

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

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2013 JUL 26 PM 4:43

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

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

AGENCY: Environmental Protection - Water Resources TITLE NUMBER: 47

CITE AUTHORITY: 22-11-7a + 22-1-6(d)(7)

AMENDMENT TO AN EXISTING RULE: YES  NO

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

TITLE OF RULE BEING AMENDED: Regulations for State Certification  
of Activities Requiring Federal Licenses and Permits

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.



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: 7/26/13

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Department of Environmental Protection  
60157th St. SE Charleston WV  
25304

LEGISLATIVE RULE TITLE: 47 CSR5-A

1. Authorizing statute(s) citation 22-11-7(g) 22-1-6(d)(2)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:  
6/21/13

b. What other notice, including advertising, did you give of the hearing?  
Newspaper Ad, DEP website, DEP Email List

c. Date of Public Hearing(s) or Public Comment Period ended:  
7/26/2013

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

Attached  No comments received

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

7/26/13

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

Patrick Campbell

68157th St SE Charleston WV 25304

304 926 0499 x1046 phone

304 926 0496 fax

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)

Same

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:

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

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d. Attach findings and determinations and reasons:

Attached 

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**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

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6/17/2013 10:42:27 AM

OFFICE OF  
WEST VIRGINIA SECRETARY OF STATE

**FORM 12 -- BRIEF SUMMARY AND STATEMENT OF CIRCUMSTANCES (Page 1)**

AGENCY Water Resources Division Of Water And Waste Management  
 RULE TYPE Legislative AMENDMENT TO EXISTING RULE Yes TITLE-SERIES 47-  
 RULE NAME Regulations for State Certification of Activities Requiring Federal Licenses and Permits 05A

CITE AUTHORITY 22-11-7(a) and 22-1-6(d)(7)

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN RULE AND STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE.

The rule sets forth the process and conditions for the state to grant CWA Section 401 certification of federal permits. Federal permits include Section 404 permits for filling a water of the US, Section 10 permits for Navigable Water impacts and FERC licenses for hydropower operations.

Revisions include:

- Refers to the newer federal rule for a mitigation hierarchy (bank, in-lieu fee, permittee responsible)
- Provides a rate for temporary impacts (3% of permanent impact fee per year of impact)
- Adjusts certification application fee from \$250 to \$350 (based on inflation)
- Clarifying mitigation is required for Section 10 permits (barge fleeting areas)
- Requiring FERC consider public access at hydropower operations
- Requiring mitigation of fish loss from hydropower operations
- Establishing an ability to seek increased mitigation (up to 25%) if permits are not obtained in advance of impact

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes  
 Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



Title-Series: 47-05A



Rule Id: 9124



Document: 24938



**WEST VIRGINIA  
SECRETARY OF STATE**

**NATALIE E. TENNANT**

**ADMINISTRATIVE LAW DIVISION**

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OFFICE OF  
WEST VIRGINIA SECRETARY OF STATE

**FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 2)**

**AGENCY** Water Resources Division Of Water And Waste Management  
**RULE TYPE** Legislative AMENDMENT TO EXISTING RULE Yes **TITLE-SERIES** 47-  
**RULE NAME** Regulations for State Certification of Activities Requiring Federal Licenses and Permits 05A

**CITE AUTHORITY** 22-11-7(a) and 22-1-6(d)(7)

**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.**

<b>Effect Of Proposal</b>	<b>Current Increase/Decrease (use ' - ')</b>	<b>Next Increase/Decrease (use ' - ')</b>	<b>Fiscal Year (Upon Full Implementation)</b>
<b>ESTIMATED TOTAL COST</b>			
<b>PERSONAL SERVICES</b>			
<b>CURRENT EXPENSES</b>		42,000	42,000
<b>REPAIRS AND ALTERATIONS</b>			
<b>ASSETS</b>			
<b>OTHER</b>			
<b>ESTIMATED TOTAL REVENUES</b>		42,000	42,000

Kristin A Boggs – By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



Title-Series: 47-05A



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**FORM 11 – FISCAL NOTE FOR PROPOSED RULES (Page 3)**

**AGENCY** Water Resources Division Of Water And Waste Management  
**RULE TYPE** Legislative AMENDMENT TO EXISTING RULE Yes **TITLE-SERIES** 47-  
**RULE NAME** Regulations for State Certification of Activities Requiring Federal Licenses and Permits 05A

**CITE AUTHORITY** 22-11-7(a) and 22-1-6(d)(7)

**3. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT). PLEASE INCLUDE ANY INCREASE OR DECREASE IN FEES IN YOUR ESTIMATED TOTAL REVENUES.**

Assuming 20 certifications per year, and a fee of \$350 versus \$250, revenue from certifications will increase \$2,000.

Mitigation received from hydropower impacts to fishes is estimated to be \$40,000/year/facility. One facility is anticipated to be certified in 2015.

**Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.**



Title-Series: 47-05A



Rule Id: 9124



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**FORM 11 – FISCAL NOTE FOR PROPOSED RULES (Page 4)**

**AGENCY** Water Resources Division Of Water And Waste Management  
**RULE TYPE** Legislative AMENDMENT TO EXISTING RULE Yes **TITLE-SERIES** 47-  
**RULE NAME** Regulations for State Certification of Activities Requiring Federal Licenses and Permits 05A

**CITE AUTHORITY** 22-11-7(a) and 22-1-6(d)(7)

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.

In 5 years, if 5 hydropower facilities are certified, each with \$40,000/year of impact to the fishes, the annual revenue stream to the state would be \$200,000.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



Title-Series: 47-05A



Rule Id: 9124



Document: 24938

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TITLE 47  
 LEGISLATIVE RULE  
 DEPARTMENT OF ENVIRONMENTAL PROTECTION  
 WATER RESOURCES

2013 JUL 26 PM 4:43

OFFICE WEST VIRGINIA  
 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 ~~this~~ these legislative rules is to carry out the responsibilities placed upon the State by Section 401 of the Federal Clean Water Act, 33 U.S.C. ~~ede~~ §1341 and W. Va. Code §§22-1-6(d)(~~67~~)~~§22-11-7(a)~~ and §22-11-7(a) ~~22-1-6(d)(67)~~. 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~~ to present the federal authority with a certification from the appropriate state agency. ~~These~~ This rules establishes the procedures and criteria for the application, processing and review of state water quality certifications ~~which that~~ require a federal permit including those from the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. ~~ede~~ §1344; Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. ~~ede~~ §403; and licenses issued by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. ~~ede~~ §1791 et. seq.

1.2. Authority. -- W. Va. Code §§22-1-6(d)(~~67~~) ~~22-11-7(a)~~ and ~~22-1-6(d)(67)~~ 22-11-7(a).

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. "Applicant"~~s~~ means ~~are~~ persons or entities that are requesting a federal license or permit to conduct activity that ~~discharges, or may discharge,~~ into waters of the United States and ~~that~~ 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~~ subject to 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.~~ "Certification" means the certification as required under Section 401 of the Ffederal Clean Water Act, 33 U.S.C. ~~ede~~ §1341.

2.4. ~~Certification~~ means ~~certification as required under Section 401 of the Federal Clean Water Act, 33 U.S. Code '1341.~~ "Compensatory mitigation" ~~is~~ means the compensation to the State for unavoidable impacts to aquatic or recreational resources in ~~W~~waters of the United States after all appropriate and practicable avoidance and minimization has been achieved by replacing those aquatic or recreational resources through

creation, preservation, restoration, enhancement, or monetary or other compensation as set forth below in this Rule or as may be determined appropriate by the Secretary.

~~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. "Complete" means that the application package submitted to the Department by the applicant for a State 401 Water Quality Certification contains all information necessary, as determined by the Secretary, to initiate processing and public review.~~

2.6. "Condition" means limitations and monitoring requirements ~~which~~ that 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" or "~~wet meadows~~", ~~commonly known as wet meadows~~, means an area are characterized by the presence of more than fifty percent (50%) grasses, sedges and other non-woody vegetation.

2.9. "~~Forested~~ Wetlands" means an area are characterized by woody vegetation that is six (6) meters (19.685 feet) tall or taller.

2.10. "~~Open~~ water Wetlands" are ponds, lakes, and reservoirs. Vegetation may or may not be present; and covers less than ten percent (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 pint of disturbance or impact. Width = average stream width (in feet) at the ordinary high water mark.~~

~~2.12~~ 2.11 "Permanent Impacts" means the ~~are considered~~ unavoidable loss of aquatic resources that result from a permanent structure or activities that cause physical stream loss.

~~2.13 — Permanent Impacts are considered unavoidable loss of aquatic resources that result from a permanent structure or activities that cause physical stream loss.~~

~~2.14~~ 2.12 "Scrub-shrub Wetlands" are areas dominated by woody vegetation less than six (6) meters (19.685 feet) tall. The species include true shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions.

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.

~~2.15~~ 2.13. "Secretary" means the Secretary of the Department of Environmental Protection or his or her designee, 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 2.14. "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 conditions, 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.

3.2.a. The Secretary shall provide credit for any mitigation that is a required component of the permit issued by the U.S. Army Corps of Engineers pursuant to 33 U.S.C. 1344.

~~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). Any condition the Department puts on a State 401 Certification becomes a term or condition of the federal license or permit.~~

~~±~~**§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~~two copies of a complete application, or an electronic 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)~~three hundred and fifty dollars (\$350).

4.1.a.1. The Secretary ~~shall have~~ has 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. The Secretary may request additional information if he or she determines that such information is necessary to properly evaluate the application.~~

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 Certification Decision. -- Any certification decision will be based on compliance with Sections 301, 302, 303, 306 and 307 of the federal 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 B Scope of Certification, the West Virginia Water Pollution Control Act, and the rules promulgated thereunder.~~

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. Withdrawal, Dismissal or Denial of Federal Application Meets and Negates the Need for Certification. -- If an application for a federal license or permit is withdrawn, dismissed, denied, or otherwise rendered void, then the certification is no longer needed and any sState certification proceeding or action is rendered moot ~~and unnecessary~~. Any applicant for an activity ~~needing requiring~~ a sState certification, which that was rendered moot ~~and unnecessary~~, must renew its application for certification and the full time period ~~set forth~~ of in subsection 4.1.b. of this ~~rRule is available for review upon resubmission of a complete application.~~ starts over upon resubmission of a complete application.

4.2. Contents of aApplication. Application for sState 401 ~~wWater~~ Quality ~~eCertification~~ shall ~~include be made on the form prescribed by the Secretary, including an alternative analyseis analysis~~ and the following, if applicable:

4.2.a. A Wetlands Delineation. Wetlands shall be identified using the most current and acceptable method as determined by the US Army Corps of Engineers (currently 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, fluvial geo-morphological methods, or other acceptable methods to address stream impacts. The plan shall also incorporate the monitoring requirements found in section 6.3 of this Rule.

4.2.c. A Conceptual Mitigation/Compensation Agreement Plan to be executed in accordance with section 6.2 of this Rule.

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

4.2.e. A statement affirming that all the information listed in subsections 4.2.a. through 4.2.c. above submitted to the Department 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.~~ Contents of Application for Surface Mining Operations. In addition to the information listed in subsections 4.2.a. through 4.2.e. above, activities that meet the definition of "surface mining operations" as set forth in W. Va. Code § 22-3-3 shall also submit the following information with their applications for State certification:

4.2.f.1. A No Practical Alternative Demonstration. A demonstration document containing, but ~~not limited to~~ without limitation, a demonstration of 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~~ That no practical alternatives exist to the activity for which the federal permit or license is being sought, including an explanation of alternative activities 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. ~~That~~ such activity will impact Waters of the United States ~~U.S.~~ no more than is necessary to accommodate its proper construction and operation, and

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., the U.S. Environmental Protection Agency's "Rapid Bioassessment Protocols for Use in Wadeable Streams and Rivers". Bioassessment ~~stations~~ locations shall be located as follows: one ~~(1)~~ above the proposed activity, one ~~(1)~~ at the proposed activity and one ~~(1)~~ downstream of the proposed activity or at other station locations necessary to assess the activity's impact. The Secretary may, at his or her discretion, request from the applicant certain ~~s~~State preferred biologic indices to facilitate review. Upon request of the applicant and for good cause shown, the Secretary may waive the survey requirement. may be waived with the Department's concurrence.

4.2.f.4. A Delineation of the Stream to be Impacted. The applicant shall measure ~~the~~ length, width and depth of the stream segment to be 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 the Department's rules entitled Requirements Governing Water Quality Standards (47 C.S.R.2 § 2.9) or West Virginia Surface Mining Reclamation Rule (38 C.S.R. 2 § 2.69), 467 CSR 2-2.9 and/or 38 CSR 2-2.71 the Department's. 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 an appendix to the Delineation of the Stream to be Impacted, the applicant shall also submit the following information:

4.2.f.4.A. ~~Submit all findings in an appendix to the report including, but not limited to, the following~~ The name of the person(s) conducting the stream delineation and his or her qualifications (i.e. DEP representative, company representative, consultant, biologist, etc.);

4.2.f.4.B. The date on which the delineation was conducted;

4.2.f.4.C. The recent weather conditions and those on the day of the delineation;

4.2.f.4.D. A statement verifying that the applicant followed the October 1999 DEP Stream Delineation Memorandum ~~was followed~~ in the determination process;

4.2.f.4.E. The method used for determination (i.e. post-hole or benthic); and

4.2.f.4.F. 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 consist of the following: be a letter to the Secretary requesting certification, a completed application form as prescribed by the Secretary, the FERC license application document submitted to and accepted by FERC under 18 CFR §4.1-4.202, and/or part 5.1 – 5.31 as applicable, 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~~ has ninety (90) days to review such changes or until the end of the one-year review period, authorized in subdivision (see subsection 4.1.b. of this rule) above 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 from the date it receives a complete application to issue its certification decision. from the date of submission of the application.

4.3.c. Prior to issuing a Section 401 Certification, the Secretary shall evaluate the recreational resources of all projects under Federal licenser applications therefor and seek, within his/her its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project. Reasonable expenditures by a licensee for public recreational development pursuant to an approved plan, including the purchase of land, will be included as part of the project cost. The licensee Secretary expects the licensee to shall assume the following responsibilities:

4.3.c.1. To acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project.

4.3.c.2. To develop suitable public recreational facilities upon project lands and waters and to make provisions for adequate public access to such project facilities and waters and to include therein consideration of the needs of persons with disabilities in the design and construction of such project facilities and access.

4.3.c.3. To encourage and cooperate with appropriate local, State, and Federal agencies and other interested entities in the determination of public recreation needs and to cooperate in the preparation of plans to meet these needs, including those for sport fishing and hunting.

4.3.c.4. To encourage governmental agencies and private interests, such as operators of user-fee

facilities, to assist in carrying out plans for recreation, including operation and adequate maintenance of recreational areas and facilities.

4.3.c.5. To cooperate with local, State, and Federal Government agencies in planning, providing, operating, and maintaining facilities for recreational use of public lands administered by those agencies adjacent to the project area.

4.3.c.6. To comply with Federal, State and local regulations for health, sanitation, and public safety, and to cooperate with law enforcement authorities in the development of additional necessary regulations for such purposes.

4.3.c.7. To provide either by itself or through arrangement with others for facilities to process adequately sewage, litter, and other wastes from recreation facilities including wastes from watercraft, at recreation facilities maintained and operated by the licensee or its concessionaires.

4.3.c.8. To ensure public access and recreational use of project lands and waters without regard to race, color, sex, religious creed or national origin.

4.3.c.9. To inform the public of the opportunities for recreation at licensed projects, as well as of rules governing the accessibility and use of recreational facilities.

#### §47-5A-5. Public Notice, Public Hearings.

##### 5.1. Public Notice.

5.1.a. Upon the Certification application being deemed complete by the Department, 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. Army Corps of Engineers. Each advertisement ~~will~~ shall contain at a minimum the following:

5.1.a.1. ~~The surface mining and NPDES~~ Any other sState issued 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") ~~× by~~ 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 for which the applicant is seeking certification.

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

5.1.a.4. A narrative description clearly describing the location of the ~~certification request~~ activity for which the applicant is seeking certification.

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 application for 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 application for certification request may be submitted.

5.1.a.8. The type of operation being permitted; and

5.1.a.9. The type of federal permit being sought.

5.1.b. The advertisement and publication dates for the application for 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 by the activity that is the subject of the application for certification, has the right to file written comments or objections to the ~~certification request~~ application with the Secretary within thirty (30) days after the publication date of the advertisement required in ~~subsection~~ subdivision 5.1.a. ~~of this section above~~. 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~~ Applicants for State certification of activity licensed by FERC shall provide notice of the same by publishing a Class II legal advertisement 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~~ the applicant may resolve disputes raised, rebut adverse comments and information, or supplement its application based on 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~~ the requester expects to be given at the hearing.

5.2.c. The Secretary, ~~if determined necessary~~, at his or her discretion, may also hold a public hearing without a request for the same.

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. For permanent stream impacts/losses to aquatic resources where a Section 404 permit is required, compensatory mitigation projects shall be completed consistent with 33 CFR Part 332, effective date April 10, 2008, as required by the Federal Clean Water Act, for the types and locations of waters impacted.~~

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. For temporary stream impacts/losses to aquatic resources where a Section 404 permit is required, compensatory mitigation projects shall be completed consistent with 33 CFR Part 332, effective date April 10, 2008, as required by the Federal Clean Water Act, for the types and locations of waters impacted at a prorated amount of three percent (3%) per year, or portion thereof. 6.2.b.1. Temporary stream impacts/ or losses to aquatic resources projected to last longer than twenty (20) years shall be mitigated pursuant to the rate for permanent stream impacts or losses rate set forth in subdivision 6.2.a. above.~~

6.2.c. ~~Compensation for wetlands must occur for impacts cumulatively greater than one-tenth (1/10) acre and above at the following ratios. For recreational resource impacts associated with Section 10 permits, when monetary compensation is the agreed upon mitigation, compensation shall be at a rate of one hundred and fifty dollars (\$150) per linear foot for single row barge fleeting areas. For multiple row barge fleeting areas the rate shall be at two dollars (\$2.00) per square foot of occupied river. The percentage of time the~~

fleeting area may be vacant will not be considered in this calculation.

6.2.c.1. The secretary may consider and approve non-monetary mitigation proposals for recreational resource impacts associated with Section 10 permits on a case-by-case basis.

6.2.d. Compensation for wetlands must occur for impacts cumulatively greater than one-tenth (1/10) acre and above at the following ratios:

6.2.ed.1. Impacts to open water wetlands are to be replaced at a ratio of one (1) unit created for each unit impacted.

6.2.ed.2. Impacts to emergent wetlands are to be replaced at a ratio of two (2) units created for each unit impacted.

6.2.ed.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.ed.4. Impacts to forested wetlands are to be replaced at a ratio of three (3) units created for each unit impacted.

6.2.ed.5. If a forested or scrub shrub wetland is converted to an emergent wetland it is to be mitigated at a ratio of two (2) units created for each unit impacted.

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

6.2.e.2. Mitigation shall be completed 12 months prior to the impact of the resource. Full credit realization will be dependent upon the success criteria set forth in the mitigation plan.

6.2.e.3. 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.ef.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 Office of Lands and Streams ~~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.e.f.5.1.i. Five (5) units to every one (1) unit for open body wetlands;

6.2.e.f.5.2.ii. Ten (10) units to every one (1) unit for wet meadow wetlands and;

6.2.e.f.5.3.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.g.1. Permanent impacts for coal-related monetary mitigation will be assessed at \$200,000 per acre of impacts in watersheds greater than or equal to two hundred and fifty (250) acres from the toe of the farthest downstream permanent structure, and/or cumulatively exceeds a 2-acre of loss or impact of stream. Monetary mitigation for permanent stream or wetland impacts will be assessed consistent with 33 CFR Part 332 methodologies and rates, effective date April 10, 2008.~~

~~6.2.d.2h. 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.e. Monetary mitigation for permanent wetland impacts will be assessed consistent with 33 CFR Part 332 methodologies and rates, effective date April 10, 2008, provided the replacement ratios in 6.2.d. are incorporated.~~

~~6.2.d.3j. A payment plan over three (3) years shall may be allowed, provided that the Department receives the compensation is received prior to impacting a water of the U.S.~~

6.2.ej. 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.fk. In lieu of monetary compensation, applicants can make in-kind donations of land that would be suitable for lake development, water resources improvement or creation, or the creation of facilities associated with recreation. Such sites must have the approval of both the Division of Natural Resources, Wildlife Resources Section and the Department approval for the department's consideration.

#### 6.2.1. Impacts to Recreational Resources Associated with Section 10 Permits.

6.2.1.1. Where monetary compensation is the agreed upon mitigation for impacts to recreational resources associated with Section 10 permits, compensation shall be at a rate of \$150 per linear foot for single-row barge fleeting areas. For multiple-row barge fleeting areas, the rate shall be \$2 per square foot of occupied river. The Secretary will not consider the percentage of time the fleeting area may be vacant in this calculation.

6.2.1.2. The Secretary may consider and approve non-monetary mitigation proposals for impacts to recreational resources associated with Section 10 permits on a case-by-case basis.

6.2.m. The Secretary, consistent with values determined appropriate by the West Virginia Division of Natural Resources for replacement of fish, shall require compensation for loss of fish caused by impingement or entrainment at FERC regulated hydropower facilities.

#### 6.3. Monitoring Requirements.

6.3.a. The permittee shall monitor A a compensatory mitigation site shall be monitored until the Secretary determines that the permittee has met the success criteria outlined in the restoration plan. has been

met.

6.3.b. ~~The permittee shall submit M~~ monitoring reports shall be submitted yearly until the Secretary determines that ~~the project has been determined is~~ complete and has been successful for three ~~concurrent~~ consecutive 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~~ or property interest is 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 for hearing 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 Secretary grants the request for a hearing ~~is granted~~, the Secretary, or ~~his designated appointee~~ the Secretary's designee acting as a hearing examiner, ~~will~~ shall hold the hearing within ~~sixty (60)~~ days from the date of the appeal request is received by the Department. 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~~ the Secretary's designee acting as a hearing examiner, shall follow the procedures contained in the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1, et seq. ~~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 in writing 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). Because C~~ certification conditions; therefore, are considered terms or conditions of the federal permit sought, they 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~~ the enforcement mechanisms ~~under the W. Va. Code may be available~~ under W. Va. Code §§22-1-3(a), 22-11-24, and 22-11-25 may also apply.

8.21.a. If a permittee undertakes activities prior to or without applying for certification, the Department may issue an after-the-fact certification. Any mitigation or compensation required as an after-the-fact certification may be at a rate of up to 125% of the original calculated mitigation or compensation requirement.

**47 CSR 5A. RULES FOR INDIVIDUAL CERTIFICATION OF ACTIVITIES REQUIRING A  
FEDERAL PERMIT**

**RESPONSE TO COMMENTS**

On June 21, 2013, the Department of Environmental Protection (DEP) commenced a thirty two day public comment period and subsequently held a public hearing on July, 15, 2013 to accept oral comments on a rule describing the process of state certification of federal permits. DEP also accepted written comments through July 22, 2013. Three commenters submitted written comments regarding the rule, one of which also gave an oral comment. In addition to changes made in response to oral and written comments, DEP made limited technical and clerical corrections to the rule.

DEP would like to thank those persons who took the time to review the proposal and offer constructive comment. The rule is improved based on submitted comment and subsequent modification.

DEP addresses the comments submitted below.

**Response to Comments from West Virginia Division of Natural  
Resources, Wildlife Resources Section**

**Comment 1A:**

**The DEP assesses recreational impacts resulting from Rivers and Harbors Act Section 10 Permits and provides Water Quality Certifications for these activities. We suggest that this code be cited and defined in the rule, possibly under section 5A-2.2.3.**

**Response 1A:**

§47-5A-1 lists Section 10 of the Rivers and Harbors Act of 1899, 33 US Code 403 as requiring a 401 certification. This notation, combined with the fact that Section 401 of the CWA allows certification of all water related federal permits and demonstrates clear authority to issue water quality certifications on Section 10 permits.

**Comment 1B:**

**According to the Mitigation Rule, functional assessment for streams and wetlands should be conducted when feasible (Federal Register /Vol. 73, No 70/ Thursday, April 10, 2008/ Rules and Regulations and §332.3 General compensatory mitigation requirements section (f) Amount of compensatory mitigation).**

**(1) "In cases where appropriate functional or conditional assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required". The development of functional assessment methodologies is an evolving process. We suggest that language be included in the rule to address future methods that are being or may be developed to companion the federal regulations. This language addition would prevent conflicting state and federal evaluation methods and ultimately confusion by applicants applying for stream and wetland permits.**

**Response 1B:**

DEP took the substance of this comment into consideration when revising language related to the current federal stream functional assessments process as a developed and accepted tool is currently available. We did not include similar provisions for wetlands as a wetland functional assessment tool has not yet been fully developed, tested and adopted for use by the US Army Corps of Engineers. When a wetland functional assessment tool is accepted by the Corps, DEP will consider revisions to this rule.

**Comment 1C:**

**5A-1, General Clean Water Act, 33 US Code 1344 does not match the same citation made in 5A-2.2.3.**

**Response 1C:**

After reviewing the US Code, DEP does not believe the two citations need to match in that 33 US Code 1344 in 5A-1 references Section 404 of the Clean Water Act whereas, 33 US Code 1341 in 5A-2.2.3 references Section 401.

**Comment 1D:**

**5A-2.2.5, Complete means.... We suggest that "complete" be further defined by adding language giving the Director of Water and Waste Management the specific authority to make that determination.**

**Response 1D:**

DEP agrees that the suggestion would add clarity to the definition of "Complete" and has modified 2.5 as follow: "Complete means that the application package submitted by the applicant for a State 401 Water Quality Certification contains all information necessary, as determined by the Secretary, to initiate processing and public review.

**Comment 1E:**

**5A-4.3.c, Federal Energy Regulatory Commission (FERC) certification issuance: The present wording requires the FERC to evaluate the recreational resources impacted by projects. The FERC is required by 18 CFR §2.7 to evaluate recreation of all projects or applications and maximize, within its authority, the development of these resources. Since the Rule seeks to endow the WVDEP, through the 401 Certification process, the same authority as the FERC, it therefore seems reasonable that the WVDEP Secretary or Director of the Division of Water and Waste Management be given the authority to evaluate and maximize the development of recreational resources. We suggest that the language be changed to reflect this authority.**

**Response 1E:**

DEP acknowledges the intent of the revisions in this Section is to ensure FERC maximizes recreational resources at project sites. We have clarified this intent and the Secretary's and licensee's role in the following revisions:

"Prior to issuing a Section 401 Certification the Secretary shall evaluate the recreational resources of all projects under Federal licensor applications therefor and seek, within his/her authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project. Reasonable expenditures by a licensee for public recreational development pursuant to an approved plan, including the purchase of land, will be included as part of the project cost. The licensee shall assume the following responsibilities:"

**Comment 1F:**

**5A-6.2.1, FERC Hydropower projects, impingement or entrainment: We suggest that "freshwater mussels" be included in conjunction with fish for impact compensation. Mussels are subject to impacts from these projects. In 2003 the American Fisheries Society revised their *Procedures for Replacement Values for Fish* with the publication *Procedures for Replacement Values for Fish and Mussels*. Freshwater mussels are an important aquatic species and several species are listed as threatened or endangered by the Fish and Wildlife Service. All species of mussels are protected under WV law and are listed by the WVDNR as a "no-take" species. Freshwater mussels are known to occur below dams where hydropower is being proposed or developed (eg. RC Byrd L&D on the Ohio River and, Sutton Dam on the Elk River). Destroying physical habitat, lowering dissolved oxygen and modifying the flow regime can have negative impacts on freshwater mussels and flow modification can change water quality, temperature regime, and/or result in scour. Freshwater mussels have been relocated from RC Byrd's projected construction zone and plans are proposed to monitor the freshwater mussels downstream of the Sutton Dam.**

**Response 1F:**

The intent of Section 6.2.1. is to allow for recuperation of damages from impingement and entrainment of fish. Since the mussel effects mentioned above are not related to either impingement or entrainment, we do not believe it necessary to include them in the same context as fish. Further, DNR's law allowing for no-take of mussels and other available 401 Certification provisions, are believed sufficient to protect against, or mitigate for, mussel loss from impacts such as scour, low Dissolved Oxygen, filling, etc.

## **Response to Comments from the West Virginia Coal Association (WVCA)**

**Comment 2A:**

**Based on our reading, it appears the state's rule relative to mitigation has been modified to include references to the federal CWA section 404 mitigation regulations for federal compensation for unavoidable impacts to waters. What is unclear to us, however, is whether these changes are intended to mean that federal mitigation will satisfy the requirements for state mitigation or that applicants will have to pay compensation to the state or undertake other mitigation measures for the state in addition to federal mitigation requirements. If the intent of the rule is to accept federal mitigation for the requirements under state 401 certification, then we agree with the revisions.**

**Response 2A:**

Since adoption of the new federal mitigation regulations in 2008, West Virginia has worked closely with the Corps of Engineers to develop mitigation practices and procedures that are acceptable to both agencies. Several agencies working together review mitigation banks, developed the WV Stream and Wetland Valuation Metric, and DEP, with Corps oversight, operates an In-Lieu Fee Program. Dialogue on individual certification applications between the Corps and DEP is frequent. This process has been successful and there is no intent in this proposal to “double dip” mitigation. So, in fact, consistent with §22-11-7a West Virginia does provide credit for federal mitigation.

One concern with §22-11-7a is that it is only applicable to surface coal mining operations. Similar language is not found in Code relative to non-coal facilities, yet the past practice of accepting mutually agreed upon mitigation has been the same for coal and non-coal activity. To clarify this past practice in both coal and non-coal mining 401 Certifications, a new Section 3.2.a. has been added which reads as follows:

***3.2.a. The Secretary shall provide credit for any mitigation that is a required component of the permit issued by the U.S. Army Corps of Engineers pursuant to 33 U.S.C. 1344.***

The commenter also included a set of comments relevant to a 2007 draft version of this rule which were not responded to since the one purpose of these revisions is to acknowledge and give credit for the current federal mitigation process.

**Comment 2B:**

**The Association is also concerned about the proposed permit fee increase. If the agency is modifying the rule to accept federal mitigation then it follows that less specific analysis will be required by the state in the development of mitigation plans. Additionally, the volume of mining permits that require CWA Section 401 certification has dropped dramatically in the last few years. WV DEP should commensurately reduce the size of the CWA Section 401 mitigation program to account for these changes, not seek to sustain the same intensity for a program that will now have less to do by increasing associated permit fees.**

**Response 2B:**

The certification fee charged, now or in the past, never covered the expense of the coal or non-coal 401 Certification Programs. These programs budgets are greatly supplemented by other funding sources and the fee has not been adjusted since 2002. The U.S. Bureau of Labor Statistics Consumer Price Index Calculator was used to determine the adjustment which was an increase only in the amount of inflation.

**Comment 2C:**

**Finally, WVCA believes the "after the fact" mitigation requirements are overly proscriptive in mandating a 125 percent ratio. By mandating an increased compensation rate the agency has precluded the consideration of extenuating circumstances on a case-by-case basis.**

**Response 2C:**

Section 8.1.a. reads "Any mitigation or compensation required in an after-the-fact certification may be at a rate of up to one hundred twenty five percent (125%) of the original calculated mitigation or compensation requirement."

The 125% value is not mandatory and may be up to 125%. For an after-the-fact certification, the mitigation or compensation will be calculated on a case by case basis while considering temporal loss, resource impacted, etc.

## **Response to Comments from the Independent Oil and Gas Association of West Virginia, Inc.**

**Comment 3A:**

**As the COE's mitigation program has developed, IOGA understands that the DEP has taken the position that its mitigation requirements are not intended to-and in fact do not-duplicate those already required as part of a federally issued permit (such as a COE permit). Given this history, and as a matter of policy, IOGA questions the need for the proposed revisions to the Draft Rule which appear to adopt for West Virginia the COE's mitigation rules. IOGA questions the need for duplicative state rules that appear to require mitigation to the State for the same impacts already requiring federally imposed mitigation. See 47 C.S.R. SA-2.4 of the Draft Rule.**

**Response 3A:**

The primary intent of these rule revisions is to reflect 2008 changes in the federal program and complement it where possible. While the agency works closely with the Corps in reviewing mitigation proposals, and gives credit for federal mitigation, there are instances where the Corps does not require mitigation when state water resources are impacted (e.g. Section 10 Corps permits for barge fleeting areas). Further this rule sets forth our application, public notice and appeal procedures – all necessary components of a 401 Certification Program.

**Comment 3B:**

**Further, IOGA is concerned that the proposed revisions to the Draft Rule related to mitigation will make West Virginia's mitigation requirements unnecessarily stringent, inflexible and expensive. IOGA urges the DEP to reconsider its proposed changes adopting the COE's mitigation rules, and also strongly urges the DEP to expressly clarify in the Draft Rule that it will not require duplicative mitigation for impacts already mitigated as part of a federally issued permit or license.**

**Response 3B:**

In response to similar comment received the Agency has added a new Section 3.2.a. which clarifies that credit be given for required federal mitigation. The new Section 3.2.a. is as follows:

***3.2.a. The Secretary shall provide credit for any mitigation that is a required component of the permit issued by the U.S. Army Corps of Engineers pursuant to 33 U.S.C. 1344.***

**Comment 3C:**

**IOGA also notes that several proposed revisions in the Draft Rule appear to incorporate portions of federal regulations prospectively. See, e.g., 47 CSR SA-6.2.g. We believe this violates fundamental rules of drafting for legislative rules, and urge the DEP to revise such sections to avoid incorporation of future changes to the referenced federal rules.**

**Response 3C:**

IOGA points out that the proposed rule contains a prospective incorporation of federal regulation that should be avoided in state rulemaking. One of the intents of the revisions is to acknowledge an increased federal role in mitigation after 2008 federal rulemaking. When federal mitigation is required, West Virginia will give credit for said mitigation. If federal rules change, DEP would likely still give credit for their required mitigation.

Recognizing the state should avoid wholesale adoption of prospective federal regulations, language in Sections 6.2.a., 6.2.b., 6.2.h. and 6.2.g. has been modified to reflect reliance on only the current federal regulation effective April 10, 2008.

**Comment 3D:**

**Definition of "Applicants." IOGA respectfully requests that the provisions contained in 47 C.S.R. SA-2.1 be retained in its current form, without inclusion of the DEP's proposed addition of "or may discharge. " IOGA believes that fundamentally this rule applies only**

**when a federally issued permit is required, and is concerned that the proposed phrase "or may discharge" adds ambiguity as opposed to clarification regarding who is considered to be an "applicant" and may lead to confusion over when an application is in fact required under this rule. We urge the DEP to reconsider this proposed change.**

**Response 3D:**

The term "or may discharge" has been in the Section 1.1 of the Rule since at least 2002. The term is also found in Section 401 of the Clean Water Act. The DEP's intention was to bring consistency to the definition therefore the suggested modification will not be made.

**Comment 3E:**

**Section 6.1. This section of the rule currently allows the agency to demand compensation for impacts to aquatic resources that are lost through compensatory mitigation or monetary mitigation. The DEP now proposes to add "or recreational" in this section of the Draft Rule. The proposed addition unnecessarily expands the scope of impacts for which compensation can be required by the DEP. "Recreational" is not defined, and would arguably apply to more than aquatic recreational resources, which would go beyond the scope and purpose of the rule. IOGA suggests that the DEP eliminate, or at least clarify, this proposed revision.**

**Response 3E:**

Upon review, the Agency's agrees the addition of "recreational" in section 6.1 is unnecessary as it is already included in Section 2.2.

**Comment 3F:**

**Section 6.2.d. and f. While the DEP has not proposed changes to the mitigation ratios expressed in this section, IOGA believes that the ratios are too high and should be reconsidered. In particular, IOGA notes that the ratios specified in these sections are more stringent than required by any federal rule, and makes mitigation unnecessarily difficult for certain types of wetland impacts.**

**Response 3F:**

The Agency experience is that a when a wetland is filled or impacted, a comparably functioning replacement cannot be achieved without allowing for lengthy periods of establishment time, hence the ratio concept. (e.g. a mature forested wetland takes many years to reach a similar functional level) It has also been the Agency's experience that wetland creation success rates

are often less than promised. For these reasons the Agency believes the ratios, which have been in effect since 2002, are still appropriate.

**Comment 3G:**

**Section 6.2.i. The section, which currently allows for a payment plan of up to three years to satisfy mitigation obligations, is proposed to become optional at the DEP's discretion. In addition, the DEP proposes to allow such payment plans only where compensation is provided in advance of any impacts. These proposed changes in effect eliminate the benefit of the provision for anyone needing time to pay for mitigation/compensation obligations. IOGA objects to these proposed changes as unnecessarily stringent.**

**Response 3G:**

The Agency, charged with protection of the public interest, cannot allow waters to be impacted without having compensation provided in advance of the impacts. Bankruptcy scenarios could leave the public resource heavily impacted while awaiting a payment that would never come. The payment option is offered as a matter of convenience and has historically helped companies achieve the goals of their project without a full outlay of capital prior to impacts (e.g. phased property development). It has been our recent experience that the language, as proposed, would not have practically limited anyone's use of this option.

**Comment 3H:**

**Section 6.2.1. The proposed use of the American Fishery Society's fish replacement values, while limited in this section to FERC hydropower facilities, is of concern. IOGA understands that the DEP has historically relied upon DNR or other agency information for establishing such values. IOGA suggests that the adoption of a separate set of fish replacement values here could lead to inconsistency and ambiguity with regard to replacement values for natural resources in the future, and urges the DEP to reconsider this approach.**

**Response 3H:**

To the best of DEP's knowledge, the WVDNR relies on the American Fishery Society's replacement values for fish when establishing fish replacement costs. Given that DEP does want to defer this calculation to the WVDNR, we will alter the language to grant the WVDNR the ability to use the method(s) they believe most appropriate. Section 6.2.1 will be modified as follows:

*6.2.1. The Secretary, consistent with values determined appropriate by the West Virginia Division of Natural Resources for replacement of fish, shall require compensation for loss of fish caused by impingement or entrainment at FERC regulated hydropower facilities.*

**Comment 3I:**

**Section 8.1.a. IOGA appreciates the clarification that the DEP may grant an after-the-fact certification for an activity that receives an after-the-fact federal permit or license. IOGA objects, however, to the inclusion of the authority to assess a mitigation obligation at 125% of the amount that would otherwise have been calculated. Broad enforcement authority is already available to the federal permitting agencies, and every DEP certification attaches to and becomes fully enforceable under that federal permit. This additional enforcement authority, in context, is unnecessary.**

**Response 3I:**

In this section the agency is seeking authority to require extra mitigation, on a case-by-case for two primary reasons: one to act as a deterrent to entities conducting unauthorized fill activities and second, to allow for settlement of a violation without federal enforcement. Even if federal enforcement action is pursued, West Virginia may realize no gain for violation of its law. Since the provision purposefully contains the language "up to" 125%, the state has the option, on a case-by-case basis to pursue punitive mitigation when warranted.



WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

ORIGINAL

PROPOSED RULE 47CSR5A

REQUIREMENTS GOVERNING WATER QUALITY STANDARDS

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PUBLIC HEARING

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MONDAY, JULY 15, 2013  
6:04 P.M.

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DEP  
601 57TH STREET  
CHARLESTON, WEST VIRGINIA

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Deborah R. Booth  
Certified Court Reporter  
and Notary Public

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**MEEKS REPORTING, LLC**

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POST OFFICE BOX 1852, CHARLESTON, WV 25327 • (304) 342-4758 FAX (304) 342-4847

## P R O C E E D I N G S

1  
2 MS. COSCO: Well, good evening. My name is Kathy  
3 Cosco and I am with the Public Information Office. Welcome  
4 to the DEP and the public hearing on three of the Agency's  
5 proposed rules.

6 This evening we will be taking comments on changes  
7 to 60CSR3, the Voluntary Remediation and Redevelopment rule;  
8 47CSR5A, Rules for Individual Certification of Activities  
9 Requiring a Federal Permit; and 47CSR2, Requirement Governing  
10 Water Quality Standards.

11 To make the most efficient use of our time we will  
12 open the hearing for comments on the first rule, and once  
13 everyone who wishes to speak about that rule has a chance to  
14 do so, we will close the hearing on that rule and immediately  
15 open the next hearing for the next rule.

16 We have three sign-in sheets in the back. I have  
17 already collected the first round, but if you would like to  
18 add your name I'll gather that up. But if you wish to speak  
19 about all three rules, we ask that you make sure your name is  
20 on each of the sign-in sheets. However, if you only wish to  
21 comment on one, your name only needs to be on that sign-in  
22 sheet.

23 The second rule that we will accept comments on  
24 this evening is 47CSR5A, Rules for Individual Certification

1 of Activities Requiring a Federal Permit.

2 This rule was promulgated during the 2002  
3 Legislative Session and has not been amended since then. The  
4 proposed amendments to this rule are to bring it into  
5 conformance with its federal counterpart, which was amended  
6 by the Army Corps of Engineers in 2008. Specifically, the  
7 proposed amendments refer to the newer federal rule for a  
8 mitigation hierarchy; provide a rate for temporary impacts,  
9 adjust the application fee from 250 to \$350 to account for  
10 inflation; clarify mitigation is required for Section 10  
11 permits; require FERC to consider public access at hydropower  
12 operations; and allow for mitigation of fish loss from  
13 hydropower operations.

14 If you have written comments, please provide them  
15 to me when you speak, or at the close of this hearing. Or at  
16 the end of the comment period, which is July 22nd.

17 So according to our sign-in sheet I have one person  
18 who wishes to speak on this, and that is Jason Bostic. Would  
19 you like to come up?

20 MR. BOSTIC: Thank you, Ms. Kathy. And my  
21 apologies ahead of time. I am going to have to read from  
22 prepared comments. I usually don't like to do that.

23 Good evening. I am Jason Bostic with the West  
24 Virginia Coal Association and we appreciate the opportunity

1 to offer comments tonight on the proposed revisions to the  
2 State's 401 Water Quality and Certification rule.

3           While the Association typically supplies detailed  
4 substantive comments on a rule change proposed from the  
5 Department we find it difficult in this instance since the  
6 intent of these changes is not readily discernible from the  
7 proposed rule. It appears that the State rule relative to  
8 mitigation has been modified to include references to the  
9 Federal Clean Water Act, Section 404 mitigation regulations,  
10 including references to the rates for federal compensation  
11 for unavoidable impacts to waters. What is unclear to us is  
12 whether those changes are intended to mean that federal  
13 mitigation will satisfy the requirements for state mitigation  
14 or that applicants will have to pay compensation to the State  
15 or undertake other mitigation measures at a federal rate for  
16 the state in addition to any federal mitigation requirements.

17           If the intent of the rule is to accept federal  
18 mitigation for the requirements under State 401  
19 Certification, then we agree with the revisions. The West  
20 Virginia Legislature modified the state law several years ago  
21 regarding 401 Certification to reflect a similar preference.  
22 While we are disappointed it has taken the Department upward  
23 of five years to modify the rule to reflect the Legislature's  
24 intent, we would still nonetheless support such change.

1           If it is the goal of the revisions, then I would  
2 submit there is a much easier way to accomplish the goal,  
3 which would be to simply copy the language that is now  
4 contained in the Code regarding 401 Certification and state  
5 mitigation requirements.

6           To summarize, we are concerned that the intent of  
7 the revisions cannot be deciphered from the proposed changes,  
8 so at the very least clarification is warranted before this  
9 rule is finalized for consideration by the Legislature. The  
10 Coal Association will be submitting detailed comments to the  
11 Agency before the close of the written comment period. Thank  
12 you.

13           MS. COSCO: Okay. Is there anyone else who would  
14 like to speak on 47CSR5A, Rules for Individual Certification  
15 of Activities Requiring a Federal Permit?

16           (No response.)

17           MS. COSCO: Okay. There being no one else who  
18 wishes to speak on this rule this concludes the public  
19 hearing for the proposed rule 47CSR5A. The Agency will  
20 review all comments and prepare a written response which will  
21 be included when the rule is filed with the Secretary of  
22 State.

## REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Deborah R. Booth, Notary Public and Certified Court Reporter, do hereby certify that the foregoing is a correct verbatim record of the proceedings had when this matter was called for hearing.

Given under my hand this 22nd day of July, 2013.



*Deborah R. Booth*  
Deborah R. Booth, CCR  
Notary Public

My commission expires January 26, 2014.



**DIVISION OF NATURAL RESOURCES**  
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Earl Ray Tomblin  
Governor

Frank Jezioro  
Director

July 19, 2013

West Virginia Department of Environmental Protection  
2014 Proposed Rules  
Division of Water and Waste Management  
47CSR5A Rules for Individual Certification of Activities Requiring a Federal Permit  
Comments from the West Virginia Division of Natural Resources, Wildlife Resources Section

The West Virginia Division of Natural Resources, Wildlife Resources Section (WVDNR) has reviewed the propose rule (47CSR5A) by the West Virginia Department of Environmental Protection, Division of Water and Waste Management (WVDEP) and provides the following comments.

**General Comments:**

The DEP assesses recreational impacts resulting from Rivers and Harbors Act Section 10 Permits and provides Water Quality Certifications for these activities. We suggest that this code be cited and defined in the rule, possibly under section 5A-2.2.3.

According to the Mitigation Rule, functional assessment for streams and wetlands should be conducted when feasible (Federal Register /Vol. 73, No 70/ Thursday, April 10, 2008/ Rules and Regulations and §332.3 General compensatory mitigation requirements section (f) Amount of compensatory mitigation).

(1) "In cases where appropriate functional or conditional assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required." The development of functional assessment methodologies is an evolving process. We suggest that language be included in the rule to address future methods that are being or may be developed to companion the federal regulations. This language addition would prevent conflicting state and federal evaluation methods and ultimately confusion by applicants applying for stream and wetland permits.

**Specific comments:**

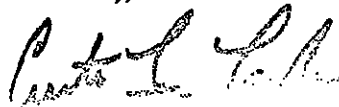
5A-1, General Clean Water Act, 33 US Code 1344 does not match the same citation made in 5A-2.2.3.

5A-2.2.5, Complete means.... We suggest that "complete" be further defined by adding language giving the Director of Water and Waste Management the specific authority to make that determination.

5A-4.3.c, Federal Energy Regulatory Commission (FERC) certification issuance: The present wording requires the FERC to evaluate the recreational resources impacted by projects. The FERC is required by 18 CFR §2.7 to evaluate recreation of all projects or applications and maximize, within its authority, the development of these resources. Since the Rule seeks to endow the WVDEP, through the 401 Certification process, the same authority as the FERC, it therefore seems reasonable that the WVDEP Secretary or Director of the Division of Water and Waste Management be given the authority to evaluate and maximize the development of recreational resources. We suggest that the language be changed to reflect this authority.

5A-6.2.1, FERC Hydropower projects, impingement or entrainment: We suggest that "freshwater mussels" be included in conjunction with fish for impact compensation. Mussels are subject to impacts from these projects. In 2003 the American Fisheries Society revised their *Procedures for Replacement Values for Fish* with the publication *Procedures for Replacement Values for Fish and Mussels*. Freshwater mussels are an important aquatic species and several species are listed as threatened or endangered by the Fish and Wildlife Service. All species of mussels are protected under WV law and are listed by the WVDNR as a "no-take" species. Freshwater mussels are known to occur below dams where hydropower is being proposed or developed (eg. RC Byrd L&D on the Ohio River and, Sutton Dam on the Elk River). Destroying physical habitat, lowering dissolved oxygen and modifying the flow regime can have negative impacts on freshwater mussels and flow modification can change water quality, temperature regime, and/or result in scour. Freshwater mussels have been relocated from RC Byrd's projected construction zone and plans are proposed to monitor the freshwater mussels downstream of the Sutton Dam.

Sincerely,

A handwritten signature in black ink, appearing to read "Curtis I. Taylor". The signature is fluid and cursive, written over a white background.

Curtis I. Taylor, Chief

CIT/RA/dc



# West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 • (304) 342-4153 • Fax 342-7651 • [www.wvcoal.com](http://www.wvcoal.com)

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July 22, 2013

Mr. Scott G. Mandirola

Director

West Virginia Department of Environmental Protection

Division of Water & Waste Management

601 57<sup>th</sup> Street

Charleston, WV 25304

Via Electronic Mail: [Scott.G.Mandirola@Wv.Gov](mailto:Scott.G.Mandirola@Wv.Gov)  
[dep.comments@wv.gov](mailto:dep.comments@wv.gov)

Re: Public Comment Period on Proposed Revisions to 47 CSR 5A – Section 401 water quality certification rule

Dear Mr. Mandirola:

Pursuant to the public notice published by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments regarding the agency's proposed revisions to the state's water quality certification rule, 47 CSR 5A.

The West Virginia Coal Association (WVCA) is a non-profit trade association representing the interests of the West Virginia coal industry on issues of policy and regulation before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's general members account for 95 percent of the Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in

West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal removal and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA is the largest state coal trade association in the nation. WVCA's general members routinely apply for, obtain and operate under Clean Water Act (CWA) Section 404 authorizations from the U.S. Army Corps of Engineers and as a result must obtain CWA Section 401 water quality certifications from WV DEP...

While we appreciate this opportunity to offer comments on the proposed revisions to the state's 401 water quality certification rule, we find it difficult, however, in this instance to offer substantive comments since the intent of these changes is not readily discernible from the proposed rule.

Based on our reading, it appears the state's rule relative to mitigation has been modified to include references to the federal CWA section 404 mitigation regulations for federal compensation for unavoidable impacts to waters.

What is unclear to us, however, is whether these changes are intended to mean that federal mitigation will satisfy the requirements for state mitigation or that applicants will have to pay compensation to the state or undertake other mitigation measures for the state in addition to federal mitigation requirements.

***If the intent of the rule is to accept federal mitigation for the requirements under state 401 certification, then we agree with the revisions.*** The West Virginia Legislature modified the state law regarding 401 certification to reflect a similar

preference several years ago. While we are disappointed that it has taken several years to modify the rule to reflect the Legislature's intent, we would support such a change. If this is indeed the goal of the revisions, we would submit there is a much easier way to accomplish this purpose -- simply incorporating by reference: *federal mitigation as satisfying the requirements of 47 CSR 5A*, similar to the language now contained in the code:

**22-11-7a Certification agreements; required provisions; effective date.**

**(C) The director shall provide credit for any mitigation that is a required component of the permit issued by the U.S. Army Corps of Engineers pursuant to 33 U.S.C. 1344...**

If this is not the goal of these revisions and they instead are intended to invoke new requirements in addition to those required by the federal permitting action, then we strongly oppose this effort as duplicative and superfluous. As WVCA has noted in response to other rulemaking exercises, the state's mitigation program and its unique ratios and requirements became largely redundant when the Corps required mitigation according to federal regulations as a condition of CWA Section 404 permit issuance. A copy of these previous comments from WVCA is provided as an attachment and we ask that WV DEP consider them as part of the current rulemaking

To summarize, we are concerned that the intent of the revisions cannot be deciphered from the proposed changes so, at the very least, clarification is warranted before this rule is finalized for consideration by the Legislature.

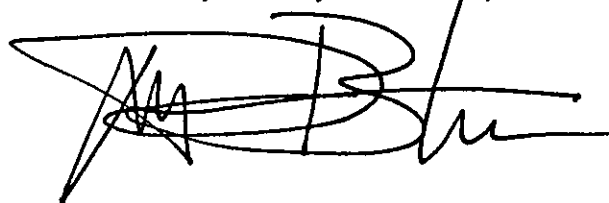
The Association is also concerned about the proposed permit fee increase. If the agency is modifying the rule to accept federal mitigation then it follows that less specific analysis will be required by the state in the development of mitigation plans.

Additionally, the volume of mining permits that require CWA Section 401 certification has dropped dramatically in the last few years. WV DEP should commensurately reduce the size of the CWA Section 401 mitigation program to account for these changes, not seek to sustain the same intensity for a program that will now have less to do by increasing associated permit fees.

Finally, WVCA believes the “after the fact” mitigation requirements are overly proscriptive in mandating a 125 percent ratio. By mandating an increased compensation rate the agency has precluded the consideration of extenuating circumstances on a case-by-case basis.

WVCA appreciates the opportunity to provide these comments regarding the proposed revisions to the state’s 401 water quality certification rule.

**Respectfully Submitted,**

A handwritten signature in black ink, appearing to read 'Jason D. Bostic', written over a horizontal line.

**Jason D. Bostic  
Vice-President**

**West Virginia Coal Association**

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

July 10, 2007

**Ms. Jessica Greathouse  
West Virginia Department of Environmental Protection  
Public Information Office  
601 57<sup>th</sup> 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.<sup>1</sup>

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).**<sup>2</sup>

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.<sup>3</sup>

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

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

<sup>3</sup> 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.<sup>4</sup> 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

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<sup>4</sup> 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.<sup>5</sup>

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<sup>5</sup> "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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup>

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*

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

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

<sup>8</sup> 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 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.**

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.

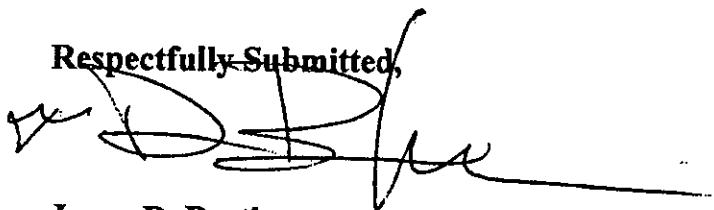
**6.2.d.1.D Permanent wetland impacts for coal related monetary mitigation will be assessed at the rate \$30,000 per acre of wetland replaced based on the ratios in section 6.2.c.**

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 typed name below.

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



July 22, 2013

**VIA E-MAIL & U.S. MAIL**

Mr. Scott G. Mandirola, Director  
Division of Water and Waste Management  
West Virginia Department of Environmental Protection  
601 57th Street, SE  
Charleston, WV 25304

**Re: Comments on Proposed Revisions to 47 CSR 5A**

Dear Director Mandirola:

On behalf of the Independent Oil and Gas Association of West Virginia, Inc. ("IOGA"), I am submitting comments regarding the West Virginia Department of Environmental Protection's ("DEP") proposed revisions to its "Rule for Individual State Certification of Activities Requiring a Federal Permit," 47 C.S.R. 5A (the "Draft Rule"). IOGA is a statewide non-profit trade association representing companies engaged in the exploration, production and development of natural gas and oil resources in West Virginia, and the companies and individuals who support these activities. IOGA is proud to work to improve both West Virginia's natural environment and West Virginia's economic climate. We appreciate the opportunity to offer comments on the Draft Rule.

**A. GENERAL COMMENTS**

As a general matter, IOGA understands that the DEP's mitigation program as expressed by this rule, and in practice, was originally developed due at least in part to an absence of a robust federal mitigation program, which led to impacts authorized under Section 404 of the Clean Water Act ("CWA") without full mitigation. Over time, the United States Army Corps of Engineers ("COE"), the agency charged with administering Section 404 of the CWA as well as Section 10 of the Rivers and Harbors Act, has developed and implements a complete mitigation program. Thus, mitigation is now required for impacts authorized by a COE permit (and has been for a number of years).

As the COE's mitigation program has developed, IOGA understands that the DEP has taken the position that its mitigation requirements are not intended to—and in fact do not—duplicate those already required as part of a federally issued permit (such as a COE permit). Given this history, and as a matter of policy, IOGA questions the need for the proposed revisions to the Draft Rule which appear to adopt for West Virginia the COE's mitigation rules. IOGA

Scott G. Mandirola, Director  
Division of Water and Waste Management  
West Virginia Department of Environmental Protection  
July 22, 2013

questions the need for duplicative state rules that appear to require mitigation *to the State* for the same impacts already requiring federally imposed mitigation. *See* 47 C.S.R. 5A-2.4 of the Draft Rule. Further, IOGA is concerned that the proposed revisions to the Draft Rule related to mitigation will make West Virginia's mitigation requirements unnecessarily stringent, inflexible and expensive. IOGA urges the DEP to reconsider its proposed changes adopting the COE's mitigation rules, and also strongly urges the DEP to expressly clarify in the Draft Rule that it will not require duplicative mitigation for impacts already mitigated as part of a federally issued permit or license.

IOGA also notes that several proposed revisions in the Draft Rule appear to incorporate portions of federal regulations prospectively. *See, e.g.,* 47 CSR 5A-6.2.g. We believe this violates fundamental rules of drafting for legislative rules, and urge the DEP to revise such sections to avoid incorporation of future changes to the referenced federal rules.

## **B. SPECIFIC COMMENTS**

1. **Definition of "Applicants."** IOGA respectfully requests that the provisions contained in 47 C.S.R. 5A-2.1 be retained in its current form, without inclusion of the DEP's proposed addition of "or may discharge." IOGA believes that fundamentally this rule applies **only** when a federally issued permit is required, and is concerned that the proposed phrase "or may discharge" adds ambiguity as opposed to clarification regarding who is considered to be an "applicant" and may lead to confusion over when an application is in fact required under this rule. We urge the DEP to reconsider this proposed change.

2. **Section 6.1.** This section of the rule currently allows the agency to demand compensation for impacts to aquatic resources that are lost through compensatory mitigation or monetary mitigation. The DEP now proposes to add "or recreational" in this section of the Draft Rule. The proposed addition unnecessarily expands the scope of impacts for which compensation can be required by the DEP. "Recreational" is not defined, and would arguably apply to more than *aquatic* recreational resources, which would go beyond the scope and purpose of the rule. IOGA suggests that the DEP eliminate, or at least clarify, this proposed revision.

3. **Section 6.2.d. and f.** While the DEP has not proposed changes to the mitigation ratios expressed in this section, IOGA believes that the ratios are too high and should be reconsidered. In particular, IOGA notes that the ratios specified in these sections are more stringent than required by any federal rule, and makes mitigation unnecessarily difficult for certain types of wetland impacts.

4. **Section 6.2.i.** The section, which currently allows for a payment plan of up to three years to satisfy mitigation obligations, is proposed to become optional at the DEP's discretion. In addition, the DEP proposes to allow such payment plans only where compensation

Scott G. Mandirola, Director  
Division of Water and Waste Management  
West Virginia Department of Environmental Protection  
July 22, 2013

is provided in advance of any impacts. These proposed changes in effect eliminate the benefit of the provision for anyone needing time to pay for mitigation/compensation obligations. IOGA objects to these proposed changes as unnecessarily stringent.

5. **Section 6.2.1.** The proposed use of the American Fishery Society's fish replacement values, while limited in this section to FERC hydropower facilities, is of concern. IOGA understands that the DEP has historically relied upon DNR or other agency information for establishing such values. IOGA suggests that the adoption of a separate set of fish replacement values here could lead to inconsistency and ambiguity with regard to replacement values for natural resources in the future, and urges the DEP to reconsider this approach.

6. **Section 8.1.a.** IOGA appreciates the clarification that the DEP may grant an after-the-fact certification for an activity that receives an after-the-fact federal permit or license. IOGA objects, however, to the inclusion of the authority to assess a mitigation obligation at 125% of the amount that would otherwise have been calculated. Broad enforcement authority is already available to the federal permitting agencies, and every DEP certification attaches to and becomes fully enforceable under that federal permit. This additional enforcement authority, in context, is unnecessary.

### C. CONCLUSION

While IOGA is supportive of the DEP's goal to protect and improve water quality in West Virginia, we are concerned about a number of the proposed changes for the Draft Rule. We respectfully request that the DEP reconsider this rule in light of IOGA's comments.

We appreciate the opportunity to provide these comments to the DEP and are hopeful that they will be given due consideration by your agency.

INDEPENDENT OIL AND GAS  
ASSOCIATION OF WEST VIRGINIA, INC.

By:



Charlie Burd  
Executive Director

cc: Mr. Randy Huffman, Secretary, West Virginia Department of Environmental Protection