

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: July 26, 2001

Signature of Agency Head or Authorized Representative:

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 26, 2001

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Department of Environmental Protection

10 McJunkin Road

Nitro, WV 25143

LEGISLATIVE RULE TITLE: Title 47 Series 5A

1. Authorizing statute(s) citation 22-11-7(a) & 22-1-6(d)(6)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 8, 2001

b. What other notice, including advertising, did you give of the hearing?
None

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 12, 2001

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X

No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 26, 2001

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Kenneth Politan, Assistant Chief

10 Mc Junkin Road

Nirto, WV 25143

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

N/A

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

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 JUL 26 P 3:40

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 license or 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 including those from 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.

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, any activity involving a discharge into waters of the United States or the State that require a 401 state water quality certification the following terms are defined as follows:~~the following terms are defined as follows:~~

2.1. Applicants are persons or entities that are requesting a federal license or permit to conduct activity that discharges into waters of the United States and require an individual Section 401 state water quality certification. ~~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 assure 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~~ Vegetation may or may not be present, and covers less than 10% of the surface area.

2.11. Permanent Impacts are considered unavoidable losses 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. Emergent Wetlands, commonly known as wet meadows, are characterized by the presents of more than 50% grasses, sedges and other non-woody vegetation. 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.

2.16. Wetlands are those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. (EPA, 40 cfr 230.3 and CE, 33 cfr 328.3)

§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. 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 secretary's jurisdiction. The State may grant, grant with condition, deny, or waive certification. If the State denies certification, then the federal license or permit shall not be granted. 33 U.S.C. §1341(a)(1).

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 to the Department of Environmental Protection 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~~secretary shall, within one year after an application is deemed complete, issue, waive or deny the request for a water quality certification.

4.1.b.1. 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 subsection 3.1 – Scope of Certification.

4.1.b.2. 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.

4.1.b.3. Dismissal or Denial of Federal Application Meets 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 subsection 4.1.b. of this rule is available for review upon resubmission of a complete application.

4.2. Contents of application. Application for state 401 water quality certification shall include the form prescribed by the secretary including an alternative analyses 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. Include other alternatives that were considered but eliminated.

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~~Survey of the stream~~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 or other station locations necessary to assess the impact. 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 department's concurrence.

4.2.a.4. A Delineation of the ~~stream~~Stream to be impacted~~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. Provide a table listing the station number with the corresponding acreages, including the drainage area from toe of pond and toe of fill.

_____ 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 Identifying and Delineating Wetlands~~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 riparian revegetation plan, fluvial geo-morphological, or other acceptable methods to address impacts. The plan shall incorporate monitoring requirements found in section 6.3. ~~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.

4.3. Federal Energy Regulatory Commission Licenses

4.3.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 secretary requesting certification, completed application under 4.2., 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 required by subsection 5.1.d. of this rule.

4.3.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 secretary, 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 subsection 4.1.b. of this rule) 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 (6) months to issue its certification decision from the date of submission of the application.

§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: Nothing herein prohibits a joint public notice process with the U. S. Corps of Engineers. 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. Where a public hearing is granted the public comment period will be extended to the close of the hearing.

5.1.d. 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 WV Code §59-3-2(a)) 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.

5.1.e. Submission of Comments to Applicant; Response. – Any comments and information received by the Department may be forwarded to the applicant so that they may resolve disputes raised, rebut adverse comments and information, or supplement such comments and information. The Department will prepare a response to significant comments.

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-Department~~ may require the applicant, as a condition of certification, to compensate for aquatic resources lost through compensatory mitigation and/or monetary compensation. If mitigation/compensation is required, necessary agreements will be executed prior to certification.

6.2. Compensatory Mitigation Requirements.

6.2.a. ~~The Division-Department~~ 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 greater~~ than 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~~ emergent 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 in-kind compensation projects, monetary compensation can be collected for loss of resources. ~~Specifically for~~ 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. Monetary compensation may be acceptable if in-kind compensation or acquisition of existing wetlands cannot be accomplished.

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, and \$30,000 per acre of wetland replaced based on the ratios in sections 6.2.c.1. through 6.2.c.4.

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, ~~or~~ facilities associated with recreation. 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 outlined in the restoration plan has been met. ~~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.

§47-5A-7. Appeal of Certification.

7.1. Standing for Requesting and Appeal Hearing; Requests; Decision.

7.1.a. Any person whose property, interest in property, or other constitutionally protected interests, under West Virginia State Constitution Article 3, Section 10, are directly affected by the Department's certification or certification denial, may request a hearing within fifteen (15) days after notification of the certification decision.

7.1.b. A person described under subdivision 7.1.a. shall make such a request to the secretary. The request for hearing shall identify the interest directly affected and set forth the manner in which the person is aggrieved or adversely affected.

7.1.c. The secretary shall decide whether to hold such hearing.

7.2. Appeal Hearing.

7.2.a. If the request for a hearing is granted, the secretary, or his designated appointee acting as a hearing examiner, will hold the hearing within sixty (60) days from the date of the appeal request. All hearings will normally be held in Charleston at a place specified by the secretary. The secretary, however, may hold the hearing at another location or time.

7.2.b. The parties to the proceeding shall be the aggrieved person, who shall be known as the appellant and the Department of Environmental Protection which shall be the appellee.

7.2.c. In conducting the hearing, the secretary or his designated appointee acting as a hearing examiner, shall follow the procedures contained in the W. Va. Code §29A-5-1 entitled "Contested Cases." Both parties may be represented by counsel.

7.2.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.

7.2.e. After the hearing the secretary shall decide the issues presented and shall notify the parties of such decision.

§47-5A-8. Enforcement of Certification Provisions.

8.1. 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 conditions, 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 W. Va. Code may be available. See e.g., W. Va. Code §§22-1-3(a), 22-11-24, and 22-11-25.

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July 12, 2001

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TELEPHONE 304-488-17618000 HAMPTON CENTER
MORGANTOWN, WEST VIRGINIA 26506
TELEPHONE 304-538-3000412 MARKET STREET
PARKERSBURG, WEST VIRGINIA 26101
TELEPHONE 304-424-34901000 TECHNOLOGY DRIVE
FAIRMONT, WEST VIRGINIA 26534
TELEPHONE 304-368-60001144 MARKET STREET
WHEELING, WEST VIRGINIA 25303
TELEPHONE 304-233-40001680 LINCOLN STREET
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THE WORLD'S LEADING ASSOCIATION
OF INDEPENDENT LAW FIRMS

Mr. Ken Politan
West Virginia Department of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143

Re: Comments to Proposed 47 CSR 5A

Dear Mr. Politan:

The following comments are prepared on behalf of the West Virginia Chamber of Commerce ("Chamber") to the proposed 47 C.S.R. 5A. The Chamber appreciates the opportunity to comment on the proposed rule.

The Chamber is aware that for the past several years the coal industry has been operating under the §401 certification processes being proposed in 47 C.S.R. 5A. However, there are many members of the Chamber who are unaware of the requirements under the §401 certification process, and the newly proposed 47 C.S.R. 5A is substantially different from the existing 47 C.S.R. 5A. Accordingly, the Chamber has several questions to be addressed under the Division of Water Resources' proposal on §401 certification.

First, under §4 of the proposed 47 C.S.R. 5A, several items must be included in application for individual §401 certification. The Chamber would like more information on what must be included in the wetlands delineation and stream restoration plan, which must be filed under §§4.2.b and 4.2.c of the proposed rule.

Second, the Chamber is concerned with the extensive amount of time the Agency is afforded before finally issuing certification. Specifically, the Chamber is concerned that DWR is allowed an additional sixty days before certification is finally issued. While the one-year period is contained in the current rule, §4.1.a.1 of the proposed rule effectively adds an additional 15% additional lead-time to project development. As businesses seek to maximize their value chain through logistical improvements to reduce time-to-market of products, the total lead time of 14 months will negatively impact businesses' already non-competitive view of locating or expanding facilities within West Virginia. In addition, if the Agency is going to add yet another fee to the regulated community, the Chamber feels it would be reasonable that DWR could use this new revenue source to actually reduce the §401 certification review period through appropriate streamlining to actually encourage business development within the State. At the minimum, DWR should explain the rationale for requiring a new fee to perform an activity it has performed for the past several years.

Mr. Ken Politan

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July 12, 2001

Third, the Chamber feels that the Public Notice requirement of §5.1 of the proposed rule is unnecessary and redundant. Currently, the United States Corps of Engineers gives the public notice of such certification activities. The additional public notice requirements will require two identical - and probably simultaneous - public notice proceedings. Thus, §5.1 of the proposed rule is not only burdensome on the potential permit applicants but also on those that are potentially impacted by any activity requiring federal licenses and permits.

Fourth, with respect to §6.2 of the proposed 47 C.S.R. 5A, the Chamber has several concerns regarding wetlands mitigation. While conceptually mitigation is broadly accepted, much remains unsaid regarding its practical outworking. Although §6.2 of proposed 47 C.S.R. 5A distinguishes among three broad types of wetlands and acknowledges "habitat values" in a general way, it still relies fundamentally on "area for area" exchanges. We believe that effective mitigation is more appropriately undertaken on a functional basis. For the concept to be developed meaningfully and fairly, the rule should set forth a science-based mechanism for judging equivalency between partially impaired and fully functional wetlands. To do that requires some analysis of what habitats and functions may be lost and a similar projection that considers how the losses will be ameliorated. While it is well recognized that wetlands are a unique source of values that should be maintained, it is by no means true that all activities in or near these ecosystems result in a loss of function. Several questions need to be anticipated: what wetland values are fully or partially represented in the area proposed to be disturbed; which of these values will be diminished or lost due to the proposed activity; what is the nature and extent of efforts necessary to adequately compensate for those losses? As it now stands, these important determinations are left to the discretion of the agency.

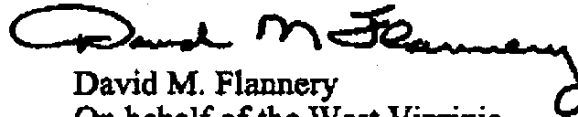
Additionally, the Chamber feels that any agreement on compensatory mitigation be memorialized in writing before the certification is granted. The way §6.1 of the proposed rule is currently written, compensation would be required as a condition of certification, although no mention is made of how the compensation is determined. Is the compensation determined through negotiation with the agency or is the amount determined by stipulation? If compensatory mitigation is determined by stipulation, the lack of specificity in the proposed rule could provide the DWR - or the Department of Natural Resources' Public Lands Corporation - with a hammer to shape compensation to satisfy their viewpoint after the fact. Any compensation costs should be known up front to properly determine the net present value of the development investment as part of the financing due diligence.

Finally, the Chamber specifically requests the Agency to reinstate the appeal process which is found in §§8 and 9.3.b of the existing 47 C.S.R. 5A. Although the Chamber is of the opinion that an appeal to the Environmental Quality Board could be filed, pursuant to W.Va. Code §22-11-21, the Chamber wishes the Agency to explicitly authorize appeals of such state certifications of federal activities.

Mr. Ken Politan
Page 3
July 12, 2001

The Chamber urges that these comments be adequately addressed by the agency before this rule is finalized.

Very truly yours,



David M. Flannery
On behalf of the West Virginia
Chamber of Commerce

cc: Allyn G. Turner, Director
Division of Water Resources
WV Department of Environmental Protection
1201 Greenbrier Street
Charleston, West Virginia 25301

From: "Flannery, David M." <DMFlannery@jacksonkelly.com>
To: "kpolitian@mail.dep.state.wv.us" <kpolitian@mail.d...>
Date: Thu, Jul 12, 2001 5:01 PM
Subject: 47 CSR 5A

Dear Ken

This will supplement the comments of the West Virginia Chamber of Commerce that were filed with you earlier today on this proposed rule:

1. We are concerned about the proposal to incorporate several documents into the rule that have not themselves been subject to comment and public review. DEP should refrain from incorporating those documents into the rule unless it has proposed those documents for review and comment.

2. We find the mitigation ratios proposed in the rule to be unnecessarily high. They have no federal counterpart and are higher than we believe to be reasonable in all applications. We favor the state pursuing the approach set forth in a 1981 guidance document of the US Fish and Wildlife Service which provides for a mitigation ratio of 1:1 in the absence of any other specific justification or negotiation and agreement among the parties.

David M. Flannery
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**COMMENTS OF THE
WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION
REGARDING
RULES FOR INDIVIDUAL STATE CERTIFICATION OF ACTIVITIES
REQUIRING A FEDERAL PERMIT
47 C.S.R. 5A**

July 11, 2001

The West Virginia Oil and Natural Gas Association welcomes this opportunity to comment on a rule that will have an effect on its members. WVONGA members are involved in all aspects of the oil and gas industry, from well drilling to pipeline transmission. This requires work through and around wetlands, particularly West Virginia's streams and rivers. For the most part, WVONGA members use the Corps of Engineers' Clean Water Act (CWA) Section 404 nationwide permits, and are subject to the general CWA Section 401 certification requirements. Occasionally, though, a WVONGA member will need an individual permit, and therefore we offer the following comments.

WVONGA joins in the comments filed by the West Virginia Manufacturers Association, but would like to expand upon some of those comments. One of those comments relates to the time period for issuance of 401 certifications, set out in Subsection 4.1. We believe that twenty days is all that is necessary to determine whether an application for an individual 401 certification is complete. In addition, while we realize that time is needed to adequately evaluate a mitigation proposal, we believe that one year is too long to wait for a 401 certification. We believe that sixty days from the end of the public comment period or the close of the public hearing, whichever last occurs, would be more appropriate.

WVONGA does not object to the DEP's goal of returning streams as much as possible to their natural condition following fill activities. However, that won't always be possible, because the nature of the fill sometimes results in altered streams. We suggest that Section 4.2.c. be changed to require the applicant to identify what will be done to meet the "success criteria" referred to in Section 6.3. In that event, the goal of the restoration project, whether or not mitigation was required pursuant to Section 6, would be identified and there would be a means of evaluating whether the goals had been achieved. The DEP would have the ability to review those success criteria before approving a mitigation plan or Stream Restoration Plan and could decide whether they are appropriate.

We suggest that there be some clarification as to when a Stream Restoration Plan is required. Presumably it is where any waters of the United States, including non-stream wetlands, are affected by fill activities, but it may be that the DEP intends that Stream Restoration Plans only be required where compensation or mitigation is not contemplated. Is a Stream Restoration Plan required where there will be compensation paid or mitigation is provided? We assume that not all dredge and fill activities will require mitigation, as the Director retains the discretion to forego a mitigation where impacts are not great, and that Stream Restoration Plans are intended for those situations. However, that is not apparent from the rule.

Section 6.2.d.2 allows payment of money in lieu of mitigation for impacts to streams. Presumably this will apply to non-stream wetlands as well. Furthermore, we would appreciate it if the DEP would confirm that compensation payments are not required where the area disturbed is less than a tenth of an acre.

The mitigation ratios in Section 6 appear excessive. Ratios of three to one for replacement of forested wetlands and fifteen to one for acquisition of existing forested wetlands should be reduced to two to one and five to one, respectively. The acquisition ratios for the others should be reduced as well, so that there is a preservation of wetlands resources without unreasonable cost.

One means of mitigating for wetlands loss has been other types of activities that improve enjoyment of aquatic resources. We urge that the DEP retain the flexibility to accept such things as construction of handicap-accessible docks at prime fishing locations as acceptable mitigation where the DEP and Division of Natural Resources approve.

The DEP might want to consider adding a section which identifies the applicant's right of objecting to, and appealing from, a decision to deny a 401 certification or to impose conditions that the applicant believes are unreasonable.

WVONGA believes that the 401 certification rule is well done and preserves to the DEP sufficient flexibility to compensate for losses of wetlands. We urge the DEP to make the few changes WVONGA suggests in order to make it an even better rule.

Ray I. Joseph, Executive Director
West Virginia Oil and Natural Gas Association

**COMMENTS OF THE
WEST VIRGINIA MANUFACTURERS ASSOCIATION
REGARDING
REGULATIONS FOR STATE CERTIFICATION
OF ACTIVITIES REQUIRING FEDERAL
LICENSING AND PERMITS
47 C.S.R. 5A**

July 11, 2001

I. Introduction.

The West Virginia Manufacturers Association (WVMA) is composed of over 200 manufacturers and supporting organizations dedicated to the encouragement and development of manufacturing in West Virginia. WVMA members are among those who apply for federal permits from the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. §1344, and offer these comments with regard to the state water quality certification requirements imposed by Section 401, 33 U.S.C. §1341.

The WVMA commends the Department of Environmental Protection (DEP) for developing a rule explaining how 401 certification will be handled. We offer the following comments in support of, and in the interest of improving, the DEP's proposed rule.

II. Comments.

1. *Section 4.1.a.* The DEP has allowed itself sixty days to determine whether an application package is complete, and one year in which to issue, waive or deny the requested certification. The WVMA urges the DEP to reconsider those time periods. Determining whether an application is complete should be a relatively simple task that can be accomplished within twenty days of receipt of the application package. Thereafter, sixty days following the close of the public comment period should be sufficient for issuance of an individual certification. We urge the DEP to substitute "twenty days" for "sixty days" for determining completeness, and "sixty days after close of the public comment period" for "one year" in which to take action on the application.

2. *Section 4.2.c.* Is a Stream Restoration Plan required in non-flowing wetlands? Is the plan intended to include the "success criteria" referred to in Section 6.3? Regardless of the answer to these questions, we suggest that the DEP delete the reference to "return[ing] the stream back to "natural conditions," since that may be unachievable in many cases. The DEP might want to

consider requiring that the Stream Restoration Plan "... outline fluvial geo-morphological methods to address impacts and designate the success criteria to be achieved by the plan."

3. *Section 4.2.d.* Mitigation/compensation agreements are not mandatory, although they may be required at the discretion of the Division. See Section 6.1. We suggest that the phrase "if required by Section 6.1 of this rule" be added to the end of Section 4.2.d.

4. *Sections 5.1.c. and 5.2.d.* Written comments are due thirty days after the publication date of the advertisement specified in Subsection 5.1.a. Public hearings at which comment will be received may be held after the written comment period has ended. The DEP might consider specifying that a public hearing does not extend the time for submitting written comments. If the DEP wants to accept written comments at the public hearing, Section 5.1.c. should be amended to note that the written comment period will be extended where a public hearing is held.

5. *Section 6.2.b.* As with the comment with regard to Section 4.2.c., the WVMA suggests that the DEP not tie itself or its applicants to returning a stream to its "natural condition". By their very nature, fill activities will to some degree change the stream's natural condition, making return to that condition an impossible goal. We suggest that some reference to achieving the "success criteria" referred to in Section 6.3 is a more reasonable approach. The WVMA urges the DEP to leave itself and its applicants sufficient flexibility to implement an restoration plan that improves stream conditions even if it does not restore it to "natural conditions."

6. *Section 6.2.c.* Section 401 certification is required for filling of "waters of the United States", which includes streams and wetlands. The terms "stream" and "wetlands" are used various ways in the rule and sometimes interchangeably. We suggest that some attempt to be made to clarify how mitigation will apply. For example, in Section 6.2.c. the term "wetlands", which might include streams in some situations, could be clarified by renaming them "non-stream wetlands".

7. *Section 6.2.d.2.* Monetary compensation may be collected for loss of resources; for non-coal monetary mitigation, the rate is assessed at \$100.00 per lineal foot of stream loss. For those non-coal activities which require filling of a non-stream wetland, will the option of monetary mitigation be available as well? If so, at what cost?

8. *Section 6.3.* The WVMA urges that the "success criteria" referred to in this section be made a part of any Stream Restoration Plan, in lieu of the requirement of returning the stream to

natural conditions. In addition, for non-stream wetlands, it is not clear to us where in the mitigation process the success criteria is identified and required. We suggest that the success criteria be developed early in the mitigation process so that the applicant can participate in its development, and the public can comment on it.

III. Conclusion.

The WVMA appreciates this opportunity to offer suggestions with regard to this rule, and hopes that the DEP will give careful consideration to the comments offered herein.

Karen S. Price, President

West Virginia Manufacturers Association



Division of Mining and Reclamation - HPU
10 McJunkin Road
Nitro, West Virginia 25143
Phone: 304-759-0510
Fax: 304-759-0528

West Virginia Department of Environmental Protection

Bob Wise
Governor

Michael O. Callaghan
Director

July 25, 2001

Mr. David Flannery
Jackson & Kelly PLLC
Attorneys at Law
Post Office Box 553
Charleston, West Virginia 25322

Dear Mr. Flannery:

Find attached a responsive summary to comments for all comments received on the rule including yours. If you should have any questions, please contact me at 759-0510.

Sincerely,

Kenneth Politan

Attachment



Division of Mining and Reclamation - HPU
10 McJunkin Road
Nitro, West Virginia 25143
Phone: 304-759-0510
Fax: 304-759-0528

West Virginia Department of Environmental Protection

Bob Wise
Governor

Michael O. Callaghan
Director

July 25, 2001

Mr. Ray I. Joseph
West Virginia Oil and
Natural Gas Association
c/o David Yaussy
Robinson & McElwee PLLC
Post Office Box 1791
Charleston, West Virginia 25326

Dear Mr. Joseph:

Find attached a responsive summary to comments for all comments received on the rule including yours. If you should have any questions, please contact me at 759-0510.

Sincerely,

Kenneth Politan

Attachment



Division of Mining and Reclamation - HPU
10 McJunkin Road
Nitro, West Virginia 25143
Phone: 304-759-0510
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West Virginia Department of Environmental Protection

Bob Wise
Governor

Michael O. Callaghan
Director

July 25, 2001

Ms. Karen Price
West Virginia Manufacturers Association
c/o David Yaussy
Robinson & McElwee PLLC
Post Office Box 1791
Charleston, West Virginia 25326

Dear Ms. Price:

Find attached a responsive summary to comments for all comments received on the rule including yours. If you should have any questions, please contact me at 759-0510.

Sincerely,

Kenneth Politan

Attachment

RESPONSE TO COMMENTS

Response to WV Chamber of Commerce

Comment: Would like more information on what must be included in the wetlands delineation and stream restoration plan, which must be filed under sections 4.2.b. and 4.2.c. of the proposed rule.

Response: The regulations reference U.S. Army Corps of Engineers Manual that dictates the methodology for determining and delineating wetlands. The stream restoration plans are site specific. In an attempt to return streams to its near original conditions, fluvial geomorphology techniques will be used to restore streams when practical. These restoration techniques are available for your review in the following publication Applied River Morphology, 2nd edition. This is the preferred technique for stream restoration other methods will be acceptable.

Comment: Concerned with an additional 60 days allowed by DWR to determine application completeness beyond the one year in the current version. Effectively extending the amount of lead-time by 15 %.

Response: Although the concern is understood past regulations have not defined a complete application. Under this process we have not only defined a complete application, see section 4., we have placed time constraints for timely reviews and actions by the DWR. We believe this is in the best interests of the applicant and the regulated industry. These are maximum time limits. This comment also brought to our attention that the original 47csr5A had separate requirements for activity requiring a Federal Energy Regulatory Commission License (FERC). The requirements covering applications and public notices for FERC licenses have been re-inserted in sections 1.1, 4. and 5. Language has been added in sections 3.1. and 4.1.b.1. to 4.1.b.3. to clarify what the secretary has to take into consideration during the certification review process.

Comment: Concern about the redundant public notice requirements of the COE and DEP.

Response: In many instances the information presented in the COE application process is inadequate to make a decision based on our state water quality regulations. We believe the best way to resolve this issue is to require a state specific application and public notice process. Since certification involves more than COE permitting, we have modified the definition in section 2.1. to clarify who applicants are and identified activities that require certification in section 2. Also a statement has been added to 5.1. that allows discretionary judgement whether to allow joint public notice.

Comment: Concerned with wetland mitigation and the determination of value of those wetlands.

Response: Discretion by the agency is necessary in these issues. There are agreements between state and federal agencies that the differing habitats function and values increase

as biological succession proceeds. For example, a wet meadow requires less time to mature and replace the functions and values lost from filling than a shrub or forested wetland system. In addition, we have more wet meadow type wetland systems in West Virginia than we have shrub and forested systems. Consequently, higher replacement ratios are warranted for the systems that take longer to mature and are in limited supply. In addition, to help eliminate any confusion over what are and aren't wetlands we have accepted the COE definition of wetlands, see section 2.16.

Comment: Concerned with reinstatement of the appeal process.

Response: Appeal provisions in conjunction with certification enforcement have been added as sections 7. and 8.

Additional comments from WV Chamber of Commerce via e-mail received July 12, 2001.

Comment: Concerned with incorporation of documents into the rules that have not been subject to public review.

Response: Because of the lack of a specific cite reference it is difficult to interpret your concern. However, if you are referring to section 4.2.a., these are documents that are only applicable to the coal mining industry. The coal mining industry has been completing these documents in the past and now we are incorporating them into the rule as part of the application submittal.

Comment: Concerned with mitigation ratios as unnecessarily high.

Response: These ratios have been in place prior to this rule, as part of the state certification of the nationwide permits issued in 1997 and have been coordinated and approved by the USFWS and EPA. These ratios have been accepted by the COE as part of the conditions to their permitting process.

Response to West Virginia Oil and Natural Gas Association

Comment: Concern regarding application comment periods and 401 Certification issuance times.

Response: We refer you to the response to comments to the WV Chamber of Commerce regarding application review times.

Comment: Concerned with returning streams to natural conditions and that is not always possible and that success criteria be added.

Response: We agree with your first comment that streams cannot be returned to it's natural state where there is a permanent fill. Section 6.2. allows the applicant to compensate offsite in-kind. In addition the rule was changed, see sections 6.2.d. and

6.2.f. to reflect these concerns by adding other compensation options such as monetary and offsite in-kind.

Comment: Concern with stream restoration plan success.

Response: Prior to any certification the applicant will submit a stream restoration plan according to section 4.2.c. The plan will serve as the measure for successful stream restoration. Sections 4.2.c. and 6.3. have been changed to more clearly define the success criteria and the monitoring requirements.

Comment: Concerned when a stream restoration plan is required.

Response: It is the intention of this rule to allow the applicant to have different mitigation options. The first, in-kind mitigation would require a stream or wetland restoration plan. Other types of mitigation will be available, such as monetary mitigation. The latter will not require restoration plans. All will require, prior to making any mitigation determination decision, an alternative analysis. Section 4.2. was changed to include a requirement for an alternative analysis for all projects. You are correct in assuming that not all dredge and fill activities will require mitigation.

Comment: Concerned with monetary mitigation applying to non-stream wetlands and payments not required for areas less than one-tenth of an acre.

Response: Section 6.2.d.2. has been added to address monetary compensation. Section 6.2.c. was changed to reflect requiring compensation for greater than one-tenth of an acre. We also refer you to the response to comments to the WV Manufacturers Association.

Comment: Concerning mitigation ratios.

Response: These mitigations ratios have been in use since June 1997, the date that the nationwide permits went into effect.

Comment: Concerning flexibility to accept certain mitigation projects.

Response: We feel that adequate flexibility has been retained for out of kind mitigation and to complete projects such as outlined in your comments. In lieu of monetary compensation the applicant may use in-kind donations of land, lake development or water resources improvements or creation. Section 6.2.f. has been amended to address your concerns.

Comment: Concerning appeal process.

Response: Sections 7. and 8. have been added to provide appeal rights and certification enforcement provisions to address your concerns.

Response to the West Virginia Manufacturers Association.

Comment: Concern regarding application comment periods and 401 Certification issuance times.

Response: We refer you to the response to comments to the WV Chamber of Commerce regarding application review times.

Comment: Concerned with returning streams to natural conditions and that is not always possible and that success criteria be added.

Response: We agree with your first comment that streams cannot be returned to it's natural state where there is a permanent fill. Section 6.2. allows the applicant to compensate offsite in-kind. In addition the rule was changed, see sections 6.2.d. and 6.2.f., to reflect these concerns by adding other compensation options such as monetary and offsite in-kind.

Comment: Concerned with mitigation/compensation agreements are not always mandatory.

Response: We concur and section 6.1. was changed to reflect your concern.

Comment: Concerned with specifying that a public hearing does not extend the time for submitting comments.

Response: Section 5.1.c. has been changed to reflect the comment period being extended to the close of the public hearing.

Comment: Concerned with the success criteria in returning a stream to it's natural condition.

Response: Prior to any certification the applicant will submit a stream restoration plan according to section 4.2.c. The plan will serve as the measure for successful stream restoration. Sections 4.2.c. and 6.3. have been changed to more clearly define the success criteria and the monitoring requirements.

Comment: Concerned with whether stream and wetland mitigation are interchangeable.

Response: We believe it is clear how mitigation will apply to both streams and wetlands. Section 6.2.b. applies to streams only and section 6.2.c. for wetlands only, sections 6.2.d., 6.2.e., and 6.2.f. apply to both wetlands and streams.

Comment: Concerned with monetary compensation for wetlands.

Response: Section 6.2.d.2. was amended to address your concern and provides a monetary compensation rate of \$30,000 per acre of wetland replaced based on the ratios in section 6.2.c.

Comment: Concerned with the success criteria being part of the stream restoration plan.

Response: Prior to any certification the applicant will submit a stream restoration plan according to section 4.2.c. The plan will serve as the measure for successful stream restoration. Sections 4.2.c. and 6.3. have been changed to more clearly define the success criteria and the monitoring requirements.

PUBLIC HEARING
July 12, 2001

There is no transcript of this public hearing since no one attended.