



**WEST VIRGINIA
SECRETARY OF STATE**

NATALIE E. TENNANT

ADMINISTRATIVE LAW DIVISION

eFILED

12/18/2013 1:13:11 PM

OFFICE OF
WEST VIRGINIA SECRETARY OF STATE

FORM 4 -- NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

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)**

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

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS 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: 25511

TITLE 47
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
WATER RESOURCES

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 Federal 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 Wwaters 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 ~~W~~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 ~~W~~wetlands" means an area are characterized by woody vegetation that is six (6) meters (19.685 feet) tall or taller.

2.10. "Open ~~W~~water ~~W~~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 ~~W~~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)~~ \$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—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 nNegates the nNeed 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 ~~a~~Application. Application for sState 401 ~~w~~Water ~~q~~Quality ~~e~~Certification 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~~B. That treatment facilities will be located as close as practical to the source(s) with which it is associated.

4.2.f.1.~~e~~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~~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, ~~T~~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 ~~T~~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~~ has 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 ~~State~~ 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~~ 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 of 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:-

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

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

unit impacted.

6.2.c.3. Impacts to scrub-shrub type wetlands are to be replaced at a ratio of three (3) units created for each unit impacted.

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

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

6.2.d.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.d.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.e. 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.1. Five (5) units to every one (1) unit for open body wetlands;

6.2.e.2. Ten (10) units to every one (1) unit for wet meadow wetlands and;

6.2.e.3. 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.f.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 ½ 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.2g. 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.3h. 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.fj. 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.k. Impacts to Recreational Resources Associated with Section 10 Permits.

6.2.k.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.k.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.l. 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~~ 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.

~~8.2.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.