

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #3

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2007 JUL 27 PM 1:29

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: ~~WVDEP, DWWM~~ Water Resources TITLE NUMBER: 47

CITE AUTHORITY: §§22-11-7(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: West Virginia Rules for Individual State Certification of Activities
Requiring a Federal Permit

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Stephanie R. Timmerman
Authorized Signature

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, 2007

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Department of Environmental Protection
Division of Water and Waste Management
610 - 57th Street
Charleston, WV 25304
(304 926-0499

LEGISLATIVE RULE TITLE: Rules for Individual State Certification of
Activities Requiring a Federal Permit

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

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 1, 2007

b. What other notice, including advertising, did you give of the hearing?
Class I legal ad in Charleston Gazette and Daily Mail
Agency mailing list
Agency website
Agency newsletter

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 10, 2007

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached x No comments received 1

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

July 26, 2007

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

Charles Sturey, Environmental Program Manager II

610 - 57 Street
Charleston, WV 25304

Phone: (304) 926-0499 ext. 1526

Fax: (304) 926-0456

- 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

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

**Rule Title: RULES FOR INDIVIDUAL STATE CERTIFICATION OF ACTIVITIES
REQUIRING A FEDERAL PERMIT Title 47 Series 5A**

A. AUTHORITY: §§ 22-11-7(a) and 22-1-6(d)(6).

B. SUMMARY OF RULE:

The proposed amendments to this rule are being made to adopt into rule requirements that have been applied through past practices for coal related activities requiring mitigation and issuance of a 401 State Certification of a 404 Permit. Ratios for monetary compensation for temporary impacts are detailed. Monetary compensation for permanent impacts to wetlands from coal related activities are made the same as non-coal related. Stream measurement information is being requested to be added to the 401 applications.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

The proposed amendments to this rule are being made to adopt into rule requirements that have been applied through past practices for coal related activities requiring mitigation and issuance of a 401 State Certification of a 404 Permit.

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

There is no federal counterpart regulation, thus no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

**F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY
COUNCIL:**

During a May 22, 2007 and May 30, 2007 meetings, the Environmental Protection Advisory Council reviewed and discussed this rule. Their comments are contained in the attached minutes.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules for Individual State Certification Title 47 Series 5A

Type of Rule: Legislative Interpretive Procedural

Agency: Department of Environmental Protection

Address: 601 - 57th Street
Charleston, WV 25304

Phone Number: (304) 926-0490 ext. 1526 Email: csturey@wvdep.org

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

These changes are mainly for clarification and should have no fiscal impact on state government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: Rules for Individual State Certification Title 47 Series 5A

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

There are no proposed increases or decreases in fees proposed by these changes. Nothing proposed in these changes should have a fiscal impact on the state or public beyond what they are currently experiencing.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

These changes are proposed for clarification of information needed for the state certification of activities requiring a federal 404 permit.

Date: _____

Signature of Agency Head or Authorized Representative

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TITLE 47
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION OF WEST VIRGINIA
WATER RESOURCES
SECRETARY OF STATE

SERIES 5A
RULES FOR INDIVIDUAL STATE CERTIFICATION OF
ACTIVITIES REQUIRING A FEDERAL PERMIT

§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 US Code § 1341 and W. Va. 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 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 US Code §1344 and licenses issued by the Federal Energy Regulatory Commission under the Federal Power Act, 16 US Code §1791 et. seq.

1.2. Authority. -- W. Va. Code §§22-11-7(a) and 22-1-6(d)(6).

1.3. Filing Date. -- ~~May 8, 2002.~~

1.4. Effective Date. -- ~~July 1, 2002.~~

§47-5A-2. Definitions.

When used in this rule, for any activity involving a discharge into waters of the United States or the State that requires a 401 state water quality certification, 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.

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.Code §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. Emergent Wetlands, commonly known as wet meadows, are characterized by the presence of more than 50% grasses, sedges and other non-woody vegetation.

2.9. Forested Wetlands are characterized by

woody vegetation that is six (6) meters tall or taller.

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

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

2.13. 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, except for structures defined as temporary structures in this section.

2.14. 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.

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

2.16. Temporary Structure means, for structures permitted under W. Va. Code §22-3-1 et seq., any structure which will be removed before or upon final bond release; for structures not

permitted under W. Va. Code §22-3-1 et seq., temporary structure means any structure which will be removed upon completion of the project.

2.17. 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. (Environmental Protection Agency, 40 CFR 230.3 and Corps of Engineers, 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.Code §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.Code §1341(d).

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

4.1. Information contained within environmental processes and reviews such as environmental assessments, environmental impact statements and mining and reclamation plans, may be used to meet part or all of the requirements of this rule.

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 by the Secretary further information may be requested to facilitate an evaluation of the certification request.

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

4.2.b. 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.

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

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

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

4.2.f. This subsection is only applicable to activities that meet the definition of a surface mining operation as defined in W. Va. Code §22-3-3. This information shall accompany the state 401 water quality certification application.

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

4.2.f.1.A. Demonstrate that there is not a practical alternative in Waters of the U.S., including other alternatives that were considered but eliminated.

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

4.2.f.1.C. Such activity will impact Waters of the U.S. no more than is

necessary to accommodate its proper construction and operation.

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

4.2.f.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.f.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 facilitate review. The survey requirement may be waived with the Department's concurrence.

4.2.f.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 crossings 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 ordinary high water mark. 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.f.4.A. Submit all findings in an appendix to the report including, but not limited to the following:

4.2.f.4.B. Name of person(s) conducting the stream delineation and his or her qualifications (i.e. DEP representative, company representative, consultant, biologist, etc).

4.2.f.4.C. Date delineation was conducted.

4.2.f.4.D. Recent weather conditions and those on the day of the delineation.

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

4.2.f.4.F. Method used for determination (i.e. Post-hole or benthic).

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

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 CFR [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. 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 and available.

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 W. Va. 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 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 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/losses 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.b.1. Compensatory mitigation shall be required for all permanent and temporary stream impacts resulting from coal related activities in watersheds greater than or

equal to two hundred and fifty (250) acres and/or when the activity results in a stream loss or impact exceeding one half (1/2) acre of stream. The drainage area and one half (1/2) acre assessments shall be measured starting from the toe of the most downstream permanent or temporary impact (excluding stream crossings) in which the activity occurs.

6.2.c. Compensation for wetlands must occur for impacts cumulatively 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. An applicant for a proposed project who desires to provide compensatory in-kind mitigation prior to the disturbance of the mitigable resource, will comply with the following criteria:

6.2.c.5.A. Mitigation ratio will be at one (1) unit created to every one (1) unit impacted.

6.2.c.5.B. Mitigation shall be completed 12 months prior to the impact of the resource.

6.2.c.5.C. Mitigation plans will meet the review and approval of the Department of Environmental Protection and Division of Natural Resources. Satisfactory completion will be determined by concurrence of DEP and DNR prior to final approval of mitigation obligation.

6.2.c.6. 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 activities that meet the definition of surface mining operations the money shall be deposited in the Stream Restoration Fund (W. Va. Code §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 exceeds a 1/2 acre of loss or impact of stream.~~ Monetary compensation for stream impacts resulting from coal related activities shall be assessed as follows:

6.2.d.1.A. Permanent impacts for coal related monetary mitigation will be assessed at \$200,000 per acre of impacts.

6.2.d.1.B. Temporary coal

related stream impacts resulting from structures (excluding stream crossings) that will be removed prior to final bond release will be assessed at \$20,000 per acre of stream impact per each five-year period of impact and/or prorated for each year the impact occurs.

6.2.d.1.C. Temporary coal related stream impacts resulting from stream crossings (i.e. culverting) and stream relocations where the stream impact is greater than or equal to two hundred one (201) lineal feet, but less than or equal to four hundred (400) lineal feet and is in place for five years or more, shall be assessed at \$20,000 per acre for the first five (5) year period and prorated for each additional year the impact shall occur. A temporary stream impact resulting in more than four hundred (400) linear feet shall be monetary compensated at a rate of \$20,000 per acre per each five (5) year term and/or prorated for each year the impact occurs.

6.2.d.1.D. Permanent wetland impacts for coal related monetary mitigation will be assessed at the rate \$30,000 per acre of wetland replaced based on the ratios in section 6.2.c.

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 section 6.2.c.

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. 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.Code §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.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF MINING AND RECLAMATION

IN THE MATTER OF:

PROPOSED RULE 47CSR5A

Individual State Certification of Activities Requiring a
Federal Permit

TRANSCRIPT OF PROCEEDINGS had or testimony of
adduced pursuant to the West Virginia Rules of Civil
Procedure in the above-entitled action, on the 10th day of
July, 2007, commencing at 6:12 p.m. and concluding at 6:14
p.m., at the office of the West Virginia Department of
Environmental Protection, 601 57th Street, S.E.,
Charleston, Kanawha County, West Virginia, pursuant to
notice to all interested parties.

BEFORE: JESSICA GREATHOUSE, Facilitator
Public Information Office

ORIGINAL

NANCY MCNEALY
CERTIFIED COURT REPORTER
Post Office Box 13415
Charleston, West Virginia 25360-0415
(304) 988-2873 FAX (304) 988-1419

APPEARANCES: DAVE VANDE LINDE, Mining & Reclamation
 JIM RATLIFF, Mining & Reclamation
 KEN POLITAN, Mining & Reclamation
 CHARLES STURRY, Mining & Reclamation
 VAUGHN ANDERSON, Mining & Reclamation
 JASON BOSTIC, West Virginia Coal
 Association

I N D E X

Reporter's Certificate.....Page 6

1 MS. GREATHOUSE: Good evening. My name is
2 Jessica Greathouse, and I'm the Facilitator for tonight's
3 hearing. The purpose of tonight's hearing is to accept
4 comments on Proposed Rule 47CSR5A, Individual State
5 Certification of Activities Requiring a Federal Permit.

6 Please make sure you have signed in and
7 indicated if you are going to make a comment. Comments
8 shall be limited to the proposed revisions to the rule.
9 Copies of the rules are available from the Secretary of
10 State's Office or from the DEP webpage, www.WVDEP.org/2008
11 [Rules](#).

12 We are here this evening to listen to your
13 comments and questions and include them in the official
14 record. Written comments must be submitted to the West
15 Virginia Department of Environmental Protection Public
16 Information Office, 601 57th Street, S.E., Charleston, West
17 Virginia, 25304. Comments may also be e-mailed to
18 Comments@WVDEP.org.

19 This meeting is being recorded. The
20 comment period will end at the conclusion of the hearing
21 with e-mails being accepted through midnight tonight.

22 Is there anyone wishing to make a comment
23 on the record?

24 (No response.)

1 MS. GREATHOUSE: If there is no one who would
2 like to make a comment on the record, this closes the
3 hearing and the official record. We will file our rule
4 with the responses to your comments with the Secretary of
5 State's Office. This concludes the hearing and thank you
6 for your participation.

(WHEREUPON, the hearing was closed.)

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF MINING AND RECLAMATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, **NANCY MCNEALY**, Certified Verbatim Reporter and Commissioner of West Virginia, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption hereof.

Given under my hand this 11th day of July, 2007.

My commission expires November 26, 2010.



Nancy McNealy

Certified Verbatim Reporter

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
PROPOSED RULE HEARING

RULE: RULES FOR INDIVIDUAL STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL PERMIT Title 47 Series 5A

DATE: July 10, 2007 **LOCATION:** 601 57th Street, Charleston, WV 25304

REGISTRATION

NOTE: PLEASE PRINT - If information is not complete or legible, notification of decision will not be provided by DMR

FULL NAME <i>(Only one name per line)</i>	COMPLETE MAILING ADDRESS <i>Include Address, City, State, and Zip Code</i>	REPRESENTING	"X" IF SPEAKING	"X" IF SUBMITTING COMMENTS
JASON BOSTIC	P.O. Box 3923 Charleston, WV 25339	West Virginia Coal Association		X

West Virginia Coal Association

P.O. Box 3923
Charleston, WV 25339
304-342-4153
304-342-7651(fax) jbostic@wvcoal.com (e-mail)

representing *"America's "Fuel of Choice"*

July 10, 2007

**Ms. Jessica Greathouse
West Virginia Department of Environmental Protection
Public Information Office
601 57th Street SE
Charleston, WV 25304**

Re: Comments on Proposed Revisions to 47 CSR 5A

Dear Ms. Greathouse:

Pursuant to the notice filed with the West Virginia Secretary of State, the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to 47 CSR 5A, "Rules for Individual State Certification of Activities Requiring a Federal Permit".

WVCA is a non-profit state trade association representing the interests of the West Virginia coal industry on policy and regulatory issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's primary goal is to enhance the viability of West Virginia's coal industry by supporting efficient and environmentally responsible coal extraction and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA appreciates the opportunity to provide comments regarding the West Virginia Department of Environmental Protection's

(WVDEP”) proposed revisions to the state’s Clean Water Act (“CWA”) Section 401 certification rule.

General Comments

WVCA is very concerned about the WVDEP’s proposal to add detail to its § 401 mitigation program, particularly at this time. The WVDEP has not articulated any problems with implementation of its existing mitigation program pursuant to this rule, and the WVCA sees no benefit to adding further detail and complexity now. Even more importantly, the WVCA understands the history of the WVDEP’s § 401 mitigation program, and believes that the very basis for its development years ago no longer exists. The WVDEP’s program has been fully replaced by the federal mitigation program which has developed into a comprehensive program and is the subject of new joint United States Army Corps of Engineers (“Corps”) and the United States Environmental Protection Agency (“EPA”) rules to update and conform their collective mitigation goals and requirements. The state’s mitigation requirements, at least as they relate to mitigation for activities permitted by a CWA § 404 permit, have become obsolete and duplicative.

History of State § 401 Mitigation Requirements.

The state’s mitigation program as maintained by the WVDEP and implemented through the § 401 rules is not a required component of the federal § 404 permitting program. The § 401 certification program is intended to insure that

issuance of a federal permit does not result in a violation of state water quality standards:

CWA section 401 provides that states certify that federal activities or activities requiring federal approvals relative to CWA section 404 would not violate applicable effluent limitations, or other limitations, or other water quality requirements.¹

Instead, the state has independently required mitigation as a condition of § 401 certification. Implementation of the state's mitigation program and requirements dates from a time when the Corps imposed no federal mitigation requirement on mining operations authorized by the § 404 General Permit for coal mining operations, Nationwide Permit 21("NWP 21"):

[NWP] 21. Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM) or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. **The notification must include an OSM or state-approved mitigation plan** (emphasis added).²

Based on the requirements of the NWP 21, a state mitigation plan was required for a mining-related § 404 permit (usually a NWP 21) to be issued by the Corps:

Prior to reissuance of NWP 21 in January 2002, the COE [Corps] considered mitigation adequate with the inclusion of an OSM or state-approved SMCRA onsite mitigation plan in the permit application.³

¹ Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. page II.C-42.

² Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Dec. 13, 1996. 61 Fed. Reg. 241.

³ Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page II.C-52.

West Virginia implemented this program through the § 401 certification program which imposed monetary or in-lieu fee requirements on coal mining related § 404 permits.

In 2002, the Corps revised and reissued NWP 21 adding a condition that the Corps' District Engineer require federal mitigation, reviewed and approved by the Corps in accordance with its joint mitigation rules and regulations maintained with the EPA.⁴ The revised and reissued NWP 21 allowed the Corps to consider state mitigation when determining federal mitigation, but removed the automatic acceptance of state-required mitigation as sufficient for § 404 authorization. From this point on, the state mitigation requirements as maintained in the § 401 certification process became duplicative because the Corps was requiring federal mitigation plans as part of the § 404 permitting process.

Federal Mitigation Requirements are Comprehensive.

Coal mining-related § 404 permitting and mitigation has evolved since the Corps's reissuance of NWP 21 in 2002. Most mining projects are now permitted using the Corps' Individual Permit process and mitigation plans are now developed based on the Corps's and EPA's combined preference for on-site, in-kind mitigation to restore the impacted aquatic resource.

As you know, coal mining operations are typically subject to the federal CWA § 404 program and the state § 401 certification program because of activities undertaken in jurisdictional waters. The steeply-sloped terrain of West

⁴ Final Notice of Issuance, Reissuance and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Jan. 15, 2002. 67 Fed. Reg. 10.

Virginia is permeated by small ephemeral and intermittent streams that serve to drain natural runoff into larger perennial stream systems. Any development in these areas--coal mining or otherwise--will result in some form of impact to small streams. Unlike many other activities subject to § 404 permitting and § 401 certification, mining activities are mostly temporary in nature, with the reclamation process providing a unique opportunity for reconstruction of impacted stream segments. The Corps has recognized this opportunity for on-site, in-kind replacement/restoration of impacted aquatic resources and issued guidance encouraging this type of mitigation:

This guidance acknowledges the uniqueness of regional and site-specific conditions, recognizes that features constructed in accordance with the Surface Mining Control and Reclamation Act may contribute to overall mitigation plans, and identifies several appropriate ways to accomplish appropriate mitigation projects.

Surface mining operations can result in the creation of intermittent and and/or perennial streams depending on the on-site hydrologic conditions and the chosen method of dealing with groundwater and/or runoff. Applicants are encouraged to optimize these opportunities for on-site mitigation.

...Corps staff, Office of Surface Mining staff, and the mining operator should coordinate to explore options for incorporating...features required by SMCRA into compensatory mitigation plans. If successfully implemented, channels and other features will help maintain and potentially improve the physical, chemical and biological integrity of waters of the United States.⁵

⁵ "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining." U.S. Army Corps of Engineers. May 7, 2004

In addition to the Corps's above-cited guidance for mining, on-site, in-kind mitigation remains the preferred means of performing mitigation for other authorized impacts to aquatic resources:

In the interest of achieving functional replacement, in-kind compensation of aquatic resources will often be appropriate.⁶

Mitigation should be required, when practicable, in areas adjacent or contiguous to the discharge site. On-site mitigation generally compensates for locally important functions, e.g., local flood control functions or unusual wildlife habitat.⁷

Compensatory mitigation should generally be "in-kind" and occur as close to the site of the adverse impact as practicable in order to minimize losses to the local aquatic ecosystem.⁸

Unfortunately, the WVDEP has to date largely ignored the mitigation guidance and requirements developed and imposed by the Corps and EPA. The WVDEP has continued to implement its duplicative § 401 mitigation requirements, and typically requires mitigation above and beyond that which is required by the Corps despite the mandate of W. Va. Code § 22-11-7a(a)(2)(C):

The Director shall provide credit for any mitigation that is a required component of the permit issued by the United States Army Corps of Engineers pursuant to 33 U.S.C. § 1344 to the extent that it satisfies required mitigation pursuant to this section.

Because a comprehensive federal mitigation program is being implemented, the WVDEP's failure to provide credit for such mitigation *as*

⁶ Regulatory Guidance Letter No.01-1. U.S. Army Corps of Engineers, October 31, 2001.

⁷ Regulatory Guidance Letter No.02-2. U.S. Army Corps of Engineers, December 24, 2002.

⁸ Compensatory Mitigation Guidelines- Huntington District . U.S. Army Corps of Engineers, Huntington, WV District. January 30, 2004.

mandated is a serious concern to the WVCA. To the extent a state program is relevant at all, perhaps to address the limited circumstances where the state's definition of "waters of the state" is broader than the CWA definition of "waters of the United States," it should be narrowly tailored to address that need. The WVCA cannot support proposed revisions that are not so narrowly tailored.

WVCA urges WVDEP to postpone pursuit of these proposed revisions at this time and to more fully consider the need for its separate mitigation program in light of (1) the federal mitigation now required as part of a § 404 permit, (2) the possibility of creating inconsistencies with the draft federal Corps and EPA rule for mitigation, (3) the deletion of NWP 21 conditions relating to state mitigation, and (4) the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

Specific Comments

Page 4 4.2.f.2.A. Economic Information about the coal mining operations, including, without limitation, the estimated number of jobs created, the estimated proportion of employees who will be residents of West Virginia, the estimated annual payroll, the estimated annual coal production (if applicable), the estimated life of the operation, the estimated severance tax for the operation, the estimated annual property tax, and such other economic information as may be requested by the agency.

WVCA questions why this level of information is needed for the § 401 certification process. Similar information is provided to the Corps under the § 404 permitting program and to the state through the Community Impact Statement. The justification for requiring duplicative information as part of the § 401 certification process is lacking. Further, we are puzzled as to why this information

is required only for mining operations. Sections 404 and 401 of the CWA apply to all manner of filling activities, not just coal mining operations. If this information is needed by the WVDEP to properly implement the § 401 certification process, then it should be required for all dredge and fill activities. If it is not, then it should be removed from the proposed revisions. Without further explanation and justification, the WVCA does not support this proposed revision.

4.2.f.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 crossings 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 ordinary high water mark. 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.

As proposed, this revision appears to extend the reach of the state's jurisdiction and expand the WVDEP's mitigation requirements under the § 401 certification program. While this change may be motivated by a desire to more closely align the state's mitigation requirements with those of the Corps, the WVDEP's first and most needed step in that direction is compliance with W. Va. Code § 22-11-7a(a)(2)(C). Until the WVDEP revises its mitigation rules and policies to accept Corps-required mitigation, this proposed change will serve only to increase the amount of in-lieu fee mitigation provided to the state, with no resulting environmental benefit. Further, the proposed change appears to be counter to the authorizing statute which bears no mention of the "ordinary high water mark." The WVCA does not support this proposed revision.

6.2.b.1. Compensatory mitigation shall be required for all permanent and temporary stream impacts resulting from coal related activities in watersheds greater than or equal to two hundred and fifty (250) acres and/or when the activity results in a stream loss or impact exceeding one half (1/2) acre of stream. The drainage area and ½ acre assessments shall be measured starting from the toe of the most downstream permanent or temporary impact (excluding stream crossings) in which the activity occurs.

WVCA believes that this proposed revision extends the authority of the state beyond the authorizing, underlying statute:

1) If the applicant's surface coal mining operation will not impact waters of the state designated as national resource waters and streams where trout naturally reproduce and will not impact wetlands of the state in a manner inconsistent with all applicable state or federal standards as the case may be, as required by the federal Clean Water Act, and if the watershed above the toe of the farthest downstream permanent structure authorized pursuant to the United States Army Corps of Engineers permits issued in accordance with 33 U.S.C. §1344 and 33 C.F.R. Parts 323 or 330 is less than two hundred fifty acres, then the director may issue a water quality certification pursuant to the requirements of this section. If the watershed above the toe of the farthest downstream permanent structure impacted is equal to or greater than two hundred fifty acres, the director shall require that mitigation be undertaken. Additionally, the director may require mitigation for temporary impacts to waters of the state as specified in subdivision (2) of this subsection.

(2) If the watershed above the toe of the farthest downstream permanent structure authorized pursuant to the United States Army Corps of Engineers permits issued in accordance with 33 U.S.C. §1344 and 33 C.F.R. Parts 323 or 330 is greater than or equal to two hundred fifty acres and all other necessary requirements are met consistent with this section, the director shall further condition a water quality certification on a requirement that the applicant mitigate the expected water quality impacts under the following conditions...

The above-cited statute contains no reference to “1/2 acre” of stream.

Apparently, the agency is attempting to further extend its jurisdiction or merely implementing past policies that existed with respect to coal and non-coal

mitigation. Since the statute contains no reference to ½ acre of stream, WVCA suggests the agency delete this proposed revision. If the agency truly believes that this change is necessary, it should seek a legislative revision to 22-11-7(a) and only then seek to modify the rule.

~~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 exceeds a ½ acre of loss or impact of stream. Monetary compensation for stream impacts resulting from coal related activities shall be assessed as follows:~~

6.2.d.1.A Permanent impacts for coal related monetary mitigation will be assessed at \$200,000 per acre of impacts

6.2.d.1.B Temporary coal related stream impacts resulting from structures (excluding stream crossings) that will be removed prior to final bond release will be assessed at \$20,000 per acre of stream impact per each five-year period of impact and/or prorated for each year the impact occurs.

6.2.d.1.C Temporary coal related stream impacts resulting from stream crossings (i.e. culverting) and stream relocations where the stream impact is greater than or equal to two hundred one (201) lineal feet, but less than or equal to four hundred (400) lineal feet and is in place for five years or more, shall be assessed at \$20,000 per acre for the first five (5) year period and prorated for each additional year the impact shall occur. A temporary stream impact resulting in more than four hundred (400) linear feet shall be monetary compensated at a rate of \$20,000 per acre per each five (5) year term and/or prorated for each year the impact occurs.

As noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, because § 404 permit mitigation plans cover both permanent and temporary impacts, there is no need for the duplicative state provision for monetary mitigation. As explained in our general comments, the Corps and EPA have continuously stressed a desire for on-site, in-kind mitigation. Using the “Central Appalachian Protocol”, coal mining operations have been

providing on-site, in-kind mitigation through the reclamation and stream reconstruction process. These projects have been embraced by the Corps and EPA through mining-specific regulatory guidance.

WVCA questions the need for these revisions, and urges WVDEP to re-evaluate the need for this provisions in light of the federal mitigation now required as part of a § 404 permit and the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

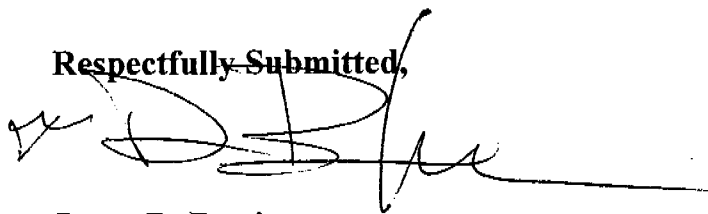
6.2.d.1.D Permanent wetland impacts for coal related monetary mitigation will be assessed at the rate \$30,000 per acre of wetland replaced based on the ratios in section 6.2.c.

Again, as noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, § 404 permit mitigation plans cover both permanent and temporary impacts to all impacted aquatic resources, including wetlands, and there is no need for the duplicative state provision for monetary mitigation for wetland impacts.

To the extent WVDEP nevertheless chooses to pursue this proposed revision, it has no justification for the \$30,000 replacement value proposed. In addition, by proposing this specific amount, the WVDEP has excluded any opportunity to determine a monetary mitigation amount for wetlands on a case-by-case basis, which could be either higher or lower than \$30,000 per acre.

In-lieu fee payment for wetlands impacts is a desirable option to have, but we question whether the agency will ultimately determine that wetland replacement as already specified in the rule is sufficient. The WVCA cannot support this proposed revision without additional justification and explanation, and again urges the WVDEP to re-evaluate the need for this provisions in light of the federal mitigation now required as part of a § 404 permit and the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

~~Respectfully Submitted,~~

A handwritten signature in black ink, appearing to read 'Jason D. Bostic', written over the crossed-out text.

**Jason D. Bostic
Vice-President
Environmental & Regulatory Affairs**

**2008 PROPOSED REVISIONS TO THE RULES FOR INDIVIDUAL STATE
CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL PERMIT
(47 CSR 5A)
RESPONSE TO COMMENTS**

I. General Comment of the West Virginia Coal Association (WVCA)

WVCA is very concerned about the WVDEP's proposal to add detail to its 401 Mitigation Program, particularly at this time. The State's mitigation requirements, at least as they relate to mitigation for activities permitted by a Clean Water Act (CWA) 404 Permit, have become obsolete and duplicative.

AGENCY RESPONSE:

The purpose of this rulemaking is to incorporate the current practices by the agency in reviewing the State 401 Certification Application, and the compensation required for the loss of State resource into the rule. The proposed revisions are in-kind replacement ratios and monetary compensation rates that the State has been requiring for several years. There are no new additional requirements being added in this rule. Placing these requirements in the rule will lead to a more efficient permitting process by informing applicants of what is required.

II. General Comment of the West Virginia Coal Association (WVCA)

The State's mitigation program as maintained by the WVDEP and implemented through the 401 rules is not required component of the federal 404 Permitting program. The State's mitigation requirements as maintained in the 401 Certification process is duplicative because the Corps is requiring federal mitigation plans as part of the 404 permitting process.

AGENCY RESPONSE:

Section 404(t) specifically preserves the ability of states to regulate discharges of fill. The existence of the federal 404 Program in no way preempts state law governing the discharge of fill material. The State's mitigation requirements can be found in Chapter 22, Article 11, Section 7a of the Water Pollution Control Act and 47 CSR 5A the legislative rule. A federal 404 Permit cannot be issued without a State 401 Certification or waiver. When a State 401 Certification is issued, it becomes a term and condition of the federally issued 404 Permit.

III. General Comment of the West Virginia Coal Association (WVCA)

Federal mitigation requirements are comprehensive. The WVDEP has continued to implement duplicative State 401 mitigation requirements, and typically requires mitigation

**2008 PROPOSED REVISIONS TO THE RULES FOR INDIVIDUAL STATE
CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL PERMIT
(47 CSR 5A)
RESPONSE TO COMMENTS**

above and beyond that which is required by the Corps despite the mandate of WV State Code 22-11-7a(a)(2)(C).

AGENCY RESPONSE:

The Corps' comprehensive mitigation requirements along with the 404 Permitting process have been challenged in the U.S. District Court for the Southern District of West Virginia, Civil Action No. 3:05-0784. The Judge rendered a decision on March 23, 2007, in a Memorandum Opinion and Order. The Judge's Order identified numerous shortcomings with the Corps comprehensive mitigation program causing the Corps to develop a new compensation functional assessment. Also, the Corps on numerous occasions has required more than a 1:1 ratio for compensating for impacts.

The proposed revisions will not change our current practice nor how the coal industry is currently being regulated. The purpose of the proposed revisions is to codify the agency's current practice. Inconsistencies with Section 404 of the CWA should not occur, when Section 404 clearly specifically preserves the rights of states to regulate discharges of fill within their borders. The Corps and DEP have signed the In-Lieu Fee Agreement and money has been deposited already. We are working with the Corps on the "Watershed Approach" for compensatory mitigation. DEP is a committee member on the Corps Mitigation Banking Team and are currently reviewing two banks.

IV. Specific Comment of the West Virginia Coal Association (WVCA)

Specific to: 4.2.f.2.A. Economic Information about the coal mining operations, including, without limitation, the estimated number of jobs created, the estimated proportion of employees who will be residents of West Virginia, the estimated annual payroll, the estimated annual coal production (if applicable), the estimated life of the operation, the estimated severance tax for the operation, the estimated annual property tax, and such other economic information as may be requested by the agency.

AGENCY RESPONSE:

This section of the proposed regulations was deleted based on your comments received last year. This section was not part of the regulations that was public noticed for comments.

V. Specific comment of the West Virginia Coal Association (WVCA)

Specific to: 4.2.f.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

**2008 PROPOSED REVISIONS TO THE RULES FOR INDIVIDUAL STATE
CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL PERMIT
(47 CSR 5A)
RESPONSE TO COMMENTS**

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 crossings 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 ordinary high water mark. 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.

As proposed, this revision appears to extend the reach of the state's jurisdiction and expand the WVDEP's mitigation requirements under the § 401 certification program. While this change may be motivated by a desire to more closely align the state's mitigation requirements with those of the Corps, the WVDEP's first and most needed step in that direction is compliance with W. Va. Code § 22-11-7a(a)(2)(C). Until the WVDEP revises its mitigation rules and policies to accept Corps-required mitigation, this proposed change will serve only to increase the amount of in-lieu fee mitigation provided to the state, with no resulting environmental benefit. Further, the proposed change appears to be counter to the authorizing statute which bears no mention of the "ordinary high water mark." The WVCA does not support this proposed revision.

AGENCY RESPONSE:

The definition of the "Ordinary High Water Mark" is currently in the rule at Section 2.11. There is nothing new being added to the current review process. The activity being authorized by a 404 Permit must be certified by the State. In order for the State to certify the activity being authorized by a 404 Permit, the impact caused by the activity must be delineated. The delineated impact must be the same for both the 404 and the 401 requests. The State in its certification review process has long required the measurements of the stream to be measured up to the beginning of the Ordinary High Water Mark. Mitigation has also been assessed by past practice to include the entire stream segment impacted up to the beginning of the Ordinary High Water Mark. The Corp requires all segments of the impacted stream considered to be Waters of the United States to be measured and compensated for, and the State must certify the impact regardless if State mitigation is required or not.

The State required compensation for the loss of the resources first through policy and currently mandated by the statute referenced above and legislative rule long before the Corps of Engineers began requiring compensation on these projects. The proposed revisions will not change our current practice nor how the coal industry is currently being regulated. The purpose of the proposed revisions is to codify the agency's current practice. Inconsistencies with Section 404 of the CWA should not occur, when Section 404 clearly specifically preserves the rights of states to regulate discharges of fill within their borders.

**2008 PROPOSED REVISIONS TO THE RULES FOR INDIVIDUAL STATE
CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL PERMIT
(47 CSR 5A)
RESPONSE TO COMMENTS**

The current issued Nationwide Permit No. 21 (NWP 21) has language that reads "In cases where OSM or the State has required mitigation for the loss of aquatic habitat, the Corps may consider this in determining appropriate mitigation under Section 404," as it relates to mitigation. Since the reissuance of this NWP 21, any compensation required by the State is accepted by the Corps and is credited towards the compensation that the Corps requires. The State, in accordance with WV Code 22-11-7a(a)(2)(C), does give credit for the Corp's required compensation to the extent that it satisfies the State's compensation requirements. Both the Corps and DEP are utilizing one another's compensation requirements to satisfy their specific requirements in order to prevent duplication of compensation

VI. Specific comment of the West Virginia Coal Association (WVCA)

Specific to: 6.2.b.1. Compensatory mitigation shall be required for all permanent and temporary stream impacts resulting from coal related activities in watersheds greater than or equal to two hundred and fifty (250) acres and/or when the activity results in a stream loss or impact exceeding one half (1/2) acre of stream. The drainage area and ½ acre assessments shall be measured starting from the toe of the most downstream permanent or temporary impact (excluding stream crossings) in which the activity occurs.

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6.2.d.1.A Permanent impacts for coal related monetary mitigation will be assessed at \$200,000 per acre of impacts

6.2.d.1.B Temporary coal related stream impacts resulting from structures (excluding stream crossings) that will be removed prior to final bond release will be assessed at \$20,000 per acre of stream impact per each five-year period of impact and/or prorated for each year the impact occurs.

6.2.d.1.C Temporary coal related stream impacts resulting from stream crossings (i.e. culverting) and stream relocations where the stream impact is greater than or equal to two hundred one (201) lineal feet, but less than or equal to four hundred (400) lineal feet and is in place for five years or more, shall be assessed at

**2008 PROPOSED REVISIONS TO THE RULES FOR INDIVIDUAL STATE
CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL PERMIT
(47 CSR 5A)
RESPONSE TO COMMENTS**

\$20,000 per acre for the first five (5) year period and prorated for each additional year the impact shall occur. A temporary stream impact resulting in more than four hundred (400) linear feet shall be monetary compensated at a rate of \$20,000 per acre per each five (5) year term and/or prorated for each year the impact occurs.

AGENCY RESPONSE:

The "1/2 acre" threshold is already part of the approved rule in Section 6.2.d.1. The proposed language outlining the monetary mitigation for temporary impacts is simply putting into rule how the State has conducted mitigation for temporary impacts through past practices. It also clarifies the mitigation to be assessed on the stream impact length rather than length of culvert or relocated stream segment. Confusion has arisen from applicants and reviewers using the length of culvert pipes rather than the length of the stream channel to be impacted in assessing the amount of compensation required. These proposed changes clarify the conditions and requirements. These are not new requirements.

VII. Specific comment of the West Virginia Coal Association (WVCA)

Specific to: 6.2.d.1.D Permanent wetland impacts for coal related monetary mitigation will be assessed at the rate \$30,000 per acre of wetland replaced based on the ratios in section 6.2.c.

Again, as noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, § 404 permit mitigation plans cover both permanent and temporary impacts to all impacted aquatic resources, including wetlands, and there is no need for the duplicative state provision for monetary mitigation for wetland impacts.

AGENCY RESPONSE:

The current rule is silent for the monetary compensation for coal, but specific to non-coal activities as it relates to wetland impacts. Again, the agency is codifying current practices into the proposed rule. This is not a new requirement. The proposed rule change would simply clarify what the intent of the rule was to begin with to make the assessed value the same for coal as it is for non-coal. Without the clarification, one could argue that the only monetary compensation allowed under rule would have to be assessed at \$200,000 per acre. The \$30,000 per acre of wetland was an average value of wetlands constructed throughout the State on previous compensation projects