

**TITLE 47
PROCEDURAL RULES
DIVISION OF ENVIRONMENTAL PROTECTION
WATER RESOURCES - WASTE MANAGEMENT**

**SERIES 5A
REGULATIONS FOR STATE CERTIFICATION
OF ACTIVITIES REQUIRING FEDERAL LICENSES AND PERMITS**

§47-5A-1. General.

1.1. Scope. -- The purpose of these procedural regulations 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. Section 401 of the Clean Water Act requires that any applicant for a federal license or permit to conduct an activity which will or may discharge into waters of the United States (as defined in the Clean Water Act) must present the federal authority with a certification from the appropriate state agency. 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.

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). These regulations establish such procedures for public notice and public hearings, as well as other procedures.

These regulations also interpret the scope of the State's certification.

1.2. Authority. -- W. Va. §20-1-7(30)

1.3. Filing Date. -- June 7, 1985

1.4. Effective Date. -- July 8, 1985

§47-5A-2. Definitions.

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

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

(b) "Department" means the Department of Natural Resources.

(c) "Director" means the director of the Department of Natural Resources.

**§47-5A-3. Scope and Effect of Certification:
Notification of Director.**

3.1. Scope of Certification.

(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 Department 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.

(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.

(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.

(b) In order to assure that the Department 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.

(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.

§47-5A-4. Applications.

4.1. General. -- Any applicant for certification, except for activities covered by Section 9 of these regulations, must present a complete application to the Department. The Department 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.

4.2. Corps of Engineers Permits. -- The application to the Department 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 these regulations, 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 Department has received a copy of the public notice from the Corps of Engineers. If further information is required for project assessment of Department may request it from either the applicant or the Corps.

4.3. Federal Energy Regulatory Commission Licenses.

(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 Director requesting certification, completed form Appendix A, 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 Section 6.2. of these regulations.

(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 director, 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 Section 5.1 of these regulations) 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.

4.4 Activities Requiring More Than One Certification.

(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.

(b) If the Department 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 Department, the Director may withdraw his previous certification.

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

§47-5A-5. Procedures for Certification Issuance.

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

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 Section 3.1 -- Scope of Certification.

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 Section 5.1 of these regulations is available for departmental review upon resubmission of a complete application.

§47-5A-6. Public Notice.

6.1. Corps of Engineers Permits. -- The Department'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 Department. 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 Department issues the public notice, then the applicant will bear the cost.

6.2. 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 West Virginia Code subsection (b) section two, article three, chapter fifty-nine) 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 West Virginia Code subsection (a), section two, article three, chapter fifty-nine) 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 Department may be forwarded to the applicant so that he may resolve disputes raised, rebut adverse comments and information or supplement such comments and information. The Department will prepare a response to significant comments.

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

7.2. Decision to Hold Public Hearing.

(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.

(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 West Virginia Code section two, article three, chapter fifty-nine) 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.

(a) If the public hearing is held it may be conducted by a hearing officer who shall be appointed by the Director.

(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 Department encourages the submission of written testimony with attached documents. The oral presentation should summarize the written testimony.

§47-5A-8. Appeal of Certification.

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

(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 proposed certification or certification denial, except for those activities covered by Section 9 of these regulations, may request a hearing within fifteen (15) days after notification of such proposed certification decision.

(b) A person described under subsection (a) shall make such a request to the director. The request for hearing shall identify the interest directly affected and set forth the manner in which the person aggrieved or adversely affected.

(c) The Director shall decide whether to hold such hearing.

8.2. Appeal Hearing.

(a) If the request for a hearing is granted, the director, or his 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. The director, however, may hold the hearing at another location or time.

(b) The parties to the proceeding shall be the aggrieved person, who shall be known as the appellant and the Department of Natural Resources which shall be the appellee.

(c) In conducting the hearing, the director or his designated appointee acting as a hearing examiner, shall follow the procedures contained in the West Virginia Code section one, article five, chapter twenty-nine-a et. seq. entitled "Contested Cases." Both parties may be represented by counsel.

(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.

(e) After the hearing the director 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.

(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. See 33 U.S.C. §1344(e). 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.

(b) Corps of Engineers General Permits Require State Certification. The state may certify in accordance with Section 3.1 and 3.2 of these regulations.

9.2. Procedures for Certification of Corps of Engineers General permits.

(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 Department.

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

(b) Public Hearings. -- Comments and requests for public hearings will be evaluated by the director pursuant to Section 7 of these regulation. Public hearings will be publicly noticed and conducted in accordance with Section 7 of these regulation.

9.3. Appeal of Certification of Corps of Engineers general permits.

(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.

ED. NOTE - Appendix A-C is omitted and is available in the Secretary of State's office or the Department of Natural Resources.

(b) Appeal of State Certification.

(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 Department'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 Section 9.3(a) of these regulations.

(2) A person described under subsection (b)(1) shall make such request to the director. The request for hearing shall identify the interest directly affected and set forth the manner in which it is aggrieved or adversely affected.

(3) The director shall decide whether to hold such hearing and will conduct the hearing in accordance with Section 8.2(a)-(d) of these regulations.

(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. Enforcement of Certification Provisions.

10.1. General. -- The Clean Water Act provides that any certification condition becomes a term or condition of any federal license or permit. 33 U.S.C. §1341 (d). Certification condition, therefore, 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 Code of West Virginia may be available. See e.g. West Virginia Code subsection thirty, section seven, article one, chapter twenty and section five, article seven, chapter twenty.

Title 47

~~WEST VIRGINIA~~ ^{rules} ~~PROCEDURAL REGULATIONS~~
Department of Natural Resources
Chapter 20-1C
Series XIX ~~to~~ 5
~~Part II - Procedural Regulations~~

Title: Regulations for State Certification of Activities Requiring Federal Licenses and Permits

Section 1. General

1.1 Scope of Regulations. The purpose of these procedural regulations 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. Section 401 of the Clean Water Act requires that any applicant for a federal license or permit to conduct an activity which will or may discharge into waters of the United States (as defined in the Clean Water Act) must present the federal authority with a certification from the appropriate state agency. 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.

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 applications. See 1980 Report and Opinion of Attorney General, p. 191 (February 11, 1980). These regulations establish such procedures for public notice and public hearings, as well as other procedures.

These regulations also interpret the scope of the State's certification.

1.2 Authority. Code of West Virginia § 20-1-7(30).

1.3 Promulgation History. These regulations were originally filed August 4, 1980 and refiled December 30, 1982 to become effective January 1, 1983. Amendments to these regulations became effective as an emergency filing on June 21, 1984 and were superceded as final regulations on August 8, 1984. On January 11, 1985 amendments to these regulations were filed under the emergency provisions of West Virginia Code § 29A-1-15 and are effective for six months unless otherwise amended or new regulations are issued by the Director. On April 12, 1985, proposed regulations were filed to implement the emergency regulations.

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- 1.³ Filing Date. June 7, 1985
1.⁴ Effective Date. ~~June 7, 1985~~ ^{July 8, 1985}

Section 2. Definitions

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

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

(b) "Department" means the Department of Natural Resources.

(c) "Director" means the Director of the Department of Natural Resources.

Section 3. Scope and Effect of Certification; Notification of Director

3.1 Scope of Certification.

(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 Department 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.

(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.

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(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.

(b) In order to assure that the Department 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.

(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.

Section 4. Applications

4.1 General. Any applicant for certification, except for activities covered by Section 9 of these regulations, must present a complete application to the Department. The Department 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.

4.2 Corps of Engineers Permits. The application to the Department 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 these regulations, shall be the Public Notice issued by the Corps of Engineers which describes the activity, notifies the general public of the application for the 404 permit and state certification and of the public's right to submit comments and requests for public hearings. The applicant need not submit a copy of the public notice if the Department has received a copy of the public notice from the Corps of Engineers. If further information is required for project assessment the Department may

request it from either the applicant or the Corps.

4.3 Federal Energy Regulatory Commission Licenses.

(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 Director requesting certification, completed form Appendix A, 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 § 6.02.

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(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 Director, 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 § 5.01), 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 months to issue its certification decision from the date of submission of the application.

4.4 Activities Requiring More Than One Certification.

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

(b) If the Department 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 Department, the Director may withdraw his previous certification.

4.5 Other Activities Requiring Certification. Applicants for other activities, except those covered by Section 9 of these regulations, requiring certification shall submit information to the

Department explaining the activity and its environmental impact on the natural resources under the Director's jurisdiction.

Section 5. Procedures for Certification Issuance.

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

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 Section 3.1 - Scope of Certification.

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 Moots 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 Section 5.1 is available for departmental review upon resubmission of a complete application.

Section 6. Public Notice

6.1 Corps of Engineers Permits. The Department'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 Department. 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 Department issues the public notice, then the applicant will bear the cost.

6.2 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 W. Va.

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Code § 59-3-2(b)] 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 Department may be forwarded to the applicant so that he may resolve disputes raised, rebut adverse comments and information or supplement such comments and information. The Department will prepare a response to significant comments.

Section 7. Public Hearings

7.1 Purpose. The purpose of the public hearing is to afford persons and organizations the opportunity to present comments and information which will assist the Department in its decision-making process on application for certification.

7.2 Decision to Hold Public Hearing.

(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.

(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) 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.

(a) If the public hearing is held it may be conducted by a hearing officer who shall be appointed by the Director.

(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 Department encourages the submission of written testimony with attached documents. The oral presentation should summarize the written testimony.

Section 8. Appeal of Certification

8.1 Standing for Requesting an Appeal Hearing; Requests; Decision.

(a) Any person whose property, interest in property, or other constitutionally protected interests, [under W. Va. State Constitution Article 3, Section (10)] are directly affected by the Department's proposed certification or certification denial, except for those activities covered by Section 9 of these regulations, may request a hearing within 15 days after notification of such proposed certification decision.

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

(c) The Director shall decide whether to hold such hearing.

8.2 Appeal Hearing.

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

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(b) The parties to the proceeding shall be the aggrieved person, who shall be known as the Appellant and the Department of Natural Resources which shall be the Appellee.

(c) In conducting the hearing, the Director or his designated appointee acting as a hearing examiner, shall follow the procedures contained in the West Virginia Code § 29A-5-1 et seq. entitled "Contested Cases." Both parties may be represented by counsel.

(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.

(e) After the hearing the Director shall decide the issues presented and shall notify the parties of such decision.

Section 9. Certification of Corps of Engineers General Permits on State Regional, or Nationwide Basis.

9.1 General permits on State, Regional or Nationwide Basis.

(a) In carrying out the § 404 dredge or fill permitting program, the Corps of Engineers may issue general permits on a state, regional or nationwide basis. See 33 U.S.C. 1344(e). 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.

(b) Corps of Engineers general permits require state certification. The State may certify in accordance with Section 3.1 and 3.2 of these regulations.

9.2 Procedures for Certification of Corps of Engineers General Permits.

(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

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issued by the Department.

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

(b) Public Hearings. Comments and requests for public hearings will be evaluated by the Director pursuant to Section 7 of these regulations. Public hearings will be publicly noticed and conducted in accordance with Section 7 of these regulations.

9.3 Appeal of Certification of Corps of Engineers General Permits.

(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.

(b) Appeal of State Certification. (1) Any person whose property, interest in property or other constitutionally protected interest [under W. Va. State Constitution Article 3 Section (10)] are directly affected by the Department's certification of any individual activity authorized by a certified Corps of Engineers' general permit may request an appeal hearing within 15 days after publication of the notice described in Section 9.3(a) of these regulations.

(2) A person described under subsection (b)(1) shall make such request to the Director. The request for hearing shall identify the interest directly affected and set forth the manner in which it is aggrieved or adversely affected.

(3) The Director shall decide whether to hold such hearing and will conduct the hearing in accordance with Section 8.2(a)-(d) of these regulations.

(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.

Section 10. Enforcement of Certification Provisions

10.1 General. The Clean Water Act provides that any certification condition becomes a term or condition of any federal license or permit. 33 U.S.C. § 1341 (d). Certification condition, therefore, 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 Code of West Virginia may be available. See e.g. W. Va. Code § § 20-1-7(30) and 20-7-5.

*09 @BB@
Ed. Note: Appendix A-C is omitted.
It is available from the
Secretary of State's Office
on the Department of Natural
Resources. @EB@