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TITLE 47
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
WATER RESOURCES DIVISION OF WATER AND WASTE MANAGEMENT

WEST VIRGINIA 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~~ this rule 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~~ This rule ~~establishes~~ establishes the procedures and criteria for the application, processing and review of state water quality certifications which require a federal permit including those from the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 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~~ means persons or

entities that are requesting a federal license or permit to conduct activity that discharges into waters of the United States and require an individual Section 401 state water quality certification.

2.2. "Aquatic resources" means ~~include but are is~~ 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 means~~ 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, or wet meadows, are characterized by the presence of~~ means land that contains more than

50% grasses, sedges and other non-woody vegetation.

2.9. "Forested Wetlands" ~~are characterized by means land that contains~~ woody vegetation that is six (6) meters tall or taller.

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

2.11. "Ordinary high water mark" ~~is that means the~~ 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" ~~means 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) or Structures" ~~shall~~ means any structure placed in or a disturbance in waters of the U.S. that will remain in place for twelve (12) months or longer, except for structures defined as temporary structures in this section.

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

2.15. "Secretary" means the Secretary of the Department of Environmental Protection or 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 means~~ 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 ~~in 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~~, including 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. Applications 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 a riparian revegetation plan, a fluvial geo-morphological method, 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 ~~subdivision section~~ 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 to filling 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)~~ filling activity with which it is associated.

4.2.f.1.C. Such activity will impact the 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~~ Sampling stations 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~~ stations 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 or /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 a 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 including ~~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~~ as a result of the filling activity by compensatory mitigation ~~and/or~~ monetary compensation or both. If mitigation ~~or~~ compensation is required, the 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 ~~to 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 ~~or~~ 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 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~~ shall be approved by the Department of Environmental Protection and the 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 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) linear feet, but less than or equal to four hundred (400) linear 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 monetarily compensated at a rate of \$20,000 per acre per each five (5) year term 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 be made to the Secretary and 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.