

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

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OFFICE WEST VIRGINIA
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NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: WUDEP - Division of Water Resources TITLE NUMBER: 47

CITE AUTHORITY: §§22-1-7(a) and 22-1-6(d)6

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 5A

TITLE OF RULE BEING AMENDED: State certification of Activities
Requiring Federal Licenses and Permits Rule

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.


Authorized Signature

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TITLE 47
PROCEDURAL LEGISLATIVE RULE
DIVISION DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE DIVISION OF WATER RESOURCES

SERIES 5A
STATE CERTIFICATION
OF ACTIVITIES REQUIRING FEDERAL LICENSES AND PERMITS RULE

§47-5A-1. General.

1.1. Scope. -- The purpose of this ~~procedural~~ Legislative rule is to carry out the ~~procedural~~ responsibilities placed upon the state by Section 401 of the Federal Clean Water Act, 33 U.S.C. §1341 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 which 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. ~~Federal permits and licenses issued by the federal government requiring certification include permits issued by the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. §1344 and licenses issued by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. §1791 et. seq. This rule establishes the procedures and criteria for the application, processing and review of 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.~~

In issuing such a certification, the state must establish procedures for public notice of all applications for certification, and to the extent it deems appropriate, procedures for public hearing in connection with specific application. See 1980 Report and Opinion of Attorney General, p. 191 (February 11, 1980). This rule establishes such procedures for public notice and

public hearings, as well as other procedures.

~~This rule also interprets the scope of the state's certification.~~

1.2. Authority. -- ~~W. Va. Code §22-1-6(d)(6).~~ 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~~ 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:

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

2.2. ~~"Director" means the director of the Division of Environmental Protection, or his designee.~~

2.3. ~~"Division" means the Division of Environmental Protection.~~

2.1. "Applicant" or "applicants" means 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.

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

2.3. "Complete application" 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" means 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 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" or "DEP" means the Department of Environmental Protection.

2.8. "Emergent wetlands" or "wet meadows" means lands characterized by the presents of more than 50% grasses, sedges and other non-woody vegetation.

2.9. "Forested Wetlands" means wetlands that are characterized by woody vegetation that is six (6) meters tal or taller.

2.10. "Open Water Wetlands" means ponds, lakes and reservoirs. Vegetation may or may not be present, if present, it covers less than 10% of the surface area.

2.11. "Ordinary high water mark" means 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 impacted stream time the width. Length = the length (in feet) of rthe stream from the uppermost point of disturbance or the impact to the furthest downstream point of disturbance or impact. Width = average stream width (in feet) at the ordinary high water mark.

2.12. "Permanent impacts" means unavoidable losses of aquatic resources that result from a permanent structure or activities that cause physical stream loss or impairment.

2.13. "Permanent structure" or permanent structures" means any structure placed in or a disturbance in Waters of the U.S. that will remain in place for twelve (12) months or longer.

2.14. "Scrub-shrub wetlands" means 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.

2.15. "Secretary" means the Secretary of the Department of Environmental Protection or his or her designee.

2.16. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Under the provisions of 40 CFR 230.3 and 33 CFR 328.3, wetlands generally include swamps, marshes, bogs and similar areas.

§47-5A-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 or license from the federal government to conduct an activity which may discharge into the waters of the United States must present the federal agency with a certification from the state wherein the discharge originates that such activity will comply with specified sections of federal law and with any other appropriate requirement of state law. When issuing certification, the 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 condition, deny, or waive state certification.~~

~~3.2. Effect of Certification. -- Certification and any conditions required by the certification shall become a condition on any federal license or permit. If the state denies certification, then the federal license or permit shall not be granted. 33 U.S.C. §1341(a)(1).~~

~~3.3. Notification of Director for Certification of Activities Which May Affect Waters of West Virginia.~~

~~3.3.a. Whenever a discharge originating in one state may affect the quality of water in another state, Section 401(a)(2) of the Clean Water Act requires that, upon receipt of a certification application and certification, the federal licensing or permitting agency must notify the Administrator of the United States Environmental Protection Agency. The Administrator must, within thirty (30) days of the notice of application, notify the state whose water quality will be affected. Such state may comment on the discharge's impact on water quality of that state.~~

~~3.3.b. In order to assure that the Division receives notification in a timely manner, without regard to the obligations of the United States Environmental Protection Agency, notification shall be given to the~~

~~director by the applicant within thirty (30) days after submission of a complete certification application to the appropriate agency in the state wherein the discharge originates, whenever the quality of West Virginia waters are, or will be, impacted by the activity.~~

~~3.3.c. After the permit or license is issued by the federal authority, the applicant shall send a copy of the federal license or permit, including any state certification issued by the state agency from the state in which the discharge originates.~~

3.1. Certifications may impose State standard conditions and any special conditions necessary 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 Department may grant, grant with condition(s), deny or wave certification. In accordance with the provisions of the Clean Water Act, 33 U.S.C. §1341(a)(1), if the Department denies certification, the federal license or permit shall not be granted.

3.2. Certifications may require compensatory mitigation.

3.3. In accordance with the Clean Water Act, 33 U.S.C. §1341(d) any certification condition becomes a term or condition of any federal license or permit.

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

4.1. General. -- Any applicant for certification, except for activities covered by section 9 of this rule, 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. Any applicant for an individual state 401 water quality certification shall submit five (5) copies of a complete application to the Secretary on the prescribed forms. The applicant shall submit an application fee of two hundred and fifty dollars (\$250.00) the Department with the application package.

4.1.a.1. The Secretary has sixty (60) days from the receipt of the application to determine whether or not it is complete.

4.1.a.2. The Secretary may request additional information to facilitate evaluation of a certification request.

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

4.1.b.1. Basis for Decision - Each certification decision will be based on compliance with Sections 301, 302, 303, 306 and 307 of the Clean Water Act, Section 3.1 of this rule and any applicable state law.

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 on the application 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, 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 subdivision 4.1.b of this rule is available for review upon submission of a complete application.

~~4.2. Corps of Engineers Permits. -- The application to the Division for certification of~~

~~activities requiring Section 404 permits issued by the United States Army Corps of Engineers, except for activities covered by section 9 of this rule, shall be the Public Notice issued by the Corps of Engineers which describes the activity; notifies the general public of the application for the Section 404 permit and state certification and of the public's right to submit comments and requests for public hearing. The applicant need not submit a copy of the public notice if the Division has received a copy of the public notice from the Corps of Engineers. If further information is required for project assessment, the Division may request it from either the applicant or the Corps.~~

4.2. Contents of application.. An application for a state 401 water quality certification shall be made on 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 WV Code §22-3-3. 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 the Water of the U.S., including 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, the extent applicable, of the proposed project on water quality and quantity, fish and wildlife, aquatic habitat, parks, recreation, in-stream and downstream uses.

4.2.a.3. A Biological Survey of the Stream. - Each 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 located one (1) above the proposed activity, one (1) at the proposed activity and one (1) downstream of the proposed activity or other station locations necessary to assess the activity's impact. The Secretary, may at his or her discretion, request from the applicant certain state preferred biologic indices to facility review. The survey requirement may be waived with the Department's 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 one hundred (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 crossing associated with haul roads for surface mining operations, upstream to the beginning of an intermittent stream, as defined in 46 CSR 1-2.9 and /or 38 CSR 2-2.71. The applicant shall provide a table listing the station number with the corresponding acreage including the drainage area from the toe of the pond and the toe of the 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 or

persons and his or her qualifications conducting the delineation (i.e., DEP representative, company representative, consultant, biologist, etc.).

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

4.2.a.4.iv. Recent weather conditions and on the day of the delineation.

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

4.2.a.4.vi. Type of method used for determination (i.e., 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, or by accepted methods approved by the W.Va. 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 a riparian revegetation plan, fluvial geomorphological or other acceptable methods to address impacts. The plan shall incorporate monitoring requirements found in subsection 6.3 of this rule.

4.2.d. A Mitigation/Compensation Agreement to be executed in accordance with subsection 6.2 of this rule.

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

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

4.3.a. The application to the Division for certification of an activity requiring a license from the Federal Energy Regulatory Commission (FERC) shall be a letter to the ~~director~~ Secretary requesting certification, completed ~~form Appendix A~~ application under subsection 4.2 of this rule, the license application, document submitted to and accepted by FERC under 18 C.F.R. §4.1-4.202, the Order from FERC accepting the application and a certificate of publication from the newspaper publishing the Class II legal advertisement (~~Appendix B~~) required by ~~subsection 6.2. subdivision 5.1.d.~~ subdivision 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 ~~Division Department~~ of such changes. The ~~Division Department~~ may review such alterations or modifications and, if the changes are deemed significant by the ~~director~~ Secretary, the ~~Division Department~~ may require a new application for certification. The ~~Division Department~~ will have ninety (90) days to review such changes or until the end of the year review period, (see ~~subsection 5.1 subdivision 4.1.b~~ subdivision 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 ~~Division Department~~ requires a new application because of a significant application modification, then the ~~Division Department~~ will have six (6) months to issue its certification decision from the date of submission of the application.

~~4.4. Activities Requiring More Than One Certification:~~

~~4.4.a. Whenever an activity requires more than one certification because two (2) or more licenses or permits are required from the federal government, the applicant must apply for certification for both federal authorizations.~~

4.3. Federal Energy Regulatory Commission Licenses.

~~4.4.b. If the Division desires, it may reissue the certification for the first federal authorization or certify, certify with conditions, waive, or deny the additional certification. If changes to the activity or planned activity have occurred and were not previously reviewed by the Division, the director may withdraw his previous certification.~~

~~4.5. Other Activities Requiring Certification. -- Applicants for other activities, except those covered by section 9 of this rule, requiring certification shall submit information to the Division explaining the activity and its environmental impact of the natural resources under the director's jurisdiction.~~

§47-5A-5. Procedures for Certification Issuance: Public Notice, Public Hearings.

~~5.1. Action Within One (1) Year. -- Upon receipt of a completed application, the Division will act upon the request for certification within one (1) year or such certification may be deemed as being waived.~~

5.1. Public Notice.

5.1.a. Upon determination that the certification application is 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 dater of publication. Nothing herein prohibits a joint public notice process with the U.S. Corps of Engineers. Each advertisement must 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 must be at a minimum four (4) inches x four (4) inches. Longitude and latitude line and northarrow must be indicated on the map and cross at or near the center of the certification request activity.

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 DEP 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 certification 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 subdivision 5.1.a of this rule. 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-

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

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. - All 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. 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.~~

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 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 newspaper in the county where the proposed activity will occur. Such hearing notice shall be sent at least thirty (30) days prior to the hearing date and shall include all pertinent information including location, date and time.

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

~~5.3. Distribution of Certification Decision. -- Copies of the proposed certification decision will be sent to the applicant and all persons who commented or attended the public hearing.~~

~~5.4. 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 5.1 of this rule is available for review upon resubmission of a complete application.~~

§47-5A-6. Public Notice:

~~6.1. Corps of Engineers Permits. -- The Division's procedure for issuing public notice for certification of a Corps of Engineers' permit may be either: (1) A public notice issued jointly with the U.S. Army Corps of Engineers, or (2) a public notice issued by the Division. Such notice will describe the activity, advise the public of the scope of certification, their rights to comment on the proposed activity and to request a public hearing, and will also inform the public to whom they should send their requests and comments. (Appendix B) If the Division issues the public notice, then the applicant will bear the cost.~~

~~6.2. Federal Energy Regulatory Commission Licenses. -- The Division's procedure for issuing a public notice for certification of a FERC license shall be a Class II legal advertisement, (Sec 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 (Appendix B).~~

~~6.3. Public Notice for Other Activities Requiring Certification. -- Public notice for other activities requiring certification will be published as a Class I legal advertisement (See W. Va. Code §59-3-2(a)) in the county where the proposed activity will take place. The applicant will bear the cost of such advertisement.~~

~~6.4. Submission of Comments to Applicant; Response. -- Any comments and information received by the Division may be forwarded to the applicant so that he may resolve disputes raised, rebut adverse comments and information, or supplement such comments and information. The Division will prepare a response to significant comments.~~

§47-5A-6. Compensatory Mitigation.

6.1. The Department 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 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 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) unites 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 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

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, water resources improvement, 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.

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. Public Hearings:

~~7.1. Purpose. -- The purpose of the public hearing is to afford persons and organizations the opportunity to present comments and~~

~~(250) acres from the toe of the farthest downstream permanent structure, and/or cumulatively exceeds a 1/2 acre of loss or impact of stream.~~

~~information which will assist the Division in its decision-making process on application for certification.~~

~~7.2. Decision to Hold Public Hearing:~~

~~7.2.a. The decision to hold a public hearing lies within the discretion of the director. The director will evaluate all requests for a public hearing and make a decision based on such requests. Such requests should explain the need for the public hearing and set forth the kind of information, material, or comments expected to be given at the hearing. The director may also hold a public hearing without request.~~

~~7.2.b. When a public hearing is called by the director, he shall send a written notice to all parties receiving the public notice and shall publish a Class I legal advertisement (See W. Va. Code §59-3-2(a) in a newspaper in the county where the activity is located or proposed. Such hearing notice shall be sent at least thirty (30) days prior to the hearing date and shall include all pertinent information including location, date and time. The applicant shall bear the cost of publishing any notice.~~

~~7.3. Conduct of Public Hearing:~~

~~7.3.a. If the public hearing is held, it may be conducted by a hearing officer who shall be appointed by the director.~~

~~7.3.b. The public hearing will be conducted in an orderly fashion. Anyone having comments and information may present them to the hearing officer subject to reasonable time limitations. If such information and comments are lengthy, the Division encourages the submission of written testimony with attached documents. The oral presentation should summarize the written testimony.~~

~~§47-5A-8.~~ §47-5A-7. Appeal of Certification.

~~8.1.~~ 7.1. Standing for Requesting and

~~8.1.a.~~ 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 ~~Division's~~ Department's ~~proposed~~ certification or certification denial, ~~except for those activities covered by section 9 of this rule,~~ may request a hearing within fifteen (15) days after notification of such proposed certification decision.

~~8.1.b.~~ 7.1.b. A person described under subdivision ~~8.1.a.~~ 7.1.a. shall make such a request to the ~~director~~ 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.

~~8.1.c.~~ 7.1.c. The ~~director~~ Secretary shall decide whether to hold such hearing.

~~8.2.~~ 7.2. Appeal Hearing.

~~8.2.a.~~ 7.2.a. If the request for a hearing is granted, the ~~director, or his~~ Secretary or his or her designated appointee acting as a hearing examiner, will hold the hearing within sixty (60) days. All hearings will normally be held in Charleston at a place specified by the ~~director~~ Secretary. The ~~director~~ Secretary, however, may hold the hearing at another location or time.

~~8.2.b.~~ 7.2.b. The parties to the proceeding shall be the aggrieved person, who shall be known as the appellant and the ~~Division~~ Department of Environmental Protection which shall be the appellee.

~~8.2.c.~~ 7.2.c. In conducting the hearing, the ~~director or his~~ Secretary or his or her designated appointee acting as a hearing examiner, shall follow the procedures contained in the ~~W. Va.~~ WV Code §29A-5-1 entitled "Contested Cases." Both parties may be represented by counsel.

~~8.2.d.~~ 7.2.d. Parties may seek discovery

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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.

~~8.2.c.~~ 7.2.c. After the hearing the ~~director~~ Secretary shall decide the issues presented and shall notify the parties of such decision.

~~§47-5A-9.~~ Certification of Corps of Engineers General Permits on State, Regional, or Nationwide Basis.**~~9.1.~~ General Permits on State, Regional or Nationwide Basis.**

~~9.1.a.~~ In carrying out the Section 404 dredge or fill permitting program, the Corps of Engineers may issue general permits on a state, regional or nationwide basis. Sec 33 U.S.C. §1344(c). Activities covered by such general permits do not require individual application to the Corps of Engineers for a Section 404 permit. Any such general permit must be for a category of activities which are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

~~9.1.b.~~ Corps of Engineers general permits require state certification. The state may certify in accordance with subsections 3.1 and 3.2 of this rule.

~~9.2.~~ Procedures for Certification of Corps of Engineers General Permits.

~~9.2.a.~~ Public Notice. -- When the Corps of Engineers proposes to issue a general permit, it requests certification from the state. Public notice of the request for certification and the director's proposed certification decision may be either: (1) a public notice issued jointly with the U.S. Army Corps of Engineers; or (2) a public notice issued by the Division.

Such public notice will describe the category of activities included in the general permit, advise the public of the scope of certification, their rights to comment on the proposed certification decision, and to request a

9.2.b. Public Hearings. -- Comments and requests for public hearings will be evaluated by the director pursuant to section 7 of this rule. Public hearings will be publicly noticed and conducted in accordance with section 7 of this rule.

9.3. Appeal of Certification of Corps of Engineers General Permits.

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

9.3.b. Appeal of State Certification:

9.3.b.1. -- Any person whose property, interest in property, or other constitutionally protected interest under West Virginia State Constitution Article 3, Section 10, are directly affected by the Division's certification of any individual activity authorized by a certified Corps of Engineers' general permit may request an appeal hearing within fifteen (15) days after publication of the notice described in subdivision 9.3.a of this rule.

9.3.b.2. -- A person described under paragraph 9.3.b.1 shall make such request to the director. The request for hearing shall identify

public hearing. Such notice will also inform the public to whom they should send their requests and comments.

the interest directly affected and set forth the manner in which it is aggrieved or adversely affected.

9.3.b.3. -- The director shall decide whether to hold such hearing and will conduct the hearing in accordance with subdivisions 8.2.a through 8.2.d.

9.3.b.4. -- The director shall examine the issues presented and notify the parties of his decision to either uphold, modify or withdraw certification for the individual activity.

~~§47-5A-10:~~ §47-5A-8. Enforcement of Certification Provisions.

~~10.1:~~ 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.