Public Notice

U S Army USACE
of Engineers
Huntington District

In reply refer to Public Notice No.	Issuance Date:
2008-6-Mod	**June 20, 2008**
Stream:	Expiration Date: **March 18, 2012**

Please address all comments and inquiries to:
U.S. Army USACE of Engineers, Huntington District
ATTN: CELRH-OR-F Public Notice No. (*reference above*)
502 Eighth Street
Huntington, West Virginia 25701-2070 Phone: (304) 399-5710

NATIONWIDE PERMITS FOR THE STATE OF WEST VIRGINIA

CORPS OF ENGINEERS REGULATORY PROGRAM
ISSUANCE OF NATIONWIDE PERMITS

On March 12, 2007, the Corps of Engineers published, in the Federal Register, the final rule for the administration of its nationwide permit program regulations under the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and the Marine Protection, Research and Sanctuaries Act. The rule became effective on March 19, 2007.

An integral part of the Corps' regulatory program is the concept of nationwide permits (NWPs) for minor activities. NWPs are activity specific, and are designed to relieve some of the administrative burdens associated with permit processing for both the applicant and the Federal government. The NWPs, published in the March 12, 2007, Federal Register, Issuance of Nationwide Permits (72 FR 11092), are issued by the Chief of Engineers, and are intended to apply throughout the entire United States and its territories. For convenience, all NWPs with the appropriate regional, general and special conditions are attached.

In response to the Federal Register Notice (72 FR 11092), the West Virginia Department of Environmental Protection (WVDEP) has issued 401 water quality certification, pending compliance with certain conditions and/or limitations, for the following NWPs: 3, 4, 5, 6, 7, 12, 13, 14, 16, 18, 19, 20, 21, 22, 25, 27, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42, 45, 46, 47, 48, 49 and 50.

An individual State Water Quality Certification is required for the following NWPs: 15, 17, 23, 34, and 43. Certification response is not applicable to NWPs: 1, 2, 8, 9, 10, 11, 24, 26, 28, 35, and 44.

Authorization for discharges covered by nationwide permits is denied without prejudice if: (1) the State Certification has been denied; or (2) the discharge is not in compliance with conditions imposed in the State Certification. Applicants wishing to conduct such discharges must first obtain either an individual water quality certificate or waiver from:

Director
West Virginia Department of Environmental Protection
601 57th Street
Charleston, West Virginia 25304

Some nationwide permits require advance notification. The notification must be made in writing as early as possible prior to commencing the proposed activity. The notification procedures are located under General Condition 27. The notification to the Corps can be made concurrently with the request for individual state certification, if required.

For activities involving Section 10 of the Rivers and Harbors Act of 1899, the permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

Assistance and further information regarding all aspects of the Corps of Engineers regulatory program may be obtained by contacting:

HUNTINGTON DISTRICT

Name:	Ginger Mullins, Chief, Regulatory Branch
Address:	U.S. Army Corps of Engineers, Huntington District 502 Eighth Street Huntington, West Virginia 25701-2070
Phone:	304-399-5710

PITTSBURGH DISTRICT

Name: Scott Hans, Chief Regulatory Branch
Address: U.S. Army Corps of Engineers, Pittsburgh District
William S. Moorhead Federal Building
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222-4186
Phone: 412-395-7154

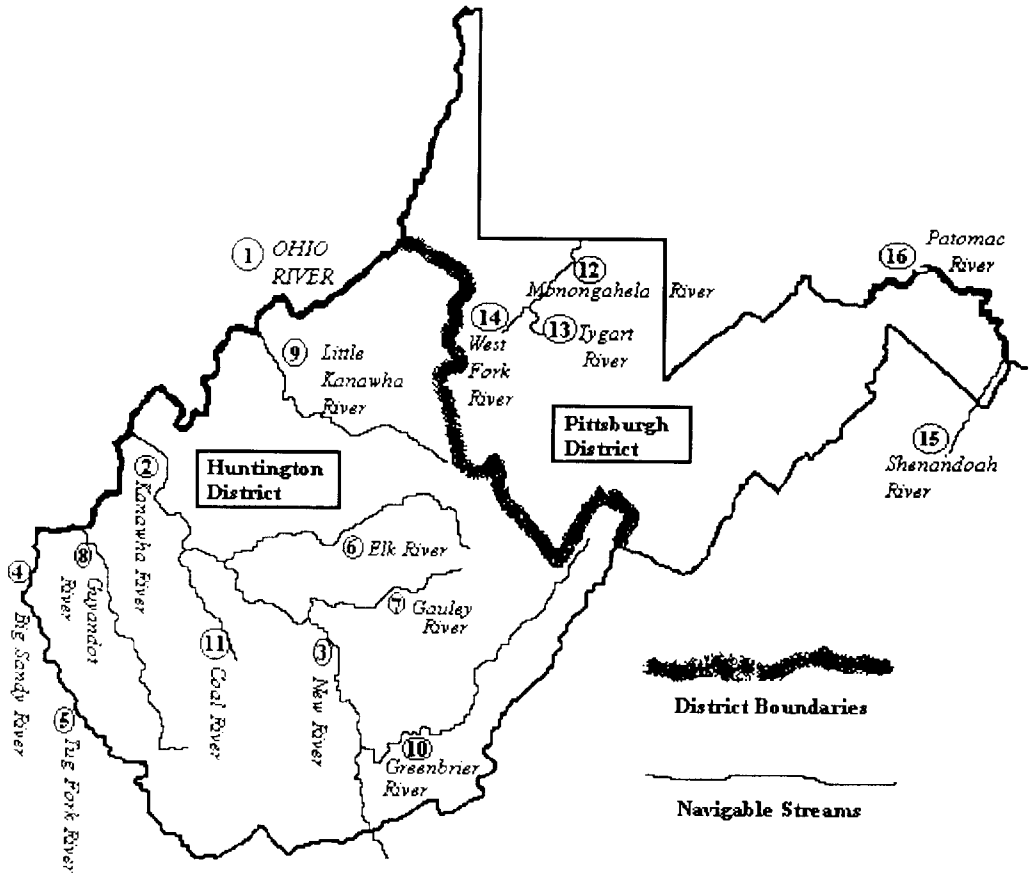
Attached is a map showing the district boundaries for the State of West Virginia.

Ginger Mullins

GINGER MULLINS
Chief, Regulatory Branch

(WV)

Corps Districts and Navigable Streams in The State of West Virginia



Navigable Limits of <u>Major Section 10 Streams in West Virginia</u> (Due to the scale of this map, all Section 10 Streams are <u>not</u> shown. Contact the proper District office for information.)

<u>Huntington District</u>

1. Ohio River.....Total Length in State
2. Kanawha River.....Total Length
3. New River.....Total Length in State
4. Big Sandy River.....Total Length
5. Tug Fork.....58 Miles
6. Elk River.....139 Miles
7. Gauley River.....75 Miles
8. Guyandot River.....122 Miles
9. Little Kanawha River.....130.75 Miles
10. Greenbrier River.....150.50 Miles
11. Coal River.....57.90 Miles

<u>Pittsburgh District</u>

1. Ohio River.....Total Length in State
12. Monongahela River.....Total Length in State
13. Tygart River.....7 Miles
14. West Fork.....74 Miles
15. Shenandoah River.....Total Length in State
16. Potomac River.....Total Length in State

2007 Nationwide Permits, Conditions, Further Information, and Definitions (with corrections)

A. Index of Nationwide Permits, Conditions, Further Information, and Definitions

Nationwide Permits

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
12. Utility Line Activities
13. Bank Stabilization
14. Linear Transportation Projects
15. U.S. Coast Guard Approved Bridges
16. Return Water From Upland Contained Disposal Areas
17. Hydropower Projects
18. Minor Discharges
19. Minor Dredging
20. Oil Spill Cleanup
21. Surface Coal Mining Operations
22. Removal of Vessels
23. Approved Categorical Exclusions
24. Indian Tribe or State Administered Section 404 Programs
25. Structural Discharges
26. [Reserved]
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
28. Modifications of Existing Marinas
29. Residential Developments
30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities
32. Completed Enforcement Actions
33. Temporary Construction, Access, and Dewatering
34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Ramps
37. Emergency Watershed Protection and Rehabilitation
38. Cleanup of Hazardous and Toxic Waste
39. Commercial and Institutional Developments

40. Agricultural Activities
41. Reshaping Existing Drainage Ditches
42. Recreational Facilities
43. Stormwater Management Facilities
44. Mining Activities
45. Repair of Uplands Damaged by Discrete Events
46. Discharges in Ditches
47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs
48. Existing Commercial Shellfish Aquaculture Activities
49. Coal Remining Activities
50. Underground Coal Mining Activities

Nationwide Permit General Conditions

1. Navigation
2. Aquatic Life Movements
3. Spawning Areas
4. Migratory Bird Breeding Areas
5. Shellfish Beds
6. Suitable Material
7. Water Supply Intakes
8. Adverse Effects from Impoundments
9. Management of Water Flows
10. Fills Within 100-Year Floodplains
11. Equipment
12. Soil Erosion and Sediment Controls
13. Removal of Temporary Fills
14. Proper Maintenance
15. Wild and Scenic Rivers
16. Tribal Rights
17. Endangered Species
18. Historic Properties
19. Designated Critical Resource Waters
20. Mitigation
21. Water Quality
22. Coastal Zone Management
23. Regional and Case-by-Case Conditions
24. Use of Multiple Nationwide Permits
25. Transfer of Nationwide Permit Verifications
26. Compliance Certification
27. Pre-Construction Notification
28. Single and Complete Project

Further Information

Definitions

Best management practices (BMPs)
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Enhancement
Ephemeral stream
Establishment (creation)
Historic property
Independent utility
Intermittent stream
Loss of waters of the United States
Non-tidal wetland
Open water
Ordinary high water mark
Perennial stream
Practicable
Pre-construction notification
Preservation
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Riffle and pool complex
Riparian areas
Shellfish seeding
Single and complete project
Stormwater management
Stormwater management facilities
Stream bed
Stream channelization
Structure
Tidal wetland
Vegetated shallows
Waterbody

Regional Conditions

Specific regional conditions are listed below each NWP. A complete list of regional general conditions is listed under part F, titled "Regional General Conditions."

B. Nationwide Permits and Conditions

1. **Aids to Navigation**. The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66). **(Section 10)**

2. **Structures in Artificial Canals**. Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). **(Section 10)**

3. **Maintenance**. **(a)** The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of and within existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional riprap to protect the structure. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the district engineer under separate authorization. The placement of riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.

(c) This NWP also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation or beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

Notification: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). Where maintenance dredging is proposed, the pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. **(Sections 10 and 404)**

Note: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act Section 404(f) exemption for maintenance.

Nationwide Permit 3 Specific Regional Conditions:

- Discharges of dredged or fill material associated with removal of accumulated sediment and debris in the vicinity of existing structures and placement of new or additional riprap to protect the structure is limited to distances of 50 feet upstream and/or 50 feet downstream of structure.

- If dredging activities are proposed to occur along an island or within a backchannel or embayment, notification to the appropriate Corps District and the U.S. Fish and Wildlife Service West Virginia Field Office at 694 Beverly Pike, Elkins, West Virginia, is required.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Prior written approval is required from the West Virginia Department of Environmental Protection, Division of Water and Waste Management in concurrence with West Virginia Division of Natural Resources for use of this permit on streams listed in Standard Condition 15 A, C and D.

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities. Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and clam and oyster digging, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. **(Sections 10 and 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Standard Conditions apply.

5. **Scientific Measurement Devices**. Devices, whose purpose is to measure and record scientific data, such as staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. **(Sections 10 and 404)**

Nationwide Permit 5 Specific Regional Conditions:

- Discharges of dredged or fill material located in wetlands, islands, island backchannels embayments, and sites at stream mouths are ineligible for this nationwide permit.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Measurement devices will not restrict stream flow. No structure authorized by this permit shall entrain or impinge fish or any other aquatic life; or impede or prevent fish movement upstream or downstream; or cause more than minimal impact without specific written authorization from the West Virginia Department of Environmental Protection, Division of Water and Waste Management with concurrence from the West Virginia Division of Natural Resources.

6. **Survey Activities**. Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, and historic resources surveys. For the purposes of this NWP, the term "exploratory trenching" means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 25 cubic yards. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under Section 402 of the Clean Water Act. **(Sections 10 and 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. All test holes which penetrate solid rock shall be abandoned so that the lateral and vertical movement of fluids is prevented, provided that the test hole need not be plugged if subsequent excavation will remove the full depth of the test hole.

B. Prior written approval is required from the West Virginia Department of Environmental Protection, Division of Water and Waste Management in concurrence with West Virginia Division of Natural Resources for activities proposing exploratory trenching under this permit.

7. **Outfall Structures and Associated Intake Structures**. Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or that are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Sections 10 and 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required when the proposed outfall structure is located in an embayment, island backchannel, stream mouth, wetland or in areas considered environmentally sensitive. Stream mouth is defined as the area extending 100 feet upstream and 100 feet downstream on receiving streams that are classified as a Section 10 stream.

B. Disturbance of shoreline will be limited to 50 linear feet.

C. The structure is to be properly designed to prevent erosion. Rip rap or a splash pad is to be constructed to dissipate energy and to aerate the discharge unless the discharge elevation is below the water line at all times.

D. Written notification to the Director of the West Virginia Department of Environmental Protection, Division of Water and Waste Management detailing the amount of water to be withdrawn by the intake structure is required. The proposed water withdrawal notification shall include sufficient detail to allow the resource agencies to determine if the proposed water withdrawal will have minimal impacts on aquatic resources.

E. No structure authorized by this permit shall entrain or impinge fish or any other aquatic life; or impede or prevent fish movement upstream or downstream; or cause more than

minimal impact without specific written authorization from the West Virginia Department of Environmental Protection, Division of Water and Waste Management with concurrence from the West Virginia Division of Natural Resources.

8. **Oil and Gas Structures on the Outer Continental Shelf**. Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps designated dredged material disposal areas.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Section 10)**

9. **Structures in Fleeting and Anchorage Areas**. Structures, buoys, floats and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where the U.S. Coast Guard has established such areas for that purpose. **(Section 10)**

10. **Mooring Buoys**. Non-commercial, single-boat, mooring buoys. **(Section 10)**

11. **Temporary Recreational Structures**. Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. **(Section 10)**

Nationwide Permit 11 Specific Regional Conditions:

- Discharges of dredged or fill material located in wetlands, islands, island backchannels embayments, and sites at stream mouths are ineligible for this nationwide permit.

12. **Utility Line Activities**. Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2 acre of waters of the United States.

Utility lines: This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term "utility line" does not include activities that drain a

water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2 acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the total discharge from a single and complete project does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district

engineer prior to commencing the activity if any of the following criteria are met: (1) the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 27.) **(Sections 10 and 404)**

Note 1: Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters), copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, accordance with the requirements for temporary fills.

Note 3: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Nationwide Permit 12 Specific Regional Conditions:

- Notification is required for all work in waters of the U.S. associated with the construction of utility line substations.

- Notification is required for all stream work (perennial, intermittent, and ephemeral) associated with the construction of foundations for overhead utility line towers, poles, and anchors.

- The maximum allowable timeframe for temporary work in waters of the U.S. is limited to one year, unless the permittee receives written approval from the Corps of Engineers granting a time extension.

- Notification for aerial transmission lines over Section 10 waters must include the nominal system voltage and the additional clearance above low steel for bridges, if available, or above maximum high water elevation.

- **Note:** All aerial crossings will have the following minimum clearances above the clearance required for bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed crossing. These clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length or span, and type of supports as outlined in the National Electrical Safety Code. **For any non-electrical**

cable, the crossing must have a minimum clearance of 20 feet above the clearance required for bridges.

NOMINAL SYSTEM VOLTAGE, KV	ADDITIONAL CLEARANCE, FEET
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750 -765	45

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Points of ingress and egress to streams for equipment shall be within the work site. Location of ingress and egress outside the immediate work area requires prior approval of the West Virginia Department of Environmental Protection Division of Water and Waste Management with concurrence from the West Virginia Division of Natural Resources.

B. Certification is limited to pipelines 36 inches or less in diameter. Individual stream crossings must be completed in a continuous, progressive manner and within 72 hours under normal (normal or below stream flow) conditions. Crossings on the Ohio, Kanawha, New and Monongahela Rivers, and the Little Kanawha River, below the confluence with Hughes River, are exempt from the 72-hour requirements, as are stream crossings requiring blasting. Whatever the situation, all stream activities shall be conducted in a continuous, progressive manner and be completed as rapidly as possible.

C. Shoreline restoration will be completed and stabilized in accordance with standard condition 5. Equipment tracking in wetlands will utilize protective mats when practical. Restoration of the disturbed areas will be completed within 72 hours of the completion of pipeline installation across the watercourse.

D. Surface disturbance will not extend beyond the right-of-way limits. Stream crossings will be conducted as close to a right angle to the watercourse as practical and the area of disturbance will be limited to reduce in stream activity.

E. Dredging for backfill material is not allowed.

F. Submarine-type pipeline crossings must be designed and constructed to prevent flotation and the possibility of leakage or rupture and the top of pipelines must be buried a minimum of three (3) feet below the stream bottom.

G. Where it is apparent that small boats, inner tubes, swimmers, etc. could be using the stream in the work area, easily seen warning signs must be placed a minimum of 50 feet upstream and downstream of the stream crossings construction site to advise stream users of the potential danger.

H. Individual State Water Quality Certification is required for pipelines transporting hazardous materials/substances as defined by the Toxic Substances Control Act, except pipelines carrying natural gas are exempt from this condition.

I. Individual State Water Quality Certification is required for utility lines through (under, on or over) wetlands that would use or consider the use of herbicides for right-of-way maintenance.

J. Only utility lines regulated by a State or Federal agency and to individual family residences are covered by this certification. Utility lines proposed by individuals or unregulated groups of individuals, industry and similar types of applicants are required to obtain prior written approval from the Director of the Division of Water and Waste Management.

K. Written notification to the Director of the Division of Water and Waste Management detailing the amount of water to be withdrawn by the intake structures is required. The proposed water withdrawal notification shall include sufficient detail to allow the resource agencies to determine if the proposed water withdrawal will have minimal impacts on aquatic resources.

L. Individual State Water Quality Certification is required for an activity impacting greater than 200 linear feet on one or more of the streams listed in West Virginia State Certification, Standard Condition 15.

M. Individual State Water Quality Certification is required for perennial and intermittent stream impacts greater than 300 linear feet.

N. No structure authorized by this permit shall entrain or impinge fish or any other aquatic life or impede or prevent fish movement upstream or downstream without specific written authorization from the West Virginia Department of Environmental Protection, Division of Water and Waste Management with concurrence from West Virginia Division of Natural Resources.

13. <u>Bank Stabilization</u>. Bank stabilization activities necessary for erosion prevention, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless this criterion is waived in writing by the district engineer;

(c) The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line, unless this criterion is waived in writing by the district engineer;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless this criterion is waived in writing by the district engineer;

(e) No material is of the type, or is placed in any location, or in any manner, to impair surface water flow into or out of any water of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and,

(g) The activity is not a stream channelization activity.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) involves discharges into special aquatic sites; (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot along the bank below the plane of the ordinary high water mark or the high tide line. (See general condition 27.) **(Sections 10 and 404)**

Nationwide Permit 13 Specific Regional Conditions:

- Notification is required for all discharges involving the construction of concrete retaining walls.
- Wherever practicable, bank stabilization work shall be accomplished using natural channel design and/or stabilization methodologies.
- All activities shall be constructed in a manner to withstand expected high flows and shall consist of clean and course non-erodable materials with 15% or less fines.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required for bank stabilization activities located in an embayment, island back channel, stream mouth or wetland.

B. Individual State Water Quality Certification is required for perennial and intermittent stream bank stabilization activities greater than 500 linear feet authorized by the Corps of Engineers.

C. Stabilized streambanks, where possible and practicable, should be sloped and revegetated for erosion control purposes.

D. The use of unconsolidated river gravel (river jack) for streambank stabilization is not certified. Unconsolidated river material may be used to reconstruct streambanks or form bankfull benches provided they are stabilized by material and/or methods which prevent further erosion under normal or expected high flows. Acceptable material and/or methods are; quarried or shot rock, clean concrete rubble, gabions, cribbing, woody

vegetation, and flow diversion structures such as rock vanes. All of the foregoing are to be used in combination with appropriate sloping and engineering specifications.

E. Individual State Water Quality Certification is required for an activity impacting greater than 200 linear feet on one or more of the streams listed in West Virginia State Certification, Standard Condition 15.

14. Linear Transportation Projects. Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the loss of waters of the United States exceeds 1/10 acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 27.) **(Sections 10 and 404)**

Note: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Nationwide Permit 14 Specific Regional Conditions:

- Notification is required for all activities in Section 10 streams.
- Notification is required for discharges causing the loss of greater than 300 feet of perennial, intermittent, and ephemeral stream.
- Notification is required for all vented (culverted) low water crossings.
- Compensatory mitigation, focusing on functional replacement, will be required for discharges causing the loss of greater than 1/10 acre of wetlands. In addition, compensatory mitigation will be required for the loss of greater than 300 linear feet of

perennial stream, intermittent, and ephemeral stream unless the applicant demonstrates that adverse effects of the project are minimal without mitigation. In such cases, the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required for perennial and intermittent stream impacts greater than 300 linear feet.

B. Activities associated with temporary access fills, temporary cofferdams or other discharges related to accessing the stream for maintenance activities require the use of clean and coarse non erodible materials with 15% or less fines that is properly sized to withstand expected high flows.

C. Pipe, box, and arched culvert crossings:

In order to comply with Nationwide Permits General Conditions 2-Aquatic Life Movements and 9-Management of Water Flows, all culverts placed in streams that contain aquatic life and intermittent streams that are direct tributaries of streams listed in West Virginia Standard Condition 15 should be installed using the following criteria;

a. The volume of fill for culverted structures is limited to the amount required to achieve transportation purpose.

b. Culverts must be installed on the same slope as the streambed where practical.

c. Set the culvert width equal to the bankfull channel width.

d. The inlet/outlets must be designed in such a manner as to maintain substrate in the bottom of the culvert (culverts installed in bedrock streams do not need to be countersunk). Countersinking the culvert to the sub-pavement of the streambed or the use of a bottomless culvert will generally fulfill this requirement.

e. Prior written approval from the West Virginia Department of Environmental Protection, Division of Water and Waste Management with concurrence from West Virginia Division of Natural Resources must be obtained for proposed culverted crossings that do not pass aquatic life and/or do not freely pass bankfull flows unless the activity's primary purpose is to impound water. Such crossings may require compensatory mitigation.

f. If fills associated with the crossing extend onto the floodplain, the use of floodplain culverts is strongly encouraged.

D. The volume of fill for a bridge abutment or piers below the ordinary high water mark is not to exceed 200 cubic yards for a single bridge project.

E. Individual State Water Quality Certification is required for an activity impacting greater than 200 linear feet on one or more of the streams listed in West Virginia State Certification, Standard Condition 15.

15. U.S. Coast Guard Approved Bridges. Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit. **(Section 404)**

An individual State Water Quality Certification is required for use of this permit.

16. Return Water From Upland Contained Disposal Areas. Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs on the upland and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. **(Section 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. The return water must comply with the water quality standards contained in Title 47, Series 2 of the Code of State Regulations (47CSR2), Requirements Governing Water Quality Standards.

17. Hydropower Projects. Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Section 404)**

An individual State Water Quality Certification is required for use of this permit.

18. Minor Discharges. Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10 acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 27.) **(Sections 10 and 404)**

Nationwide Permit 18 Specific Regional Conditions:

- This Nationwide Permit does not authorize stream culverting, relocation, channelization, construction of valley fills, or elimination of streams.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required for activities involving island back channels, stream mouths, and embayments.

19. Minor Dredging. Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). **(Sections 10 and 404)**

Nationwide Permit 19 Specific Regional Conditions:

- Notification is required for activities in Section 10 streams.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. This certification does not include activity involving island back channels, stream mouths, and embayments.

20. Oil Spill Cleanup. Activities required for the containment and cleanup of oil and hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing state contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR Part 761. **(Sections 10 and 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Substances contained during cleanup or other contaminated dredged or fill material can not be discharged or disposed of in sensitive areas such as islands, embayments, wetlands, or any water course, but only in disposal areas approved by the West Virginia Department of Environmental Protection, Division of Water and Waste Management.

21. Surface Coal Mining Operations. Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations provided the activities are already authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) **(Sections 10 and 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required for activities impacting any classification of stream listed in West Virginia 401 Water Quality Certification Standard Condition No. 15.

B. Individual State Water Quality Certification is required for activities impacting an intermittent or perennial stream(s).

C. Individual State Water Quality Certification is required for intermittent or perennial stream, crossing (linear transportation projects) e.g. haulroads, access roads, conveyor belts, and pipelines, greater than 100 linear feet per each crossing.

D. Individual State Water Quality Certification is required for wetland impacts equal to or greater than ½ acre.

22. Removal of Vessels. Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 27.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the Historic Properties general condition is completed. **(Sections 10 and 404)**

Note 1: If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

Note 2: Compliance with general condition 17, Endangered Species, and general condition 18, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the likelihood that submerged vessels may be historic properties.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

23. Approved Categorical Exclusions. Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from environmental documentation, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that Agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. **(Sections 10 and 404)**

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with

approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: http://www.usace.army.mil/inct/functions/cw/cecwo/reg/rglsindx.htm . Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same web site.

Nationwide Permit 23 Specific Regional Conditions:

- Notification is required for use of this NWP.
- Projects with discharges of dredged or fill material into waters of the United States, including wetlands shall not exceed ½ acre.
- In addition to notification requirements identified in Nationwide Permit General Condition 27, the notification should also include a copy of the categorical exclusion.
- Compensatory mitigation, focusing on functional replacement, will be required for discharges causing the loss of greater than 300 linear feet of perennial stream, intermittent, and ephemeral stream unless the applicant demonstrates that adverse effects associated with the project are minimal without mitigation. In such cases, the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration.

An individual State Water Quality Certification is required for use of this permit.

24. Indian Tribe or State Administered Section 404 Programs. Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. **(Section 10)**

Note 1: As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

Note 2: Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Pub. L. 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.4(b)).

25. Structural Discharges. Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a section 10 permit if located in navigable waters of the United States. **(Section 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Activities associated with construction pads, temporary access pads, temporary causeways, cofferdams or other discharges related to accessing the stream to conduct the activities are not authorized under Nationwide Permit No. 25. If these structures or discharges are necessary, the applicant must contact the appropriate Corps of Engineers District office for a separate authorization prior to commencement of this activity.

26. [Reserved]

27. <u>Aquatic Habitat Restoration, Establishment, and Enhancement Activities</u>. Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas and the restoration and enhancement of non-tidal streams and other non-tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

<u>Reversion</u>. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant

to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the OSM or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland that has not been abandoned or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity result in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting: For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSM or the applicable state agency. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification. The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. FWS, NRCS, FSA, NMFS, NOS, or their designated state cooperating agencies;

(2) Voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSM or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation. **(Sections 10 and 404)**

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee programs. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

Nationwide Permit 27 Specific Regional Conditions:

- Notification is required for all work in waters of the U.S., including special aquatic sites.
- Projects associated with residential subdivisions that result in impacts to greater than 300 linear feet of perennial, intermittent, and ephemeral stream are ineligible for this NWP.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Prior written approval is required from the West Virginia Department of Environmental Protection, Division of Water and Waste Management in concurrence with West Virginia Division of Natural Resources for non-coal mining related activities proposed under this permit.

28. Modifications of Existing Marinas. Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. **(Section 10)**

29. Residential Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2 acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Sections 10 and 404)**

Nationwide Permit 29 Specific Regional Conditions:

- Notification shall include information sufficient to demonstrate the proposed project represents a single and complete project and a description of the ways in which the proposed project has been designed to avoid and minimize adverse impacts to waters of the United States.

- Projects involving the culverting of perennial and intermittent streams for the purpose of yard construction or expansion are not eligible for this nationwide permit.

- Issuance of waivers of the 300-linear foot limit for ephemeral and intermittent streams will be limited to those projects located in degraded waters of the United States. If a waiver is being requested, notification shall include documentation on the nature of stream degradation.

- Compensatory mitigation focusing on functional replacement will be required for the loss of greater than 300 linear feet of intermittent and ephemeral stream for which a waiver has been obtained. Mitigation will be required unless the applicant demonstrates that adverse effects associated with the project are minimal without mitigation. In such cases, the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration.

- Projects involving stream relocation activities that incorporate appropriate channel plan, profile, dimension, as well as other elements of natural stream design would typically not require additional compensatory mitigation.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. The permittee shall, concurrent with the nationwide permit application, submit written notification to the West Virginia Department of Environmental Protection, Division of Water and Waste Management of any use of this nationwide permit.

B. Projects affecting Section 10 waters and adjacent wetlands require individual state water quality certification.

C. Individual State Water Quality Certification is required for perennial and intermittent stream impacts greater than 300 linear feet.

30. <u>Moist Soil Management for Wildlife</u>. Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession,

preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies. **(Section 404)**

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

31. Maintenance of Existing Flood Control Facilities. Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) were previously authorized by the Corps by individual permit, general permit, by 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline", as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an upland site or an authorized disposal site in waters of the United States, and proper siltation controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels, but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance

baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental impacts are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline. In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require compensatory mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 27). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the dredged material disposal site. **(Sections 10 and 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Prior written approval is required from the West Virginia Department of Environmental Protection, Division of Water and Waste Management in concurrence with the West Virginia Division of Natural Resources-Wildlife Resources Section under this nationwide permit to insure both the minimization of impacts to fisheries and wildlife habitat and the consideration to habitat enhancements.

32. Completed Enforcement Actions. Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of Section 404 of the Clean Water Act, provided that:

(a) The unauthorized activity affected no more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, Section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e). **(Sections 10 and 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

33. Temporary Construction, Access, and Dewatering. Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse effects on aquatic resources. Following completion of construction,

temporary fill must be entirely removed to upland areas, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. **(Sections 10 and 404)**

Nationwide Permit 33 Specific Regional Conditions:

- The maximum allowable timeframe for temporary work in waters of the U.S. is limited to one year unless the permittee receives written approval from the Corps granting an extension.

- All activities shall be constructed in a manner to withstand expected high flows and shall consist of clean and course non-erodable materials with 15% or less fines.
- For temporary crossings in wetlands, the use of construction pads, timber matting, and geotextile fabric to prevent over compaction of wetland substrate is required.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required for use of this permit to construct temporary causeways in Section 10 waters.

B. All activities require the use of clean and coarse non-erodible materials with 15% or less fines that is properly sized to withstand expected high flows.

C. Maximum length of time for temporary status is one year. Fills exceeding one year require written approval from the West Virginia Department of Environmental Protection, Division of Water and Waste Management.

34. Cranberry Production Activities. Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes

of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 27.) **(Section 404)**

An individual State Water Quality Certification is required for use of this permit.

35. Maintenance Dredging of Existing Basins. Excavation and removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less, provided the dredged material is deposited at an upland site and proper siltation controls are used. **(Section 10)**

36. Boat Ramps. Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the 50 cubic yard limit is waived in writing by the district engineer;

(b) The boat ramp does not exceed 20 feet in width, unless this criterion is waived in writing by the district engineer;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging may be authorized by another NWP, a regional general permit, or an individual permit.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 27.) **(Sections 10 and 404)**

Nationwide Permit 36 Specific Regional Conditions:

- The use of unsuitable material is prohibited.
- Discharges of dredged or fill material located at wetlands, islands, island backchannels, embayments, and sites at stream mouths are ineligible for this nationwide permit.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. An Individual State Water Quality Certification is required for Boat Ramps proposed for location in island backchannels, embayments and stream mouths.

37. Emergency Watershed Protection and Rehabilitation. Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR Subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). **(Sections 10 and 404)**

Nationwide Permit 37 Specific Regional Conditions:

- This NWP may be used for abandoned mine lands emergencies.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Projects that have been coordinated and obtained concurrence from the West Virginia Department of Environmental Protection, Division of Water and Waste Management and Division of Natural Resources Wildlife Resource Section in the early project planning phase are certified.

B. This certification applies only to those exigency situations that involve, threats to life, threat of loss of primary residence and loss or threat of loss to the areas infrastructure and/or other community services.

38. Cleanup of Hazardous and Toxic Waste. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Sections 10 and 404)**

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. The permittee must provide a notice of the proposed activity to the West Virginia Department of Environmental Protection, Division of Water and Waste Management, Hazardous Waste Program, 601 57th Street, Charleston, West Virginia 25304, as early as possible.

B. Certification of discharges into island backchannels, embayments, stream mouths, and wetlands is denied.

39. Commercial and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses, new ski areas, or oil and gas wells is not authorized by this NWP.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Sections 10 and 404)**

Nationwide Permit 39 Specific Regional Conditions:

- Notification shall include information sufficient to demonstrate the proposed project represents a single and complete project and a description of the ways in which the proposed project has been designed to avoid and minimize adverse impacts to waters of the United States.

- Issuance of waivers of the 300-linear foot limit for ephemeral and intermittent streams will be limited to those projects located in degraded waters of the United States. If a waiver is being requested, notification shall include documentation on the nature of stream degradation.

- Compensatory mitigation, focusing on functional replacement, will be required for discharges causing the loss of greater than 300 linear feet of intermittent and ephemeral stream for which a waiver has been obtained. Mitigation will be required unless the applicant demonstrates that adverse effects associated with the project are minimal without mitigation. In such cases, the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. The permittee shall, concurrent with the nationwide permit application, submit written notification to the West Virginia Department of Environmental Protection, Division of Water and Waste Management of any use of this nationwide permit.

B. Individual State Water Quality Certification is required for perennial and intermittent stream impacts greater than 300 linear feet.

C. Projects impacting Section 10 waters and adjacent wetlands require Individual State Water Quality Certification.

40. <u>Agricultural Activities</u>. Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal

waters. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams, unless for drainage ditches constructed in intermittent and ephemeral streams, this 300 linear foot limit is waived in writing by the district engineer.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Section 404)**

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act Section 404(f)(1)(C) exemption because of the recapture provision at Section 404(f)(2).

Nationwide Permit 40 Specific Regional Conditions:

- Projects involving impacts to perennial streams are not eligible for this nationwide permit.

- Notification is required for all intermittent and ephemeral stream impacts greater than 300 linear feet in waters of the U.S.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

41. **Reshaping Existing Drainage Ditches**. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the ditch as originally constructed (i.e., the capacity of the ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity, if more than 500 linear feet of drainage ditch will be reshaped. (See general condition 27.) **(Section 404)**

Nationwide Permit 41 Specific Regional Conditions:

- Notification is required for all impacts.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

42. Recreational Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Section 404)**

Nationwide Permit 42 Specific Regional Conditions:

- Notification shall include information sufficient to demonstrate the proposed project represents a single and complete project and a description of the ways in which the proposed project has been designed to avoid and minimize adverse impacts to waters of the United States.

- Issuance of waivers of the 300-linear foot limit for ephemeral and intermittent streams will be limited to those projects located in degraded waters of the United States. If a waiver is being requested, notification shall include documentation on the nature of stream degradation.

- Compensatory mitigation, focusing on functional replacement, will be required for discharges causing the loss of greater than 300 linear feet of intermittent and ephemeral stream for which a waiver has been obtained. Mitigation will be required unless the applicant demonstrates that adverse effects associated with the project are minimal without mitigation. In such cases, the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required for perennial and intermittent stream impacts greater than 300 linear feet.

43. Stormwater Management Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction and maintenance of stormwater management facilities, including the excavation of stormwater ponds/facilities, detention basins, and retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

Notification: For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility. **(Section 404)**

Nationwide Permit 43 Specific Regional Conditions:

- Notification is required for all impacts to wetlands, in addition to all perennial and intermittent stream impacts.
- Notification is required for ephemeral stream impacts greater than 300 linear feet.
- No waivers will be granted for impacts to more than 300 linear feet of intermittent streams under this NWP.

An individual State Water Quality Certification is required for use of this permit.

44. Mining Activities. Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities. The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. **(Sections 10 and 404)**

Revoked.

45. Repair of Uplands Damaged by Discrete Events. This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours,

or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 27) within 12-months of the date of the damage. The pre-construction notification should include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. **(Sections 10 and 404)**

Note: Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.)

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. The permittee shall, concurrent with the nationwide permit application, submit written notification to the West Virginia Department of Environmental Protection, Division of Water and Waste Management of any use of this nationwide permit.

B. Individual State Water Quality Certification is required for activities in any of the rivers or streams listed in West Virginia Standard Condition 15.

46. Discharges in Ditches. Discharges of dredged or fill material into non-tidal ditches that are: (1) constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) are determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Section 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. The permittee shall, concurrent with the nationwide permit application, submit written notification to the West Virginia Department of Environmental Protection, Division of Water Resources of any use of this nationwide permit.

47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs. Activities required for the inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that have been identified by the Pipeline and Hazardous Materials Safety Administration's Pipeline Safety Program (PHP) within the U.S. Department of Transportation as time-sensitive (see 49 CFR parts 192 and 195) and additional maintenance activities done in conjunction with the time-sensitive inspection and repair activities. All activities must meet the following criteria:

(a) Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable when temporary structures, work and discharges, including cofferdams, are necessary for construction activities or access fills or dewatering of construction sites;

(b) Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect);

(c) Temporary fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate;

(d) In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench so that there is no change in preconstruction contours;

(e) To the maximum extent practicable, the restoration of open waters must be to the pre-construction course, condition, capacity, and location of the waterbody;

(f) Any exposed slopes and stream banks must be stabilized immediately upon completion of the project;

(g) Additional maintenance activities done in conjunction with the time-sensitive inspection or repair must not result in additional losses of waters of the United States; and,

(h) The permittee is a participant in the Pipeline Repair and Environmental Guidance System (PREGS).

Reporting: The permittee must submit a post construction report to the PHP within seven days after completing the work. The report must be submitted electronically to PHP via PREGS. The report must contain the following information: project sites located in waters of the United States, temporary access routes, stream dewatering sites, temporary fills and temporary structures identified on a map of the pipeline corridor; photographs of the pre- and post-construction work areas located in waters of the United States; and a list of best management practices employed for each pipeline segment shown on the map. **(Section 10 and 404)**

Note: Division engineers may modify this NWP by adding regional conditions to protect the aquatic environment, as long as those regional conditions do not require pre-construction

notification or other actions that would delay time sensitive inspections and repairs. Examples of appropriate regional conditions include best management practices.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. The permittee shall, concurrent with the nationwide permit application, submit written notification to the West Virginia Department of Environmental Protection, Division of Water Resources of any use of this nationwide permit.

48. Existing Commercial Shellfish Aquaculture Activities. This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures necessary for the continued operation of the existing commercial aquaculture activity. This NWP also authorizes discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize new operations or the expansion of the project area for an existing commercial shellfish aquaculture activity. This NWP does not authorize the cultivation of new species (i.e., species not previously cultivated in the waterbody). This NWP does not authorize attendant features such as docks, piers, boat ramps, stockpiles, staging areas, or the deposition of shell material back into waters of the United States as waste.

Reporting: For those activities that do not require pre-construction notification, the permittee must submit a report to the district engineer that includes the following information: (1) the size of the project area for the commercial shellfish aquaculture activity (in acres); 2) the location of the activity; (3) a brief description of the culture method and harvesting method(s); (4) the name(s) of the cultivated species; and (5) whether canopy predator nets are being used. This is a subset of the information that would be required for pre-construction notification. This report may be provided by letter or using an optional reporting form provided by the Corps. Only one report needs to be submitted during the period this NWP is valid, as long as there are no changes to the operation that require pre-construction notification. The report must be submitted to the district engineer within 90 days of the effective date of this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) the project area is greater than 100 acres; or (2) there is any reconfiguration of the aquaculture activity, such as relocating existing operations into portions of the project area not previously used for aquaculture activities; or (3) there is a change in species being cultivated; or (4) there is a change in culture methods (e.g., from bottom culture to off-bottom culture); or (5) dredge harvesting, tilling, or harrowing is conducted in areas inhabited by submerged aquatic vegetation. (See general condition 27.) **(Sections 10 and 404)**

Note: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required for activities in any of the rivers or streams listed in West Virginia Standard Condition 15.

49. Coal Remining Activities. Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal, provided the activities are already authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI) Office of Surface Mining (OSM), or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977. Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts. The permittee must clearly demonstrate to the district engineer that the reclamation plan will result in a net increase in aquatic resource functions. As part of the project, the permittee may conduct coal mining activities in an adjacent area, provided the newly mined area is less than 40 percent of the area being remined plus any unmined area necessary for the reclamation of the remined area.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) **(Sections 10 and 404)**

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required for activities impacting any classification of stream listed in West Virginia 401 Water Quality Certification Standard Condition No. 15.

B. Individual State Water Quality Certification is required for activities impacting an intermittent or perennial stream(s).

C. Individual State Water Quality Certification is required for intermittent or perennial stream, crossing (linear transportation projects) e.g. haulroads, access roads, conveyor belts, etc., greater than 100 linear feet per each crossing.

D. Individual State Water Quality Certification is required for wetland impacts equal to or greater than ½ acre.

50. Underground Coal Mining Activities. Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed as part of an

integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. **(Sections 10 and 404)**

Note: Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

A. Individual State Water Quality Certification is required for activities impacting any classification of stream listed in West Virginia 401 Water Quality Certification Standard Condition No. 15.

B. Individual State Water Quality Certification is required for activities impacting an intermittent or perennial stream(s).

C. Individual State Water Quality Certification is required for intermittent or perennial stream, crossing (linear transportation projects) e.g. haulroads, access roads, conveyor belts, etc., greater than 100 linear feet per each crossing.

D. Individual State Water Quality Certification is required for wetland impacts equal to or greater than ½ acre.

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as appropriate, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP.

1. **Navigation**. **(a)** No activity may cause more than a minimal adverse effect on navigation.
(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.
(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. **Aquatic Life Movements**. No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

3. **Spawning Areas**. Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. **Migratory Bird Breeding Areas**. Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. **Shellfish Beds**. No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48.

6. **Suitable Material**. No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

7. **Water Supply Intakes**. No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. **Adverse Effects From Impoundments**. If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. **Management of Water Flows**. To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. **Fills Within 100-Year Floodplains**. The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. **Equipment**. Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. **Soil Erosion and Sediment Controls**. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

13. **Removal of Temporary Fills**. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. **Proper Maintenance**. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety.

15. **Wild and Scenic Rivers**. No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

16. **Tribal Rights**. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

17. **Endangered Species**. **(a)** No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed

for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWPs.

(e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. FWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide Web pages at http://www.fws.gov/ and http://www.noaa.gov/fisheries.html respectively.

18. **Historic Properties. (a)** In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential

for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, explaining the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

19. **Designated Critical Resource Waters**. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the district engineer after notice and opportunity for public comment. The district engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, and 50 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 27, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district

engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

20. **Mitigation.** The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10 acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. For wetland losses of 1/10 acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment. Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream restoration, to ensure that the activity results in minimal adverse effects on the aquatic environment.

(e) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2 acre, it cannot be used to authorize any project resulting in the loss of greater than 1/2 acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWPs.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. Riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(g) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

21. **Water Quality**. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

22. **Coastal Zone Management**. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

23. **Regional and Case-By-Case Conditions**. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

24. **Use of Multiple Nationwide Permits**. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal water is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

25. **Transfer of Nationwide Permit Verifications**. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

"When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate

the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below."

_____

(Transferee)

_____

(Date)

26. **Compliance Certification**. Each permittee who received an NWP verification from the Corps must submit a signed certification regarding the completed work and any required mitigation. The certification form must be forwarded by the Corps with the NWP verification letter and will include:

(a) A statement that the authorized work was done in accordance with the NWP authorization, including any general or specific conditions;

(b) A statement that any required mitigation was completed in accordance with the permit conditions; and

(c) The signature of the permittee certifying the completion of the work and mitigation.

27. **Pre-Construction Notification**. **(a)** Timing. Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, as a general rule, will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) Forty-five calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 17 that listed species or critical habitat might affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 18 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) is completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee cannot begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained.

Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Pre-Construction Notification: The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) The PCN must include a delineation of special aquatic sites and other waters of the United States on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters of the United States, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, where appropriate;

(5) If the proposed activity will result in the loss of greater than 1/10 acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(6) If any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(c) Form of Pre-Construction Notification: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

(d) Agency Coordination: **(1)** The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(2) For all NWP 48 activities requiring pre-construction notification and for other NWP activities requiring pre-construction notification to the district engineer that result in the loss of greater than 1/2-acre of waters of the United States, the district engineer will immediately provide (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(3) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(4) Applicants are encouraged to provide the Corps multiple copies of pre-construction notifications to expedite agency coordination.

(5) For NWP 48 activities that require reporting, the district engineer will provide a copy of each report within 10 calendar days of receipt to the appropriate regional office of the NMFS.

(e) District Engineer's Decision: In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If the proposed activity requires a PCN and will result in a loss of greater than 1/10 acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after

consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: **(1)** That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; **(2)** that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or **(3)** that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan.

28. **Single and Complete Project**. The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

D. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project.

E. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration, establishment (creation), enhancement, or preservation of aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Discharge: The term "discharge" means any discharge of dredged or fill material.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a

decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities eligible for exemptions under Section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of standing or

flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects waterbodies with their adjacent uplands.

Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 20.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete project: The term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete project must have independent utility (see definition). For linear projects, a "single and complete project" is all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a wetland (i.e., water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(d).

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have

rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a jurisdictional water of the United States that, during a year with normal patterns of precipitation, has water flowing or standing above ground to the extent that an ordinary high water mark (OHWM) or other indicators of jurisdiction can be determined, as well as any wetland area (see 33 CFR 328.3(b)). If a jurisdictional wetland is adjacent--meaning bordering, contiguous, or neighboring--to a jurisdictional waterbody displaying an OHWM or other indicators of jurisdiction, that waterbody and its adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of "waterbodies" include streams, rivers, lakes, ponds, and wetlands.

F. Regional General Conditions

Regional General Condition 1

Full Agency Pre-construction Notification: In an effort to expedite full agency permit review it is requested that all pre-construction notifications (PCNs) submitted for activities subject to Nationwide Permits 21, 49, and 50, and for those activities resulting in the loss of greater than ½ acre of waters of the U.S., include one original hard copy and five (5) additional copies of the PCN package. Applicants are encouraged to submit the five agency copies in electronic format as CDs, in order to minimize the use of paper and postage resources.

Regional General Condition 2

Pre-Construction Notification Submittals: In addition to the PCN requirements listed in Nationwide Permit General Condition 27, all PCNs should include the following information:

- Graphic illustrations on 8 1/2" x 11" paper. The illustrations must clearly depict the project boundaries, including all elements and phases of the proposed project. Three types of illustrations are needed to properly depict the work to be undertaken. These illustrations or drawings are identified as a Vicinity Map {a location map such as the U.S. Geological Survey (USGS) 7.5 Minute Series topographical map is highly encouraged}, a Plan View and a Typical Cross-Section Map. Each illustration should identify the project, the applicant, and the type of illustration (vicinity map, plan view or cross-section). In addition, each illustration should be identified with a figure or attachment number and the project Latitude and Longitude.

- A written description of the proposed project including acreage(s) of waters of the U.S. (according to aquatic resource type) proposed to be directly or indirectly affected as a result of the proposed project, the linear footage of proposed direct and indirect stream impacts associated with the project, and cubic yards of fill proposed to be discharged.

- A description of the ways in which the project has been designed to avoid and minimize adverse impacts to waters of the U.S.

- Information concerning whether the proposed activity would affect any historic properties listed, determined to be eligible, or which they have reason to believe may be eligible, for listing on the National Register of Historic Places.

- Basic information about the general project area (encompassing a search radius of 2 miles centered on the project area) including USGS 7.5' series topographic maps, National Register of Historic Places (NRHP) files including Historic Districts, and county atlases, histories and/or any historic USGS 15' series topographic map(s), brief description of the terrain and topography of the project area, acreage of the project area, proximity of the project area to major waterways, past land uses in the project area, and any past cultural resources studies or coordination for the project area, if available, along with photographs, keyed to mapping, showing the project area and any buildings or structures on adjacent parcels.

- The submittal of ground photographs to illustrate current conditions of the overall project site and impact site is highly encouraged.

Regional General Condition 3

Compensatory Mitigation: Compensatory Mitigation will typically be required as indicated in accordance the terms and conditions of the NWPs in addition to all General and Regional Conditions for projects with impacts that result in the conversion of a water of the U.S. to uplands or the conversion of one aquatic resource type to another.

Regional General Condition 4

Passage of Aquatic Life: The inlet/outlets to culverts must be designed in such a manner to maintain substrate in the bottom of the culvert. Countersinking the culvert to the sub-pavement of the streambed or the use of bottomless culverts will generally fulfill this requirement (culverts installed in bedrock streams do not need to be countersunk). Culverted crossings should be sized in a manner that allow the passage of aquatic life and freely pass bankfull flows. The only exception to this requirement would involve culvert placement in bedrock and/or extremely high gradient streams, in which countersinking of culverts is not practicable. In the event proposed crossings do not meet these criteria compensatory mitigation may be required.

Regional General Condition 5

Endangered Species: Federally listed endangered species, subject to Section 7 of the Endangered Species Act occur in nearly every county within West Virginia. As part of the PCN process, the District Engineer will assume responsibility for determining project-related effects to endangered species. For projects that do not require a PCN, it is the applicant's responsibility to ensure that all elements of a proposed single and complete project comply with Section 7 of the Endangered Species Act.

Regional General Condition 6

***Endangered Species Habitat*:** Due to the potential presence of endangered species or their habitats, notification is required to the U.S. Fish and Wildlife Service Elkins Field Office, 694 Beverly Pike, Elkins, West Virginia 26241, for any work in the following waterways:

Huntington District Waterways:

- Kanawha River (Kanawha Falls Wheeler Islands, River Mile 75.5) Fayette and Kanawha Counties (Tubercled-blossum pearlymussel, *Epioblasma torulosa*; Pink mucket pearlymussel, *Lampsilis abrupta*; and Fanshell, *Cyprogenia stegaria*)

- Potts Creek, Monroe County
  (James spinymussel, *Pleurobema collina*)

- South Fork Potts Creek, Monroe County
  (James spinymussel, *Pleurobema collina*)

- Elk River (Sutton Dam to slackwater below Coonskin Park) Braxton, Clay and Kanawha Counties (Clubshell, *Pleurobema clava,* Pink mucket pearlymussel; *Lampsilis abrupta;* and Northern riffleshell, *Epioblasma torulosa rangiana*)

- Meathouse Fork Middle Island Creek, Doddridge County
  (Clubshell, *Pleurobema clava*)

- Middle Island Creek, Doddridge, Tyler and Pleasants Counties
  (Clubshell, *Pleurobema clava*)

- Ohio River (Upper Greenup, R.C. Byrd, Racine, and Bellville Navigation Pools) Cabell, Mason, Jackson and Wood Counties (Pink mucket pearlymussel, *Lampsilis abrupta*; and Fanshell, Cyprogenia stegaria)

- Lower Gauley River (Summersville to Swiss), Nicholas and Fayette Counties
  (Virginia spiraea, *Spiraea virginiana)*

- Bluestone River (Bluestone Gorge to slackwater Bluestone Reservoir) Mercer and Summers Counties (Virginia spiraea, *Spiraea virginiana*)

- Greenbrier River, Pocahontas and Greenbrier Counties
  (Virginia spiraea, *Spiraea virginiana*)

- Lower Meadow River (Nallen to Gauley River) Nicholas and Fayette Counties
  (Virginia spiraea, *Spiraea virginiana*)

- Dingess Branch of Marsh Fork and associated palustrine emergent and scrub-shrub wetlands – Raleigh County (Virginia spiraea, *Spiraea virginiana*)

- Millers Camp Branch of Marsh Fork and associated palustrine emergent scrub-shrub wetlands - Raleigh County (Virginia spiraea, *Spiraea virginiana*)

- South Fork Hughes River – Ritchie County
  (Clubshell, *Pleurobema clava*)

Pittsburgh District Waterways:

- Sleepy Creek, and associated riverine emergent wetland habitat, Morgan County (Harperella, *Ptilimnium nodosum*)

- Great Cacapon River and associated riverine emergent wetland habitat, Morgan County (Harperella, *Ptilimnium nodosum*)

- Back Creek and associated riverine emergent wetland habitat Berkeley County (Harperella, *Ptilimnium nodosum*)

- Hackers Creek of West Fork River, Lewis County
  (Clubshell, *Pleurobema clava*)

- Wetlands Hardy and Berkeley Counties
  Northeastern bulrush, *Scirpus ancistrochaetus*)

- Evitts Run watershed, Jefferson County
  (Madison cave isopod, *Antrolana lira*)

- Rippon and Leetown areas near sinkholes spring seeps, or other groundwater/surface water interfaces, Jefferson County (Madison cave isopod, *Antrolana lira*)

Regional General Condition 7

Critical Resource Waters: All PCNs involving work in Critical Resource waters require notification to the National Park Service and/or the Forest Service.

Critical Resource Waters:

- **New River;**
- **Bluestone River from the upstream boundary of Pipestem Park to Bluestone Reservoir;**
- **Meadow River from an area near the US 19 Bridge to its junction with the Gauley River;**
- **All streams within the Monongahela National Forest designated as National Wild and Scenic Study Rivers;**

- **All streams and other bodies of water in State and National Forests and Recreation Areas (included are streams and bodies of water located within the Spruce Knob, Seneca Rocks and Gauley River National Recreation Areas); and**
- **Streams and their tributaries as contained within the boundaries of the designated National Wilderness Areas or the headwaters of such rivers and their tributaries; Cranberry River, Red Creek, Laurel Fork and Otter Creek.**

Regional General Condition 8

West Virginia Natural Stream Preservation Act: In accordance with the West Virginia Natural Stream Preservation Act, the following streams or rivers are protected from activities that would impound, divert or flood the body of water:

West Virginia Natural Stream Preservation Act

- **Greenbrier River from its confluence with Knapps Creek to its confluence with the New River;**
- **Anthony Creek from its headwaters to its confluence with the Greenbrier River;**
- **Cranberry River from its headwaters to its confluence with the Gauley River;**
- **Birch River from Cora Brown Bridge in Nicholas County to its confluence with the Elk River; and**
- **New River from its confluence with the Greenbrier River to its confluence with the Gauley River.**

Regional General Condition 9

Waters of Special Concerns: All PCNs involving work in Waters of Special Concern, shall include prior written notification to the West Virginia Department of Environmental Protection, Division of Water Resources. Waters of Special Concern include, but are not limited to, naturally reproducing trout streams, federally designated rivers subject to the Wild and Scenic Rivers Act, U.S.C. Subsection 1271 et. seq., including all study rivers, waters located within the boundaries of state parks, state forests, National Parks, National Forests, waters designated under the National Parks and Recreation Act of 1978, and waters with unique or exceptional aesthetic, ecological, or recreational value. For specific information on trout streams, applicants may contact the West Virginia Division of Natural Resources, Wildlife Resource Section, Trout Fisheries Program at 304-637-0245.

Regional General Condition 10

Cultural Resources: Cultural resources, including historic and prehistoric sites, buildings, districts, and objects significant in American history, architecture, archeology, engineering and culture, listed in or eligible for listing in the National Register of Historic Places (NRHP), are present throughout the State of West Virginia. As part of the PCN process, the District Engineer will assume responsibility for determining project-related effects to cultural resources subject to the provisions of Section 106 of the National Historic Preservation Act (NHPA). For projects

that do not require a PCN, it is the applicant's responsibility to ensure that all elements of a proposed single and complete project comply with Section 106 of the National Historic Preservation Act.

Regional General Condition 11

Archeological Sites and Human Remains: In the event any archeological sites or human remains are uncovered during construction, the permittee shall cease all work immediately and contact the appropriate Corps District office, the West Virginia Division of Culture and History at 304-558-0240 and the appropriate county Sheriff's Office.

Regional General Condition 12

Fills in the 100-Year Floodplain: All PCNs involving fills in the 100-year floodplain shall include a certified receipt and copy of the cover letter requesting the approval letter or floodplain permit from the appropriate Floodplain Manager/Coordinator. This Regional General Condition would apply to all PCNs involving any type of work within the 100-year floodplain.

G. West Virginia State 401 Water Quality Certification Conditions for Nationwide Permits

The following are West Virginia's Section 401 Water Quality Certification standard and special conditions that apply to the Nationwide Permits 1-20 and 22-48 as published on March 12, 2007 in Part II of the *Federal Register* (72FR 11092), by the U.S. Army Corps of Engineers. These conditions must be implemented into any activity authorized by a U.S. Army Corps of Engineers Nationwide Permit(s). The State's certification of these Nationwide Permit activities does not replace the need for the applicant proposing an activity under the Nationwide Permit Program from obtaining other applicable permits/authorizations from the West Virginia Department of Environmental Protection and/or the Division of Natural Resources. Each permittee shall, if they do not understand or are not aware of applicable Nationwide Permit conditions, contact the Corps of Engineers prior to conducting any activity authorized by a Nationwide Permit in order to be advised of applicable conditions. These 401 Water Quality Certifications, with all attendant standard conditions and special conditions, are applicable to Corps of Engineers Civil Works Projects in West Virginia.

1. The permittee will investigate for the presence of water supply intakes or other activities within 1/2 mile downstream, which may be affected by suspended solids and turbidity increases caused by work in the watercourse. The permittee will give notice to operators of any such water supply intakes and such other water quality dependent activities as necessary before beginning work in the watercourse in sufficient time to allow preparation for any change in water quality.

2. Excavation, dredging or filling in the watercourse will be done only to the extent necessary to achieve the project's purpose.

3. Spoil materials from the watercourse or onshore operations, including sludge deposits, will not be dumped in the watercourse, or deposited in wetlands or other areas where the deposit may adversely affect the surface or ground waters of the state.

4. The permittee will employ measures to prevent or control spills from fuels, lubricants or any other materials used in connection with construction and restrict them from entering the watercourse. Storage areas for chemicals, explosives, lubricants, equipment fuels, etc., as well as equipment refueling areas, must include containment measures (e.g., liner systems, dikes, etc.) to ensure that spillage of any material will not contact surface or ground waters. Storage areas and refueling areas shall be a minimum distance of 100 feet from any surface water body. Storage and refueling areas must be located outside the West Virginia Division of Health's established wellhead protection zone when domestic water supply wells are present. All spills shall be promptly reported to the State Center for Pollution, Toxic Chemical and Oil Spills, 1-800-642-3074.

5. Upon completion of earthwork operations, all fills in the watercourse or onshore and all other areas onshore disturbed during construction will be properly stabilized to prevent soil erosion. Where possible, stabilization shall incorporate revegetation using bioengineering as an alternative to rip rap. If rip rap is utilized, it is to be of such weight

and size that bank stress or slump conditions will not be created due to its placement. Fill is to be clean, nonhazardous and of such composition that it will not adversely affect the biological, chemical or physical properties of the receiving waters. To reduce potential slope failure and/or erosion behind the material, fill containing concrete must be of such weight and size that promotes stability during expected high flows. Loose large slab placement of concrete sections from demolition projects greater than thirty-six inches in its longest dimension and tires are prohibited. Rebar or wire in concrete should not extend further than one (1) inch. All activities require the use of clean and coarse non erodible materials with 15% or less fines, that is properly sized to withstand expected high flows.

6. Runoff from any storage areas or spills will not be allowed to enter storm sewers without acceptable removal of solids, oils and toxic compounds. Discharges from retention/detention ponds must comply with permit requirements of the National Pollutant Discharge Elimination System permit program of the West Virginia Department of Environmental Protection, Division of Water and Waste Management.

7. Land disturbances, which are integral to the completion of the permitted activity and are one (1) acre or greater in total area, must comply with the National Pollutant Discharge Elimination System stormwater permit requirements as established by the West Virginia Department of Environmental Protection, Division of Water and Waste Management. Best Management Practices for Sediment and Erosion Control, as described in the West Virginia Department of Environmental Protections Erosion and Sediment Control Best Management Practice Manual, 2006, or similar documents prepared by the West Virginia Division of Highways, U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS), or West Virginia Department of Environmental Protection's, Division of Mines and Reclamation may be used. These handbooks are available from the respective agency offices.

8. Green concrete will not be permitted to enter the watercourse unless contained by tightly sealed forms or cells. Concrete handling equipment shall not discharge waste washwater into wetlands or watercourses at any time without adequate wastewater treatment as approved by the West Virginia Department of Environmental Protection, Division of Water and Waste Management.

9. In stream work in warm water fishery streams and their adjacent tributaries during the fish spawning season, April - June and trout waters and their adjacent tributaries during the trout water fish spawning season September 15-February 28 requires a spawning season waiver from the West Virginia Division of Natural Resources, Wildlife Resources Section. For information about specific streams contact Wildlife Resources Section, Trout Fisheries Program at 304-637-0245 or Warm Water fisheries Program 304-558-2771. In stream work may occur during the respected spawning season in waters not considered fisheries without a waiver if all reasonable measures are taken to minimize turbidity and sedimentation downstream associated with the proposed project and the in-stream work is less than 1 day in duration.

10. Removal of mature riparian vegetation not directly associated with the project construction is prohibited. Disturbance and removal of vegetation from project construction area is to be avoided, where possible, and minimized when necessary. Removal of vegetation shall not be allowed where stream bank stability under normal flow conditions would be compromised.

11. Operation of equipment instream is to be minimized and accomplished during low flow periods when practical. Ingress and egress for equipment shall be within the work site. Location of ingress and egress outside the immediate work area requires prior approval of the West Virginia Department of Environmental Protection, Division of Water and Waste Management in concurrence with the West Virginia Division of Natural Resources.

12. The permittee will comply with water quality standards as contained in the West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2.

13. Stream activities permitted under the Nationwide Permit Program require that a West Virginia Public Lands Corporation Right of Entry be obtained. Application for this authorization should be made to the West Virginia Division of Natural Resources, Office of Real Estate Management, Capitol Complex, Building 3, Room 643, Charleston, West Virginia 25305. Any activity within the 100-year floodplain requires approval from the appropriate Floodplain Manager. The following website provides a statewide listing of Floodplain Managers in West Virginia: www.wvdhsem.gov/fplain_mgt1.htm.

14. The deposit of dredged or fill materials in island backchannels, embayments or stream mouths is not certified for any of the Nationwide Permits. Stream mouth is defined as the area extending 100 feet upstream and 100 feet downstream on receiving streams that are classified as a Section 10 stream.

15. This Standard Condition requires an Individual State Water Quality Certification for Nationwide Permits; 7, 29, 33, 39, 45, and 48 for work in any of the rivers or streams listed in Sections A through D below. Prior written notification to the West Virginia Department of Environmental Protection, Division of Water and Waste Management, is required for use of Nationwide Permits 6, 12, 13, 14, 16, 17, 18, 19, 27, 40, 41, and 42 in any of the streams listed in Sections A through D as follows, except as may be provided for in the individual nationwide permit:

    A. 'Waters of Special Concern' – includes all of those waters listed in Appendix A of 60 CSR 5, Waters of Special Concern, including but not limited to, naturally reproducing trout streams, federally designated rivers under the Wild and Scenic Rivers Act, Public law 95-542, as amended, 16 U.S.C. §§ 1271 et. seq. (Bluestone River from the upstream boundary of Pipestem State Park to Bluestone Reservoir, Meadow River from near the US 19 bridge to its junction with the Gauley River, also included are all rivers within the Monongahela National Forest designated as National Wild and Scenic Study Rivers), waters in state parks and forests, waters in National Parks and Forests, waters designated

under the National Parks and Recreation Act of 1978, and waters with unique or exceptional aesthetic, ecological, or recreational value.

B. All naturally reproducing trout streams in the following counties; Barbour, Fayette, Grant, Greenbrier, Hampshire, Hardy, Mercer, Mineral, Monroe, Nicholas, Pendleton, Pocahontas, Preston, Raleigh, Randolph, Summers, Tucker, Upshur and Webster. For information about specific streams contact Wildlife Resource Section, Trout Fisheries Program at 304-637-0245;

C. 'Outstanding National Resource Waters' - In all cases, waters that constitute an Outstanding National Resource shall be maintained and protected as necessary; included are the following rivers and their tributaries as contained within the boundaries of the designated National Wilderness Areas or the headwaters of such rivers and their tributaries; Cranberry River, Red Creek, Laurel Fork, and Otter Creek. West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2.

D. 'West Virginia Natural Stream Preservation Act' - The following streams or rivers are protected from activities that would impound, divert or flood the body of water: Greenbrier River from its confluence with Knapps Creek to its confluence with the New River, Anthony Creek from its headwaters to its confluence with the Greenbrier River, Cranberry River from its headwaters to its confluence with the Gauley River, Birch River from Cora Brown Bridge in Nicholas County to the confluence of the river with the Elk River, and New River from its confluence with the Greenbrier River to its confluence with the Gauley River.

16. Wetland and Stream Mitigation guidelines - The discharge of fill material into a stream or wetland is authorized based upon the following criteria:

1. One-tenth to ½ acre of wetland impact requires a Pre-Construction Notice (PCN) and plan for mitigation to be submitted to the Corps of Engineers along with the proposed plan for mitigation provided to the state for approval.

2. The amount of fill in a wetland, wetland complex or wetland system without mitigation is not to cumulatively exceed 1/10 acre.

In all instances, mitigation for all impacts incurred through use of these Nationwide Permits must first be directed to elimination of the impacts, then minimization of the impacts and lastly through replacement of in-kind within the major watershed in which the impact occurs. However, the use of mitigation banks for in-kind replacement is not restricted to the major watershed in which the impact has occurred until such time as mitigation banks are developed in each major watershed. The use of the In-Lieu Fee program is authorized for compensatory mitigation when all other compensatory mitigation options have been exhausted.

When in-kind, replacement mitigation is used it is to be accomplished at the following ratios:

Impacts to open water wetlands are to be one (1) acre replaced for one (1) acre impacted.

Impacts to wet meadow wetlands are to be two (2) acres replaced for one (1) acre impacted.

Impacts to scrub-shrub and forested wetlands are to be three (3) acres replaced for one (1) acre impacted.

In instances where compensatory in-kind mitigation is completed 12 months prior to the impact of the resource, the replacement ratio will be one (1) acre created to every one (1) acre impacted.

NOTE: The ratio of created wetlands to impacted wetlands not only insure no net loss, but assure the adequate replacement of the impacted wetlands functions and values at the level existing prior to the impact. For many of the more complicated type wetlands, such as scrub-shrub and forested, the values and functions cannot readily be replaced through creation. Furthermore, not all wetland creation is successful.

In certain instances, the West Virginia Department of Environmental Protection, Division of Water and Waste Management may consider the acquisition of existing wetlands. Acquisition ratios are the following:

5 to1 for open water wetlands;

10 to1 for wet meadow wetlands and

15 to1 for scrub-shrub and forested wetlands.

All wetlands acquired, using the acquisition method of mitigation, will either be deeded to the West Virginia Division of Natural Resources' Public Land Corporation for management by the Wildlife Resources Section or placed under a conservation easement and be protected from disturbance by the permittee or their designee.

In certain instances, the West Virginia Department of Environmental Protection, Division of Water and Waste Management may consider enhancement of existing wetlands. Mitigation ratios for enhanced wetlands will be decided on a case-by-case basis. Enhanced wetlands will either be deeded to the West Virginia Division of Natural Resources' Public Land Corporation for management by the Wildlife Resources Section or placed under a conservation easement and be protected from disturbance by the permittee or their designee.

Streams. Compensatory mitigation projects for stream impacts should attempt to replace stream functions. Acceptable functional assessments can be used to assess impacts and ecological lift from a proposed project. Mitigation ratios will be determined on a case-by-case basis based on the pre and post condition stream quality and complexity of the mitigation project. Riparian

zones used for compensatory mitigation purposes may require protection through deed restrictions or conservation easements by the permittee or their designee.

17. Streams with Mussel populations.

A. Should native freshwater mussels be encountered during the use of any Nationwide Permit, all activity is to cease immediately and the Wildlife Resources Section, Wildlife Diversity Program is to be contacted (304-637-0245) to determine significance of the mussel population and the action to be taken.

B. The following list of streams are known to have mussel populations, which are established as a protected "no take" species by the state. Applicants wishing to conduct projects in these streams are strongly encouraged to contact the Wildlife Resources Section, Wildlife Diversity Program with a detailed project description and an accurate project location. For further information please contact the Wildlife Resources Section, Wildlife Diversity program at 304-637-0245.

HUNTINGTON DISTRICT

- James River Drainage
  - South Fork of Potts Creek
- Kanawha River Drainage
  - Pocatalico River
  - Kanawha River above Charleston
  - Coal River
  - Elk River (downstream of Webster Springs)
    - Big Sandy Creek
  - New River
    - Bluestone River
    - Greenbrier River
      - Indian Creek
- Little Kanawha River Drainage
  - Little Kanawha River
    - Hughes River
      - North and South Fork of Hughes River
    - Steer Creek
    - Cedar Creek
    - Leading Creek
    - Reedy Creek
    - Spring Creek
    - Spruce Creek
    - Henry's Fork
    - Goose Creek
- Middle Island Creek Drainage
  - Middle Island Creek
    - Meathouse Fork (below Indian Fork)

Buckeye Creek
Mud River Drainage
Mud River
Middle Fork
Trace Fork
Ohio Direct Drainage
Twelvepole Creek
Beech Fork
Tug Fork River (up stream of Kermit, WV)
Mill Creek (Jackson County)
Hurricane Creek

PITTSBURGH DISTRICT

Ohio River Direct Drainage
Wheeling Creek
Fishing Creek
Fish Creek
Monongahela River Drainage
Dunkard Creek
West Fork River
Hackers Creek of Tygart Valley River
Kincheloe Creek
Potomac River Drainage
Cacapon River (below Wardensville)
North River of Cacapon River
Patterson Creek

18. Isolated Wetlands.

In some cases, the Corps of Engineers may determine that an activity will not impact waters of the United States because the water is an isolated wetland, and therefore docs not require a 404 permit. However, under West Virginia State code (§§22-11-3(23)) isolated wetlands are designated waters of the State. Accordingly, any applicant proposing to impact an isolated wetland must contact the West Virginia Department of Environmental Protection, Division of Water and Waste Management to obtain all necessary approvals for activities impacting any isolated wetlands.