these measures.

6.2.a.2. Off-site/In-kind: replacing habitat value losses off site from the project area, but preferably within the same watershed with similar habitat values using (a)-(d) above.

6.2.a.3. On-site/Out-of-kind: replacing habitat value losses on site where the project has taken place with different kinds of habitats. This may result in significant differences in fish and wildlife populations.

6.2.a.4. Off-site/Out-of-kind: replacing habitat value losses off site from project area with different kinds of habitats. This may result in significant differences in fish and wildlife populations.

6.2.b. For stream impacts/loses to aquatic resources, compensatory mitigation projects shall be completed at a ratio appropriate to the type of waters impacted, consistent with state or federal standards as required by the federal clean water act, for the types and locations of waters impacted. Stream restoration projects must use accepted and approved methods to restore the stream back to its natural condition.

6.2.c. Compensation for wetlands must occur for impacts cumulatively of one-tenth (1/10) acre and above at the following ratios.

6.2.c.1. Impacts to open water wetlands are to be replaced at a ratio of one (1) unit created for each unit impacted.

6.2.c.2. Impacts to wet meadow type wetlands are to be replaced at a ratio of two (2) units created for each unit impacted.

6.2.c.3. Impacts to scrub-shrub type wetlands are to be replaced at a ratio of three (3) units created for each unit impacted.

6.2.c.4. Impacts to forested wetlands are to be replaced at a ratio of three (3) units created for each unit impacted.

6.2.c.5. In certain instances, the secretary may consider the acquisition of existing wetlands. All wetlands acquired, using the acquisition method of mitigation, shall either be deeded to the West Virginia Division of Natural Resources' Public Land Corporation for

management by the Wildlife Resources Section or placed under a conservation easement and be protected from disturbance by the permittee or their designee. Acquisition ratios are the following:

6.2.c.5.i. Five (5) units to every one (1) unit for open body wetlands;

6.2.c.5.ii. Ten (10) units to every one (1) unit for wet meadow wetlands and;

6.2.c.5.iii. Fifteen (15) units to every one (1) unit for scrub-shrub and forested wetlands.

6.2.d. In lieu of compensation projects, monetary compensation can be collected for loss of resources. For activities that meet the definition of surface mining operations the money shall be deposited in the Stream Restoration Fund (§22-1-14) and expended for restoration and enhancement of streams and water resources of the State, which have been impacted by coal mining.

6.2.d.1. Permanent impacts for coal related monetary mitigation will be assessed at \$200,000 per acre of impacts in watersheds greater than or equal to two hundred and fifty (250) acres from the toe of the farthest downstream permanent structure, and/or cumulatively exceeds a ½ acre of loss or impact of stream.

6.2.d.2. Permanent impacts for non-coal monetary mitigation will be assessed at the rate of \$100.00 per lineal foot of stream lost.

6.2.d.3. A payment plan over three (3) years shall be allowed.

6.2.e. Where payment or compensation projects are deferred, the secretary may require the applicant to post a payment bond in a form satisfactory to the secretary, to be effective until compensation is made or the in-kind project is satisfactorily completed. The bond shall be released upon satisfactory completion of compensation or payment as determined by the secretary.

6.2.f. In lieu of monetary compensation, applicants can make in-kind donations of land that would be suitable for lake development or water resources improvement or creation. Such sites must have the Division of Natural Resources, Wildlife Resources Section approval for the department's consideration.

6.3. Monitoring Requirements

6.3.a. A compensatory mitigation site shall be monitored until success criteria determined for each project has been met for a period of not less than three concurrent years.

6.3.b. Monitoring reports shall be submitted yearly until the project has been determined complete and successful for three concurrent years.