

FORM 6 -- NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE

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

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THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE

~~Thursday, May 01, 2014~~
 Wednesday, May 14, 2014

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: 25665

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 legislative rule is to carry out the responsibilities placed upon the State by Section 401 of the Federal Clean Water Act, 33 U.S.C. §1341 and W. Va. Code §§22-1-6(d)(7) and 22-11-7(a). 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) to present the federal authority with a certification from the appropriate state agency. This rule establishes the procedures and criteria for the application, processing and review of state water quality certifications 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. §1344; Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403; and licenses issued by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. §1791 et. seq.

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

1.3. Filing Date. — April 14, 2014.

1.4. Effective Date. — May ¹⁴ 2014.

§47-5A-2. Definitions.

When used in this rule, for any activity involving a discharge into waters of the United States that requires a 401 state water quality certification, the following terms are defined as follows:

2.1. "Applicant" means 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 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 subject to the Secretary's jurisdiction.

2.3. "Certification" means the certification as required under Section 401 of the federal Clean Water Act, 33 U.S.C. §1341.

2.4. "Compensatory mitigation" means the compensation to the State for unavoidable impacts to aquatic or recreational resources in 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 in this Rule or as may be determined appropriate by the Secretary.

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 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, means an area characterized by the presence of more than fifty percent (50%) grasses, sedges and other non-woody vegetation.

2.9. "Forested wetlands" means an area characterized by woody vegetation that is six 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 "Permanent impacts" means the unavoidable loss of aquatic resources from a permanent structure or activities that cause physical stream loss.

2.12 "Scrub-shrub wetlands" are areas dominated by woody vegetation less than six 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. "Secretary" means the Secretary of the Department of Environmental Protection or his or her designee.

2.14. "Wetlands" 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.

§47-5A-3. Scope and Effect of Certification.

3.1. Certifications may impose State standard conditions and any special conditions necessary 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.

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

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 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 in the amount of \$350.

4.1.a.1. The Secretary has sixty (60) days upon receipt to determine if an application package is complete.

4.1.a.2. 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, 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 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 State certification proceeding or action is rendered moot. Any applicant for an activity requiring a State certification, that was rendered moot, must renew its application for certification and the full time period set forth in subsection 4.1.b. of this Rule starts over upon resubmission of a complete application.

4.2. Contents of Application. Application for State 401 Water Quality Certification shall be made on the form prescribed by the Secretary, including an alternative 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).

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 Plan to be executed in accordance with section 6.2 of this Rule.

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

4.2.f. 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 document containing the following:

4.2.f.1.A. 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. such activity will impact Waters of the United States 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 shall be located as follows: one above the proposed activity, one at the proposed activity and one downstream of the proposed activity or at other locations necessary to assess the activity's impact. The Secretary may, at his or her discretion, request from the applicant certain State preferred biologic indices to facilitate review. Upon request of the applicant and for good cause shown, the Secretary may waive the survey requirement.

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. 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). 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. 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.D. A statement verifying that the applicant followed the October 1999 DEP Stream Delineation Memorandum 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: a letter to the Secretary requesting certification, a completed application form as prescribed by the Secretary, the FERC license application 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 has (90) days to review such changes or until the end of the one-year review period, authorized in subdivision 4.1.b. 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 has six (6) months from the date it receives a complete application to issue its certification decision.

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 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:

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 (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 shall contain at a minimum the following:

5.1.a.1. 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 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 activity for which the applicant is seeking certification.

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

5.1.a.4. A narrative description clearly describing the location of the 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 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 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 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 application with the Secretary within thirty (30) days after the publication date of the advertisement required in subdivision 5.1.a. 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. 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 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 the requester expects to give at the hearing.

5.2.c. The Secretary, at his or her discretion, may 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.

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. 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.b. 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. Temporary stream impacts or losses to aquatic resources projected to last longer than 20 years shall be mitigated pursuant to the rate for permanent stream impacts or losses 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 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

then 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.f. 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.g. 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.h. A payment plan over three (3) years may be allowed, provided that the Department receives the compensation prior to impacting a water of the U.S.

6.2.i. 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.j. 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.

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 compensatory mitigation site until the Secretary determines that the permittee has met the success criteria outlined in the restoration plan.

6.3.b. The permittee shall submit monitoring reports yearly until the Secretary determines that the

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

7.1.a. Any person whose property, or property interest is directly affected by the Department's certification or certification denial, may request a hearing within 15 days after notification of the certification decision.

7.1.b. A person described under subdivision 7.1.a. shall make 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, the Secretary, or the Secretary's designee acting as a hearing examiner, shall hold the hearing within 60 days from the date 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 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. 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. Because certification conditions are considered terms or conditions of the federal permit sought, they are subject to the enforcement mechanisms available for enforcing the federal license or permit to which they attach. In addition the enforcement mechanisms available under W. Va. Code §§22-1-3(a), 22-11-24, and 22-11-25 may also apply.

8.2. 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.