

## **NATIONWIDE PERMITS FOR THE STATE OF WEST VIRGINIA**

### **U.S. ARMY CORPS OF ENGINEERS REGULATORY PROGRAM REISSUANCE AND ISSUANCE OF NATIONWIDE PERMITS 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57 and 58**

#### **WITH WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION 401 WATER QUALITY CERTIFICATION**

On January 13, 2021, the U.S. Army Corps of Engineers (Corps) published a final rule in the Federal Register (86 FR 2744) announcing the reissuance of twelve existing nationwide permits (NWP) and four new NWP, as well as the reissuance of 32 NWP general conditions and definitions with some modifications. These sixteen NWP will go into effect on March 15, 2021, and will expire on March 14, 2026:

- NWP 12 – Oil or Natural Gas Pipeline Activities
- NWP 21 – Surface Coal Mining Activities
- NWP 29 – Residential Developments
- NWP 39 – Commercial and Institutional Developments
- NWP 40 – Agricultural Activities
- NWP 42 – Recreational Facilities
- NWP 43 – Stormwater Management Facilities
- NWP 44 – Mining Activities
- NWP 48 – Commercial Shellfish Mariculture Activities
- NWP 50 – Underground Coal Mining Activities
- NWP 51 – Land-Based Renewable Energy Generation Facilities
- NWP 52 – Water-Based Renewable Energy Generation Pilot Projects
- NWP 55 – Seaweed Mariculture Activities
- NWP 56 – Finfish Mariculture Activities
- NWP 57 – Electric Utility Line and Telecommunications Activities
- NWP 58 – Utility Line Activities for Water and Other Substances

The twelve existing NWP 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, and 52 published in the January 13, 2021 final rule replace the 2017 versions of these NWP. The 2017 versions of NWP 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, and 52 expire on March 14, 2021.

There are 40 existing NWP that were not reissued or modified by the January 13, 2021 final rule. Those 40 NWP were published in the January 6, 2017, issue of the Federal Register (82 FR 1860) and those NWP remain in effect until the Corps issues a final rule reissuing those NWP or March 18, 2022, whichever comes first. The 40 2017 NWP that remain in effect are:

- NWP 1 – Aids to Navigation
- NWP 2 – Structures in Artificial Canals

- NWP 3 – Maintenance
- NWP 4 – Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
- NWP 5 – Scientific Measurement Devices
- NWP 6 – Survey Activities
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 8 – Oil and Gas Structures on the Outer Continental Shelf
- NWP 9 – Structures in Fleeting and Anchorage Areas
- NWP 10 – Mooring Buoys
- NWP 11 – Temporary Recreational Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 15 – U.S. Coast Guard Approved Bridges
- NWP 16 – Return Water From Upland Contained Disposal Areas
- NWP 17 – Hydropower Projects
- NWP 18 – Minor Discharges
- NWP 19 – Minor Dredging
- NWP 20 – Response Operations for Oil or Hazardous Substances
- NWP 22 – Removal of Vessels
- NWP 23 – Approved Categorical Exclusions
- NWP 24 – Indian Tribe or State Administered Section 404 Programs
- NWP 25 – Structural Discharges
- NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 28 – Modifications of Existing Marinas
- NWP 30 – Moist Soil Management for Wildlife
- NWP 31 – Maintenance of Existing Flood Control Facilities
- NWP 32 – Completed Enforcement Actions
- NWP 33 – Temporary Construction, Access, and Dewatering
- NWP 34 – Cranberry Production Activities
- NWP 35 – Maintenance Dredging of Existing Basins
- NWP 36 – Boat Ramps
- NWP 37 – Emergency Watershed Protection and Rehabilitation
- NWP 38 – Cleanup of Hazardous and Toxic Waste
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 45 – Repair of Uplands Damaged by Discrete Events
- NWP 46 – Discharges in Ditches
- NWP 49 – Coal Remining Activities
- NWP 53 – Removal of Low-Head Dams
- NWP 54 – Living Shorelines

The regional conditions for the 40 existing NWPs that were approved by the Great Lakes and Ohio River Division Engineer in 2017 remain in effect while these 2017 NWPs remain in effect.

An integral part of the Corps' Regulatory Program is the concept of NWP's authorizing regulated activities that result in no more than minimal individual and cumulative adverse environmental effects. NWP's are activity specific and are designed to relieve some of the administrative burdens associated with Section 10 of the Rivers and Harbors Act (Section 10) and/or Section 404 of the Clean Water Act (Section 404) permit processing for both the applicant and the federal government. The NWP's are issued by the Chief of Engineers and are intended to apply throughout the entire U.S. and its territories. Based on the recommendations provided by the Huntington and Pittsburgh Districts (Districts), the Great Lakes and Ohio River Division (LRD) has approved regional conditions on the 2021 NWP's that are applicable in the State of West Virginia. For convenience, the 2021 NWP's with the appropriate regional, general, and special conditions are attached. In addition to imposing regional conditions on certain NWP's, LRD has revoked NWP Nos. 55 (Seaweed Mariculture Activities) and 56 (Finfish Mariculture Activities) in the State of West Virginia.

Some regulated activities authorized by a NWP may proceed without notifying the Districts, as long as those regulated activities comply with all applicable terms and conditions of the NWP's, including regional conditions imposed by the Division Engineer. A non-reporting NWP may become a reporting NWP (requires the submittal of a Pre-Construction Notification (PCN) to the Districts in accordance with NWP General Condition 32) if the activity has the potential to affect a historic property (See NWP General Condition 20 and Regional General Condition 4), federally-listed endangered or threatened species or their habitat (See NWP General Condition 18 and Regional General Condition 1), waters of special concern (See Regional General Conditions 2 and 3), National Wild and Scenic Rivers (See NWP General Condition 16 and Regional General Condition 2).

Many of the proposed NWP's require advance notification (i.e., PCN) to the District Engineer before commencing those regulated activities, to ensure that the regulated activities authorized by those NWP's cause no more than minimal individual and cumulative adverse environmental effects. The PCN must be made in writing as early as possible prior to commencing the proposed regulated activity. The notification procedures are described in NWP General Condition 32. The District Engineer may require a Section 10 and/or Section 404 Individual Permit for any regulated activity determined to have more than minimal adverse environmental effects, individually or cumulatively, on the aquatic environment or that would be contrary to the public interest (33 CFR 320.4). More information about the Corps' Regulatory Program, including a fillable copy of the PCN form, is available at the following website:

<https://www.lrh.usace.army.mil/Missions/Regulatory/How-to-Apply-for-a-Permit/>

The NWP's are not valid until the appropriate state agency certifies the discharge of dredged or fill material into waters of the U.S. does not violate state water quality standards or waives certification pursuant to 40 CFR 121.9. The West Virginia

Department of Environmental Protection (WVDEP) granted a general Section 401 Water Quality Certification (WQC), with conditions, for the NWP. The WVDEP denied Section 401 WQC for the following activities, and in accordance with the Corps' regulations at 33 CFR 330.4(c), the Districts will not issue any authorization for the below activities until the WVDEP issues an individual Section 401 WQC for the specific activity or waives the right to do so:

- **NWP 21 (Surface Coal Mining Activities)** and **NWP 50 (Underground Coal Mining Activities)** for the discharge of dredged or fill material into any classification of stream listed in West Virginia Section 401 WQC Standard Condition 15, mining related activities cumulatively impacting greater than ½ acre of intermittent or perennial stream(s), linear transportation projects which involve stream crossings for haul roads, access roads, conveyor belts, pipelines, etc. in intermittent or perennial stream(s) greater than ½ acre cumulative or 300 linear feet per individual crossing, and cumulative permanent wetland impacts greater than ½ acre;
- **NWP 29 (Residential Developments)** and **NWP 39 (Commercial and Institutional Developments)** for regulated activities affecting waters subject to Section 10 of the Rivers and Harbors Act of 1899 and adjacent wetlands, and in-stream stormwater management facilities; and
- **NWP 40 (Agricultural Activities)** for regulated activities in-stream stormwater management facilities.

Portions of the General Section 401 WQC are declined by LRD, and in accordance with the Corps' regulations at 33 CFR 330.4(c), the Districts will not issue any authorization for the below activities (See highlighted conditions in attached Table 1) until the WVDEP issues an individual Section 401 WQC for the specific activity or waives the right to do so:

- **NWP 12 (Oil and Natural Gas Pipelines)** for pipeline crossings on a Section 10 river (unless the bore is greater than 100 feet below the stream bed on the Ohio River mainstem, or greater than 50 feet below the stream bed on all other Section 10 waters), utility lines within wetlands that would use or consider the use of herbicides for right-of-way maintenance, projects proposing permanent impacts to any stream identified in Section 401 WQC Standard Condition 15 A, B, and C, cumulative permanent impacts to stream(s) totaling greater than 300 linear feet and cumulative wetland impacts exceeding 1/10 acre, and Pipelines carrying separated natural gas liquids, unless installed with an automated system which will indicate a sudden loss of pressure, and when this permit is being used for water withdrawal;
- **NWP 48 (Commercial Shellfish Mariculture Activities)** when this permit is being used for the discharge of material to Section 10 waters and streams identified in Standard Condition 15 A, B, and C herein;
- **NWP 51 (Land-Based Renewable Energy Generation Facilities)** when this

- permit is being used for the discharge of material to Section 10 waters and streams identified in Standard Condition 15 A, B, and C herein;
- **NWP 52 (Water-Based Renewable Energy Generation Pilot Projects)** when this permit is being used for the discharge of material to Section 10 waters and streams identified in Standard Condition 15 A, B, and C herein;
  - **NWP 57 (Electric Utility Line and Telecommunications Activities)** for pipeline crossings on a Section 10 river (unless the bore is greater than 100 feet below the stream bed on the Ohio River mainstem, or greater than 50 feet below the stream bed on all other Section 10 waters), utility lines within wetlands that would use or consider the use of herbicides for right-of-way maintenance, projects proposing permanent impacts to any stream identified in WQC Standard Condition 15 A, B, and C, and cumulative permanent impacts to stream(s) totaling greater than 300 linear feet and cumulative wetland impacts exceeding 1/10 acre; and
  - **NWP 58 (Utility Line Activities for Water and Other Substances)** for pipeline crossings on a Section 10 river (unless the bore is greater than 100 feet below the stream bed on the Ohio River mainstem, or greater than 50 feet below the stream bed on all other Section 10 waters), utility lines within wetlands that would use or consider the use of herbicides for right-of-way maintenance, projects proposing permanent impacts to any stream identified in WQC Standard Condition 15 A, B, cumulative permanent impacts to stream(s) totaling greater than 300 linear feet and cumulative wetland impacts exceeding 1/10 acre, and pipelines transporting hazardous substances consistent with the definition found in Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601(14) and Toxic Substances Control Act, 15 U.S.C. §53 (2601–2629).

Applicants must review the Section 401 WQC standard and NWP-specific special conditions and submit to the WVDEP, at the address provided below, a request for an individual Section 401 WQC in accordance with the “Clean Water Act Section 401 Certification Rule” (see Title 85 of the Federal Register, Page 42210 [dated July 13, 2020]) and any applicable state requirements when an individual Section 401 WQC is required as indicated above.

West Virginia Department of Environmental Protection  
 Division of Water and Waste Management  
 601 57th Street SE  
 Charleston, WV 25304  
 Telephone Number: (304) 926-0495

Before submitting a request for an individual Section 401 WQC to the WVDEP, a project proponent (i.e., potential applicant) must request a pre-filing meeting with the WVDEP at least 30 days prior to submitting the Section 401 WQC request. The WVDEP will

determine if the meeting will be held, but submittal of the request for a meeting is required.

**Note:** Regulated activities associated with a project proposal qualifying for a general Section 401 WQC are not required to request a pre-filing meeting.

Applicants must submit their requests for Section 401 WQC to the WVDEP and their PCN and a copy of the Section 401 WQC request to the Corps concurrently in accordance with 40 CFR 121.5. Applicants are encouraged to submit copies to the Corps electronically in accordance with each district's electronic submittal process.

The NWP's provide a simplified, expeditious means of project authorization under the various Corps authorities. We encourage prospective permit applicants to consider the advantages of NWP authorization during the preliminary design of their projects. Assistance and further information regarding all aspects of the Corps' regulatory program may be obtained by contacting:

#### **HUNTINGTON DISTRICT**

Address: U.S. Army Corps of Engineers, Huntington District  
502 Eighth Street  
Huntington, West Virginia 25701-2070  
Phone: (304) 399-5210

#### **PITTSBURGH DISTRICT**

Address: U.S. Army Corps of Engineers, Pittsburgh District  
William S. Moorhead Federal Building  
1000 Liberty Avenue  
Pittsburgh, Pennsylvania 15222-4186  
Phone: (412) 395-7155

Below is a map showing the District boundaries for the State of West Virginia.



**A. Special Note****B. Regional General Conditions (apply to all 2021 Nationwide Permits in West Virginia)**

1. Threatened and Endangered Species
2. High-Quality Waterway
3. Natural Streams Preservation Act Waterways
4. Historic Properties:

**C. 2021 Nationwide Permits Terms and Specific Regional Conditions**

12. Oil or Natural Gas Pipeline Activities
21. Surface Coal Mining Activities
29. Residential Developments
39. Commercial and Institutional Developments
40. Agricultural Activities
42. Recreational Facilities
43. Stormwater Management Facilities
44. Mining Activities
48. Commercial Shellfish Mariculture Activities
50. Underground Coal Mining Activities
51. Land-Based Renewable Energy Generation Facilities
52. Water-Based Renewable Energy Generation Pilot Projects
55. Seaweed Mariculture Activities
56. Finfish Mariculture Activities
57. Electric Utility Line and Telecommunications Activities
58. Utility Line Activities for Water and Other Substances

**D. 2021 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. Single and Complete Project
16. Wild and Scenic Rivers
17. Tribal Rights
18. Endangered Species
19. Migratory Birds and Bald and Golden Eagles
20. Historic Properties
21. Discovery of Previously Unknown Remains and Artifacts
22. Designated Critical Resource Waters
23. Mitigation
24. Safety of Impoundment Structures
25. Water Quality
26. Coastal Zone Management
27. Regional and Case-by-Case Conditions
28. Use of Multiple Nationwide Permits
29. Transfer of Nationwide Permit Verifications
30. Compliance Certification
31. Activities Affecting Structures or Works Built by the United States
32. Pre-Construction Notification

#### **E. District Engineer's Decision**

#### **F. Further Information**

#### **G. General Limitations and Conditions for all WVDEP 401 Certified Nationwide Permits**

#### **H. Definitions**

Best management practices (BMPs)  
Compensatory mitigation  
Currently serviceable  
Direct effects  
Discharge  
Ecological reference  
Enhancement  
Establishment (creation)  
High Tide Line  
Historic property  
Independent utility  
Indirect effects  
Loss of waters of the United States  
Navigable waters

Non-tidal wetland  
 Open water  
 Ordinary high water mark  
 Perennial stream  
 Practicable  
 Pre-construction notification  
 Preservation  
 Re-establishment  
 Rehabilitation  
 Restoration  
 Riffle and pool complex  
 Riparian areas  
 Shellfish seeding  
 Single and complete linear project  
 Single and complete non-linear project  
 Stormwater management  
 Stormwater management facilities  
 Stream bed  
 Stream channelization  
 Structure  
 Tidal wetland  
 Tribal lands  
 Tribal rights  
 Vegetated shallows  
 Waterbody

**A. Special Note:** For NWP's that do not require pre-construction notification to the Corps, it is an applicant's responsibility to review the Water Quality Certification general and NWP-specific terms and conditions and submit information to the WVDEP as required by their water quality certification. A project that meets the terms and conditions of a NWP with no Pre-Construction Notification to the Corps is only valid when accompanied by a blanket or individual 401 Water Quality Certification from the WVDEP. No work in waters of the United States may commence until the required 401 water quality certification (or waiver) has been obtained from the WVDEP.

**B. Regional General Conditions (Applies to All 2021 Nationwide Permits in West Virginia):**

1. **Threatened and Endangered Species:** Section 7(a)(2) of the Endangered Species Act (ESA) states that each federal agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.. Section 7 of the ESA,

called "Interagency Cooperation," is the mechanism by which Federal agencies ensure the actions they take, including those they fund or authorize, do not jeopardize the continued existence of any federally or proposed federally listed species. Consistent with NWP General Condition 18, information for federally threatened and endangered species must be provided in the PCN to determine the proposed activity's compliance with NWP General Condition 18 and to facilitate project-specific coordination with the USFWS. All relevant information obtained from the USFWS must be submitted with the PCN.

2. All regulated activities located in high-quality waterways listed below require PCN in accordance with NWP General Condition 32:
  - New River, which includes all river miles contained in the boundaries of the New River Gorge National Park and Preserve;
  - 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, including but not limited to: Cranberry River, Red Creek, Laurel Fork and Otter Creek.

The Corps will consult, as necessary, with the National Park Service and/or the U.S. Forest Service upon receipt of the PCN.

3. Due to the ecological significance of the following waterways protection under the Natural Streams Preservation Act (WV Code Chapter 22 Article 13), all regulated activities located in these waterways require PCN in accordance with NWP General Condition 32:
  - 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, which includes the length of the New River contained in the boundaries of the New River Gorge National Park and Preserve.

The Corps will consult, as necessary, with the National Park Service and/or the U.S. Forest Service upon receipt of the PCN.

4. **Historic Properties:** Under the National Historic Preservation Act (NHPA), the Corps must ensure no federal undertaking, including a Corps permit action, which may affect historic resources, is commenced before the impacts of such action are considered and the Advisory Council on Historic Preservation and the State Historic Preservation Office (SHPO) are provided an opportunity to comment as required by the NHPA, 36 CFR 800, and 33 CFR 325, Appendix C. Consistent with NWP General Condition 20, historic properties information must be provided in the PCN if the proposed undertaking might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. All relevant information obtained from the SHPO must be submitted with the PCN.

### **HELPFUL INFORMATION FOR COMPLIANCE WITH THE 2021 NWP GENERAL CONDITIONS**

DISCLAIMER: The below information is intended to provide helpful contact information and other submittal recommendations. Contact the appropriate local, state, or federal agency for the most updated links to ensure compliance with the NWP General Conditions.

#### **General Condition 1 (Navigation)**

##### ***List of Section 10 Navigable Waters of the United States:***

Huntington District –

<https://www.lrh.usace.army.mil/Missions/Regulatory/Section-10-Streams/>

Pittsburgh District –

<https://www.lrp.usace.army.mil/Portals/72/docs/regulatory/RegulatoryBoundaries/PN12-2.pdf>

##### ***Navigation Charts:***

Huntington District –

<https://www.lrh.usace.army.mil/Missions/Civil-Works/Navigation/>

Pittsburgh District –

<https://www.lrp.usace.army.mil/Missions/Navigation/Navigation-Charts/>

***Locks and Dams:***

Huntington District

<https://www.lrh.usace.army.mil/Missions/Civil-Works/Locks-and-Dams/>

Pittsburgh District

<https://www.lrp.usace.army.mil/Missions/Navigation/Locks-and-Dams/#:~:text=Locks%20and%20Dams%20%20%20Allegheny%20River%20,Locks%20%26%20Dam%20%205%20more%20rows%20>

***Notice to Navigation Interests Request Sheets:***

Huntington District

<https://www.lrh.usace.army.mil/Portals/38/docs/navigation/Notice%20Info%20sheet.pdf>

Pittsburgh District

<https://www.lrp.usace.army.mil/Portals/72/docs/regulatory/NavNoticeRequestForm.pdf>

**General Condition 3 (Spawning Areas)**

In stream work in designated warm water 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 to March 31 requires a spawning season waiver from the West Virginia Division of Natural Resources Coordination Unit, at (304) 637-0245. For information about specific stream designations contact West Virginia Department of Environmental Protection, Water Quality Standards Section at (304) 926-0495.

**General Condition 5 (Shellfish Beds)**

Shellfish beds in West Virginia include concentrations of freshwater mussels. All mussels are protected in the State of West Virginia pursuant to West Virginia §20-2-4 and CSR 58-605.11. In addition, nine (9) federally endangered freshwater mussel species are known to occur in the state. These species are protected by the Endangered Species Act (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.). All streams that contain mussels or potential mussel habitat must be surveyed prior to any proposed streambed disturbance. Please contact the West Virginia Department of Natural Resources (WVDNR) and/or the USFWS for assistance in determining if a mussel survey is or is not required. The WVDNR contact information can be found at: <http://www.wvdnr.gov/contact.shtm>. Currently accepted protocol and supporting

materials can be found at the WVDNRs' website:

<http://www.wvdnr.gov/Mussels/Main.shtm>

### **General Condition 7 (Water Supply Intakes)**

Locations of public water supply intakes can be found at the following link:

<http://gis.wvinfrastructure.com/>

### **General Condition 10 (Fills Within 100-year Floodplains)**

The following website provides a statewide listing of Floodplain Managers in West Virginia: <http://www.dhsem.wv.gov/MitigationRecovery/Pages/Floodplain-Management.aspx>

### **General Condition 16 (Wild and Scenic Rivers)**

The following website provides information on wild and scenic rivers within West Virginia:

<https://www.rivers.gov/west-virginia.php>

### **General Condition 18 (Endangered Species)**

To obtain the most up to date information on federally threatened and endangered species applicants are encouraged to utilize the U.S. Fish and Wildlife Service's (USFWS) Information for Planning and Consultation System (IPaC) found at <https://ecos.fws.gov/ipac/>

Prior to the submittal of a PCN, applicants may also contact the USFWS, West Virginia Field Office, Ecological Services at:

Address: 6263 Appalachian Highway  
Davis, West Virginia 26260

Email: [fw5\\_wvfo@fws.gov](mailto:fw5_wvfo@fws.gov)

The West Virginia Mussel Survey Protocol may be found at the following link:

<http://www.wvdnr.gov/Mussels/Main.shtm>

**General Condition 4 (Migratory Bird Breeding Areas) and General Condition 19 (Migratory Birds and Bald and Golden Eagles)**

Prior to the submittal of a PCN, information to assist in complying with NWP General Conditions 4 and 19 may be obtained from the USFWS, West Virginia Field Office, Ecological Services at:

Address: 6263 Appalachian Highway  
Davis, West Virginia 26260

Email: [fw5\\_wvfo@fws.gov](mailto:fw5_wvfo@fws.gov)

The West Virginia Division of Natural Resources Coordination Unit may be contacted at (304) 637-0245.

**General Condition 20 (Historic Properties)**

The West Virginia National Register of Historic Places can be found at the following link: <http://www.wvculture.org/shpo/nr/nr.html>

The West Virginia State Historic Preservation Office (SHPO) Interactive Map Viewer can be found at the following link: <https://mapwv.gov/shpo/>

When reviewing a PCN, the Corps will scope appropriate historic property identification efforts and if applicable work with the applicant to take into account the effect of the proposed activity on historic properties. In these instances, information and coordination may include:

- Requesting comments directly from the West Virginia Division of Culture and History SHPO on the effect the proposed regulated activity may have on historic properties. The West Virginia Division of Culture and History SHPO may be contacted at:

Address: 1900 Kanawha Blvd E  
Charleston, West Virginia 25305  
Phone: (304) 558-0220

- To identify potential historic properties that may be affected by a proposed project, the following historic properties information may be reviewed and/or provided with the PCN when applicable:
  - A detailed description of the project site in its current condition (i.e. prior to construction activities) including information on the terrain and topography of the site, the acreage of the site, the proximity of the site to major waterways, and any known disturbances within the site.

- A detailed description of past land uses in the project site.
  - Photographs and mapping showing the site conditions and all buildings or structures within the project site and on adjacent parcels are useful. Photographs and maps supporting past land uses should be provided as available.
  - Information regarding any past cultural resource studies or coordination pertinent to the project area, if available.
  - U.S. Geological Survey (USGS) 7.5' series topographic maps;
  - West Virginia Division of Culture and history files including:
    - Historic Property Inventory Form;
    - Archaeological Site Forms;
    - Cemetery Inventory Forms;
    - National Register of Historic Places nomination forms including Historic Districts; and
    - County atlases, histories and historic USGS 15' series topographic map(s).
- When needed to evaluate effects to historic properties, the applicant is encouraged to consult with professionals meeting the Professional Qualification Standards as set forth in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716) during this data gathering process. These professionals can assist with compiling the project information discussed above and should provide recommendations as to whether the proposal has the potential to affect historic properties and if further effort is needed to identify or assess potential effects to historic properties. These professionals can also compile preliminary review information to submit to the district engineer as part of the PCN.

### **General Condition 23 (Mitigation)**

Information pertaining to mitigation can be found at the following link:

<https://www.lrh.usace.army.mil/Missions/Regulatory/Mitigation.aspx>

### **General Condition 25 (Water Quality)**

The West Virginia Department of Environmental Protection may be contacted at:

Address: 601 57th Street  
Charleston, West Virginia 25304

Phone: (304) 926-0440

Information pertaining to the West Virginia Department of Environmental Protection

water quality certification (WQC) program, including the Section 401 Clean Water Act WQC application form, can be obtained at the following link:

<https://dep.wv.gov/WWE/Programs/Pages/401Certification.aspx>

### **General Condition 32 (Pre-Construction Notification)**

The nationwide permit pre-construction notification form (Form ENG 6082) may be obtained at the following link:

[https://www.publications.usace.army.mil/Portals/76/Eng\\_Form\\_6082\\_2019Oct.pdf?ver=2019-10-22-081550-710/](https://www.publications.usace.army.mil/Portals/76/Eng_Form_6082_2019Oct.pdf?ver=2019-10-22-081550-710/)

A checklist of information that must be provided in a pre-construction notification can be obtained at the following link:

<https://www.lrh.usace.army.mil/Missions/Regulatory/How-to-Apply-for-a-Permit/Nationwide-Permits/>

### ***Electronic Submittal:***

- PCNs should be saved as a PDF document, and then submitted as an attachment in an email to the appropriate Regulatory Office:  
  
Huntington District – LRH.permits@usace.army.mil  
Pittsburgh District – Regulatory.Permits@usace.army.mil
- Electronic documents must have sufficient resolution to show project details. The PCN and supporting documents submitted electronically must not exceed 10 megabytes (10MB) per email. Multiple emails may be required to transmit documents to ensure the 10MB limit is not exceeded. Alternatively, use of the Department of Defense Secure Access File Exchange (DoD SAFE) service to transfer large files may be requested in your email.
- For tracking and processing purposes, the email should include the following:
  - Email Subject Line: include the name of the applicant, type of NWP request, and location (County and State). Example: RE: Doe, John, NWP (or Pre-Construction Notification) and Section 401 WQC Request, Cabell County, West Virginia;
  - Email Body: 1) Brief description of the proposed project, 2) contact information (phone number, mailing address, and email address) for the applicant and/or their agent, and 3) the project location: Address and Latitude/Longitude in decimal degrees (e.g. 42.92788°, - 88.36257°).

- If you do not have internet access, information may be submitted through the U.S. Postal Service to the appropriate Regulatory Office:

U.S. Army Corps of Engineers, Huntington District  
ATTN: Regulatory Division  
502 Eighth Street  
Huntington, West Virginia 25701-2070  
Phone: (304) 399-5610  
Fax: (304) 399-5805

U.S. Army Corps of Engineers, Pittsburgh District  
ATTN: Regulatory Division  
William S. Moorhead Federal Building  
1000 Liberty Avenue  
Pittsburgh, Pennsylvania 15222-4186  
Phone: (412) 395-7155  
Fax: (412) 644-4211

**C. 2021 Nationwide Permit Terms and Specific Regional Conditions:**

**NWP 12. Oil or Natural Gas Pipeline Activities.** Activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines 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 for each single and complete project.

**Oil or natural gas pipelines:** This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of oil and natural gas pipelines. There must be no change in pre-construction contours of waters of the United States. An “oil or natural gas pipeline” is defined as any pipe or pipeline for the transportation of any form of oil or natural gas, including products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel, heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt.

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.

**Oil or natural gas pipeline substations:** This NWP authorizes the construction, maintenance, or expansion of substation facilities (e.g., oil or natural gas or gaseous fuel custody transfer stations, boosting stations, compression stations, metering stations, pressure regulating stations) associated with an oil or natural gas pipeline 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 of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

**Foundations for above-ground oil or natural gas pipelines:** This NWP authorizes the construction or maintenance of foundations for aboveground oil or natural gas pipelines in all waters of the United States, provided the foundations are the minimum size necessary.

**Access roads:** This NWP authorizes the construction of access roads for the construction and maintenance of oil or natural gas pipelines, 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 cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material 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 oil or natural gas pipelines 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). Oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material may require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a

remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the oil or natural gas pipeline 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 of dredged or fill material, 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. After construction, temporary fills must be removed in their entirety and the affected areas returned to preconstruction 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: (1) A section 10 permit is required; (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States; or (3) the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length. If the proposed oil or gas pipeline is greater than 250 miles in length, the pre-construction notification must include the locations and proposed impacts (in acres or other appropriate unit of measure) for all crossings of waters of the United States that require DA authorization, including those crossings authorized by an NWP would not otherwise require preconstruction notification. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Where the oil or natural gas pipeline is constructed, installed, or maintained in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the oil or natural gas pipeline to protect navigation.

**Note 2:** For oil or natural gas pipeline activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Oil or natural gas pipeline activities must comply with 33 CFR 330.6(d).

**Note 3:** 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 oil or natural gas pipeline must be removed upon completion of the work, in accordance with the requirements for temporary fills.

**Note 4:** Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, and may require a permit from the U.S. Coast Guard pursuant to the General Bridge Act of 1946. However, any discharges of dredged or fill material into waters of the United States associated with such oil or natural gas pipelines will require a section 404 permit (see NWP 15).

**Note 5:** This NWP authorizes oil or natural gas pipeline maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

**Note 6:** For NWP 12 activities that require pre-construction notification, the PCN must include 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, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

**Corps NWP 12 Specific Regional Conditions:**

- PCN in accordance with NWP General Condition 32 is required for all permanent conversion of scrub/shrub and forested wetlands of greater than 1/10 of an acre per each single and complete project. Use of conversion in this regional condition relates to the change of a scrub/shrub and forested wetlands to a herbaceous state, but it would not result in a loss of waters of the United States (U.S.) as the wetland would continue to exist in the landscape.
- Should an inadvertent return of drilling mud occur during a directional drilling activity, and the clean-up of drilling muds results in a discharge of dredged and/or fill material into waters of the U.S. necessitates the use of NWP 12 the permittee must report to the Corps the location and circumstances of the clean-up after the work has been conducted unless a PCN is otherwise required.

**NWP 12 West Virginia 401 Water Quality Certification Special Conditions:**

- A. General Water Quality Certification is declined for:
- i. Pipeline crossings on a Section 10 river (unless the bore is greater than 100 feet below the stream bed on the Ohio River mainstem, or greater than 50 feet below the stream bed on all other Section 10 waters);
  - ii. Utility lines within wetlands that would use or consider the use of herbicides for right-of-way maintenance;
  - iii. Projects proposing permanent impacts to any stream identified in WQC Standard Condition 15 A, B, and C;
  - iv. Cumulative permanent impacts to stream(s) totaling greater than 300 linear feet and cumulative wetland impacts exceeding 1/10 acre;
  - v. Pipelines carrying separated natural gas liquids, unless installed with an automated system which will indicate a sudden loss of pressure.

An individual Section 401 Water Quality Certification or waiver must be obtained from the WVDEP.

- B. To prevent permanent impacts to aquatic resources associated with equipment tracking in wetlands, the use of protective mats when practicable is required. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
- C. To protect the integrity of aquatic resources dredging for backfill material is not allowed in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
- D. Submarine pipeline stream crossings (including horizontal directional drilling) 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 in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014), Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
- E. Horizontal directional drilling for underwater crossings requires an Inadvertent Return Contingency Plan certified by a West Virginia Professional Engineer to be kept on site and made available upon request. This condition is required to ensure the protection of the chemical, physical and biological integrity of the aquatic resource in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014), Antidegradation Implementation Procedures, W.Va.

C.S.R. §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).

- F. General Water Quality Certification is declined when this permit is being used for water withdrawal. An individual Section 401 Water Quality Certification or waiver must be obtained from the WVDEP.
- G. To prevent erosion of stream banks at Right of Way (ROW) crossings all waterbody banks are to be returned as close as practicable to preconstruction contours. Riparian areas shall be revegetated with native species of conservation grasses, legumes, and woody species (of low determinate growth), similar in density to adjacent undisturbed lands. Routine mowing or clearing adjacent to waterbodies shall be limited to allow a riparian strip at least 25 feet wide, as measured from the waterbody's mean high water mark, to permanently revegetate with native plant species across the entire construction right-of-way. However, to facilitate periodic corrosion/leak surveys, a corridor centered on the pipeline and up to 10 feet wide may be cleared at a frequency necessary to maintain the 10-foot corridor in an herbaceous state. In addition, trees that are located within 15 feet of the pipeline that have roots that could compromise the integrity of the pipeline coating may be cut and removed from the permanent right-of-way. Seeding recommendations can be found in West Virginia Division of Natural Resources' publication, "Enhancing Wildlife Habitat on Oil & Gas Infrastructure." This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
- H. To ensure water contact recreation (Category C) uses are protected, 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. Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-6.4 (2016).

**NWP 21. Surface Coal Mining Activities.** Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations, provided the following criteria are met:

- a. The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement;
- b. 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 of

dredged or fill material into tidal waters or non-tidal wetlands adjacent to tidal waters; and

- c. The discharge is not associated with the construction of valley fills. A “valley fill” is a fill structure that is typically constructed within valleys associated with steep, mountainous terrain, associated with surface coal mining activities.

**Notification:** The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.) (Authorities: Sections 10 and 404)

**NWP 21 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 15. To ensure the protection of West Virginia’s high quality and special aquatic resources, this condition is required in accordance with Tier 3 Protection Review Procedures, W.Va. C.S.R. §60-5-6 (2008) and is required consistent with the authority and requirements of the Natural Streams Preservation Act, W.Va. Code §22-13-1 et seq. (2011).
- B. Individual State Water Quality Certification is required for mining related activities cumulatively impacting greater than ½ acre of intermittent or perennial stream(s). To ensure no significant adverse impact to the chemical, physical, hydrologic, or biological integrity of aquatic ecosystems in accordance with Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1 et seq. (2014), Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016), WV Water Pollution Control Act, W.Va. Code §22-11-1 et seq. (2014) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1 et seq. (2008).
- C. Individual State Water Quality Certification is required for linear transportation projects which involve stream crossings for haul roads, access roads, conveyor belts, pipelines, etc. in intermittent or perennial stream(s) greater than ½ acre cumulative or 300 linear feet per individual crossing. To ensure no significant adverse impact to the chemical, physical, hydrologic, or biological integrity of aquatic ecosystems in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016), WV Water Pollution Control Act, W.Va. Code §22-11-1 et seq. (2014), Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1 et seq. (2014) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1 et seq. (2008).
- D. Individual State Water Quality Certification is required for cumulative permanent wetland impacts greater than ½ acre. To ensure no significant adverse impact to the chemical, physical, hydrologic, or biological integrity of aquatic ecosystems in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016), Individual State Certification of Activities Requiring a Federal

Permit, W.Va. C.S.R. §47-5A-1 et seq. (2014), and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1 et seq. (2008).

**NWP 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. This NWP does not authorize discharges of dredged or fill material 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 32.) (Authorities: Sections 10 and 404)

**NWP 29 West Virginia 401 Water Quality Certification Special Conditions:**

- A. Projects affecting Section 10 waters and adjacent wetlands require individual water quality certification. This condition is required to ensure that the activity has no significant adverse impact to water resources, fish and wildlife, recreation, critical habitats, wetlands and other natural resources in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), the Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1, et seq. (2014).
- B. Placing in-stream stormwater management facilities with this permit requires individual water quality certification. This condition is required to ensure that the activity has no significant adverse impact to water resources, fish and wildlife, recreation, critical habitats, wetlands and other natural resources in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq (2016), the Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq (2008), and Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1, et seq. (2014).

**NWP 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, wastewater treatment 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 and new ski areas 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. This NWP does not authorize discharges of dredged or fill material 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 32.) (Authorities: Sections 10 and 404)

**Note:** For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

**NWP 39 West Virginia 401 Water Quality Certification Special Conditions:**

- A. Individual water quality certification is required for projects impacting Section 10 waters and adjacent wetlands. This condition is required to ensure that the activity has no significant adverse impact to water resources, fish and wildlife, recreation, critical habitats, wetlands and other natural resources in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), the Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1, et seq (2014).
- B. Placing in-stream stormwater management facilities with this permit requires individual water quality certification. This condition is required to ensure that the activity has no significant adverse impact to water resources, fish and wildlife, recreation, critical habitats, wetlands and other natural resources in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), the Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1, et seq (2014).

**NWP 40. Agricultural Activities.** 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 jurisdictional waters of the United States to relocate existing serviceable drainage ditches constructed in nontidal 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 of dredged or fill material 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 32.) (Authority: Section 404)

**Note:** Some discharges of dredged or fill material into waters of the United States 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).

**NWP 40 West Virginia 401 Water Quality Certification Special Conditions:**

- Placing in-stream stormwater management facilities with this permit requires individual water quality certification. This condition is required to ensure that the activity has no significant adverse impact to water resources, fish and wildlife, recreation, critical habitats, wetlands and other natural resources in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), the Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1, et seq (2014).

**NWP 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. This NWP does not authorize discharges of dredged or fill material 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 32.) (Authority: Section 404)

**NWP 43. Stormwater Management Facilities.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; the construction of low impact development integrated management features such as bioretention facilities (e.g., rain gardens), vegetated filter strips, grassed swales, and infiltration trenches; and the construction of pollutant reduction green infrastructure features designed to reduce inputs of sediments, nutrients, and other pollutants into waters, such as features needed to meet reduction targets established under Total Maximum Daily Loads set under the Clean Water Act.

This NWP authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features. The maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features that are not waters of the United States does not require a section 404 permit.

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 of dredged or fill material 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 discharges of dredged or fill material into non-tidal waters of the United States for the construction of new stormwater management facilities or pollutant reduction green infrastructure features, or the expansion of existing stormwater management facilities or pollutant reduction green infrastructure features, the permittee must submit a preconstruction notification to the district engineer prior to commencing the activity. (See general condition 32.)

Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature. (Authority: Section 404)

**Corps NWP 43 Specific Regional Conditions:**

- PCN in accordance with NWP General Condition 32 is required for use of the NWP.

**NWP 43 West Virginia 401 Water Quality Certification Special Conditions:**

- Placing in-stream stormwater management facilities with this permit requires individual water quality certification. This condition is required to ensure that the activity has no significant adverse impact to water resources, fish and wildlife, recreation, critical habitats, wetlands and other natural resources in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), the Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1, et seq (2014).

**NWP 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, provided the activity meets all of the following criteria:

- a. For mining activities involving discharges of dredged or fill material into non-tidal jurisdictional wetlands, the discharge must not cause the loss of greater than 1/2-acre of non-tidal jurisdictional wetlands;
- b. For mining activities involving discharges of dredged or fill material in non-tidal jurisdictional open waters (e.g., rivers, streams, lakes, and ponds) or work in non-tidal navigable waters of the United States (i.e., section 10 waters), the mined area, including permanent and temporary impacts due to discharges of dredged or fill material into jurisdictional waters, must not exceed 1/2-acre; and
- c. The acreage loss under paragraph(a) plus the acreage impact under paragraph (b) does not exceed 1/2-acre.

This NWP does not authorize discharges of dredged or fill material 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 32.) If reclamation is required by other statutes, then a copy of the final reclamation plan must be submitted with the pre-construction notification. (Authorities: Sections 10 and 404)

**NWP 48. Commercial Shellfish Mariculture Activities.** Structures or work in navigable waters of the United States and discharges of dredged or fill material into

waters of the United States necessary for new and continuing commercial shellfish mariculture operations (i.e., the cultivation of bivalve mollusks such as oysters, mussels, clams, and scallops) in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is authorized to conduct commercial shellfish mariculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement that establishes an enforceable property interest for the operator.

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States 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:

- a. The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;
- b. The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990; or
- c. Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste.

**Notification:** The permittee must submit a pre-construction notification to the district engineer if the activity directly affects more than 1/2-acre of submerged aquatic vegetation. If the operator will be conducting commercial shellfish mariculture activities in multiple contiguous project areas, he or she can either submit one PCN for those contiguous project areas or submit a separate PCN for each project area. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** The permittee should notify the applicable U.S. Coast Guard office regarding the project.

**Note 2:** To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

**Note 3:** The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines “aquatic nuisance species” as “a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or

commercial, agricultural, aquacultural, or recreational activities dependent on such waters.”

**NWP 48 West Virginia 401 Water Quality Certification Special Conditions:**

- General Water Quality Certification is declined when this permit is being used for the discharge of material to Section 10 waters and streams identified in Standard Condition 15 A, B, and C herein.

**NWP 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 by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977. 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 of dredged or fill material 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. (See general condition 32.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Authorities: Sections 10 and 404)

**NWP 50 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 15. To ensure the protection of West Virginia’s high quality and special aquatic resources, this condition is required in accordance with Tier 3 Protection Review Procedures, W.Va. C.S.R. §60-5-6 (2008) and is required consistent with the authority and requirements of the Natural Streams Preservation Act, W.Va. Code §22-13-1 et seq. (2011).
- B. Individual State Water Quality Certification is required for mining related activities cumulatively impacting greater than ½ acre of intermittent or perennial stream(s). To ensure no significant adverse impact to the chemical, physical, hydrologic, or biological integrity of aquatic ecosystems in accordance with Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1 et seq. (2014), Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016), WV Water Pollution Control Act, W.Va. Code §22-11-1 et seq. (2014) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1 et seq. (2008).

- C. Individual State Water Quality Certification is required for linear transportation projects which involve stream crossings for haul roads, access roads, conveyor belts, pipelines, etc. in intermittent or perennial stream(s) greater than ½ acre cumulative or 300 linear feet per individual crossing. To ensure no significant adverse impact to the chemical, physical, hydrologic, or biological integrity of aquatic ecosystems in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016), WV Water Pollution Control Act, W.Va. Code §22-11-1 et seq. (2014), Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1 et seq. (2014) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1 et seq. (2008).
- D. Individual State Water Quality Certification is required for cumulative permanent wetland impacts greater than ½ acre. To ensure no significant adverse impact to the chemical, physical, hydrologic, or biological integrity of aquatic ecosystems in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016), Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1 et seq. (2014), and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1 et seq. (2008).

**NWP 51. Land-Based Renewable Energy Generation Facilities.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include, but are not limited to roads, parking lots, and stormwater management facilities within the landbased renewable energy generation facility. 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 of dredged or fill material 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 if the discharge results in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Electric utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those electric utility lines may be authorized by NWP 57 or another Department of the Army authorization.

**Note 2:** If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove electric utility lines and/or road crossings, then NWP 57 and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs 57 and 14, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

**Note 3:** For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

**NWP 51 West Virginia 401 Water Quality Certification Special Conditions:**

- General Water Quality Certification is declined when this permit is being used for the discharge of material to Section 10 waters and streams identified in Standard Condition 15 A, B, and C herein. An individual Section 401 Water Quality Certification or waiver must be obtained from the WVDEP.

**NWP 52. Water-Based Renewable Energy Generation Pilot Projects.** Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind, water-based solar, wave energy, or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based collection and distribution facilities, control facilities, roads, parking lots, and stormwater management facilities.

For the purposes of this NWP, the term “pilot project” means an experimental project where the waterbased renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site. The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the 1/2-acre limit. For each single and complete project, no more than 10 generation units (e.g., wind turbines, wave energy devices, or hydrokinetic devices) are authorized.

For floating solar panels in navigable waters of the United States, each single and complete project cannot exceed 1/2- acre in water surface area covered by the floating solar panels.

This NWP does not authorize activities in coral reefs. Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is required.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Electric utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those electric utility lines may be authorized by NWP 57 or another Department of the Army authorization.

**Note 2:** An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate review and/or approval from the Corps under 33 U.S.C. 408.

**Note 3:** If the pilot project generation units, including any transmission lines, are placed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

**Note 4:** Hydrokinetic renewable energy generation projects that require authorization by the Federal Energy Regulatory Commission under the Federal Power Act of 1920 do not require separate authorization from the Corps under section 10 of the Rivers and Harbors Act of 1899.

**Note 5:** For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

**NWP 52 West Virginia 401 Water Quality Certification Special Conditions:**

- General Water Quality Certification is declined when this permit is being used for the discharge of material to Section 10 waters and streams identified in Standard Condition 15 A, B, and C herein. An individual Section 401 Water Quality Certification or waiver must be obtained from the WVDEP.

**NWP 55. Seaweed Mariculture Activities.** Revoked in the State of West Virginia.

**NWP 56. Finfish Mariculture Activities.** Revoked in the State of West Virginia.

**NWP 57. Electric Utility Line and Telecommunications Activities.** Activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication 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 for each single and complete project.

**Electric utility lines and telecommunication lines:** This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of electric utility lines and telecommunication lines. There must be no change in preconstruction contours of waters of the United States. An “electric utility line and telecommunication line” is defined as any cable, line, fiber optic line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.

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 electric utility line or telecommunication line crossing of each waterbody.

**Electric utility line and telecommunications substations:** This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with an

electric utility line or telecommunication 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 of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

**Foundations for overhead electric utility line or telecommunication line towers, poles, and anchors:** This NWP authorizes the construction or maintenance of foundations for overhead electric utility line or telecommunication 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 electric utility lines or telecommunication lines, including overhead lines and substations, in nontidal waters of the United States, provided the activity, in combination with all other activities included in one 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 of dredged or fill material 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 electric utility lines or telecommunication 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). Electric utility lines or telecommunication lines constructed over section 10 waters and electric utility lines or telecommunication 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 authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing electric utility lines or telecommunication lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling

activities conducted for the purpose of installing or replacing electric utility lines or telecommunication lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the electric 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 of dredged or fill material, 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. After construction, temporary fills must be removed in their entirety and the affected areas returned to preconstruction 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: (1) A section 10 permit is required; or (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Where the electric utility line is constructed, installed, or maintained in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the electric utility line to protect navigation.

**Note 2:** For electric utility line or telecommunications activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Electric utility line and telecommunications activities must comply with 33 CFR 330.6(d).

**Note 3:** Electric utility lines or telecommunication lines consisting of aerial electric power transmission lines crossing navigable waters of the United States (which are defined at 33 CFR part 329) must comply with the applicable minimum clearances specified in 33 CFR 322.5(i).

**Note 4:** 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 electric utility line or telecommunication line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

**Note 5:** This NWP authorizes electric utility line and telecommunication line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

**Note 6:** For overhead electric utility lines and telecommunication lines authorized by this NWP, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

**Note 7:** For activities that require preconstruction notification, the PCN must include 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, including other separate and distant crossings that require Department of the Army authorization but do not require preconstruction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

**Corps NWP 57 Specific Regional Conditions:**

- PCN in accordance with NWP General Condition 32 is required for all permanent conversion of scrub/shrub and forested wetlands of greater than 1/10 of an acre per each single and complete project. Use of conversion in this regional condition relates to the change of a scrub/shrub and forested wetlands to a herbaceous state, but it would not result in a loss of waters of the U.S. as the wetland would continue to exist in the landscape.
- Should an inadvertent return of drilling mud occur during a directional drilling activity, and the clean-up of drilling muds results in a discharge of dredged and/or fill material into waters of the U.S. necessitates the use of NWP 57 the permittee must report to the Corps the location and circumstances of the clean-up after the work has been conducted unless a PCN is otherwise required.

**NWP 57 West Virginia 401 Water Quality Certification Special Conditions:**

A. General Water Quality Certification is declined for the following activities:

- i. Pipeline crossings on a Section 10 river (unless the bore is greater than 100 feet below the stream bed on the Ohio River mainstem, or greater than 50 feet below the stream bed on all other Section 10 waters);
- ii. Utility lines within wetlands that would use or consider the use of herbicides for right-of-way maintenance;
- iii. Projects proposing permanent impacts to any stream identified in WQC Standard Condition 15 A, B, and C;

- iv. Cumulative permanent impacts to stream(s) totaling greater than 300 linear feet and cumulative wetland impacts exceeding 1/10 acre.

An individual Section 401 Water Quality Certification or waiver must be obtained from the WVDEP.

- B. To prevent permanent impacts to aquatic resources associated with equipment tracking in wetlands, the use of protective mats when practicable is required. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
- C. To protect the integrity of aquatic resources dredging for backfill material is not allowed in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
- D. Submarine pipeline stream crossings (including horizontal directional drilling) 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 in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014), Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
- E. Horizontal directional drilling for underwater crossings requires an Inadvertent Return Contingency Plan certified by a West Virginia Professional Engineer to be kept on site and made available upon request. This condition is required to ensure the protection of the chemical, physical and biological integrity of the aquatic resource in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014), Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016).
- F. To protect the biological integrity of the aquatic ecosystem, no permanent structure authorized by this permit shall prevent fish movement upstream or downstream in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
- G. To prevent erosion of stream banks at Right of Way (ROW) crossings all waterbody banks are to be returned as close as practicable to preconstruction contours. Riparian areas shall be revegetated with native species of conservation grasses, legumes, and woody species (of low determinate growth), similar in

density to adjacent undisturbed lands. Routine mowing or clearing adjacent to waterbodies shall be limited to allow a riparian strip at least 25 feet wide, as measured from the waterbody's mean high water mark, to permanently revegetate with native plant species across the entire construction right-of-way. However, to facilitate periodic corrosion/leak surveys, a corridor centered on the pipeline and up to 10 feet wide may be cleared at a frequency necessary to maintain the 10-foot corridor in an herbaceous state. In addition, trees that are located within 15 feet of the pipeline that have roots that could compromise the integrity of the pipeline coating may be cut and removed from the permanent right-of-way. Seeding recommendations can be found in West Virginia Division of Natural Resources' publication, "Enhancing Wildlife Habitat on Oil & Gas Infrastructure." This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).

**NWP 58. Utility Line Activities for Water and Other Substances.** Activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. Oil or natural gas pipeline activities or electric utility line and telecommunications activities may be authorized by NWPs 12 or 57, respectively. This NWP also authorizes associated utility line 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 for each single and complete project.

**Utility lines:** This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines for water and other substances, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose that is not oil, natural gas, or petrochemicals. Examples of activities authorized by this NWP include utility lines that convey water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals. 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 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 of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

**Foundations for above-ground utility lines:** This NWP authorizes the construction or maintenance of foundations for above-ground utility lines in all waters of the United States, provided the foundations are the minimum size necessary.

**Access roads:** This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including utility line substations, 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 cause the loss of greater than 1/2-acre of non-tidal waters of the United States.

This NWP does not authorize discharges of dredged or fill material 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 authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody.

District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, 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 of dredged or fill material, 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. After construction, temporary fills must be removed in their entirety and the affected areas returned to preconstruction 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: (1) A section 10 permit is required; or (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Where the utility line is constructed, installed, or maintained in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the 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:** For utility line activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Utility line activities must comply with 33 CFR 330.6(d).

**Note 3:** 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, in accordance with the requirements for temporary fills.

**Note 4:** 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 the General Bridge Act of 1946. 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).

**Note 5:** This NWP authorizes utility line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

**Note 6:** For activities that require preconstruction notification, the PCN must include 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, including other separate and distant crossings that require Department of the Army authorization but do not require preconstruction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

**Corps NWP 58 Specific Regional Conditions:**

- PCN in accordance with NWP General Condition 32 is required for all permanent conversion of scrub/shrub and forested wetlands of greater than 1/10 of an acre per each single and complete project. Use of conversion in this regional condition relates to the change of a scrub/shrub and forested wetlands to a herbaceous state, but it would not result in a loss of waters of the U.S. as the wetland would continue to exist in the landscape.
- Should an inadvertent return of drilling mud occur during a directional drilling activity, and the clean-up of drilling muds results in a discharge of dredged and/or fill material into waters of the U.S. necessitates the use of NWP 58 the permittee must report to the Corps the location and circumstances of the clean-up after the work has been conducted unless a PCN is otherwise required.

**NWP 58 West Virginia 401 Water Quality Certification Special Conditions:**

A. General Water Quality Certification is declined for the following activities:

- i. Pipeline crossings on a Section 10 river (unless the bore is greater than 100 feet below the stream bed on the Ohio River mainstem, or greater than 50 feet below the stream bed on all other Section 10 waters);
- ii. Utility lines within wetlands that would use or consider the use of herbicides for right-of-way maintenance;
- iii. Projects proposing permanent impacts to any stream identified in WQC Standard Condition 15 A, B, and C;
- iv. Cumulative permanent impacts to stream(s) totaling greater than 300 linear feet and cumulative wetland impacts exceeding 1/10 acre; and
- v. Pipelines transporting hazardous substances consistent with the definition found in Section 101(14) of the Comprehensive Environmental Response,

Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601(14) and Toxic Substances Control Act, 15 U.S.C. §53(2601–2629).

An individual Section 401 Water Quality Certification or waiver must be obtained from the WVDEP.

- B. To prevent permanent impacts to aquatic resources associated with equipment tracking in wetlands, the use of protective mats when practicable is required. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
- C. To protect the integrity of aquatic resources dredging for backfill material is not allowed in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
- D. Submarine pipeline stream crossings (including horizontal directional drilling) 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 in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014), Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
- E. Horizontal directional drilling for underwater crossings requires an Inadvertent Return Contingency Plan certified by a West Virginia Professional Engineer to be kept on site and made available upon request. This condition is required to ensure the protection of the chemical, physical and biological integrity of the aquatic resource in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014), Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
- F. General Water Quality Certification is declined when this permit is being used for water withdrawal. An individual Section 401 Water Quality Certification or waiver must be obtained from the WVDEP.
- G. To protect the biological integrity of the aquatic ecosystem, no permanent structure authorized by this permit shall prevent fish movement upstream or downstream in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).

H. To prevent erosion of stream banks at Right of Way (ROW) crossings all waterbody banks are to be returned as close as practicable to preconstruction contours. Riparian areas shall be revegetated with native species of conservation grasses, legumes, and woody species (of low determinate growth), similar in density to adjacent undisturbed lands. Routine mowing or clearing adjacent to waterbodies shall be limited to allow a riparian strip at least 25 feet wide, as measured from the waterbody's mean high water mark, to permanently revegetate with native plant species across the entire construction right-of-way. However, to facilitate periodic corrosion/leak surveys, a corridor centered on the pipeline and up to 10 feet wide may be cleared at a frequency necessary to maintain the 10-foot corridor in an herbaceous state. In addition, trees that are located within 15 feet of the pipeline that have roots that could compromise the integrity of the pipeline coating may be cut and removed from the permanent right-of-way. Seeding recommendations can be found in West Virginia Division of Natural Resources' publication, "Enhancing Wildlife Habitat on Oil & Gas Infrastructure." This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. 33 §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).

#### **D. 2021 Nationwide Permit General Conditions:**

**Note:** To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, 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. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

##### **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

or her 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. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

**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 NWP 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

**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 preconstruction course, condition, capacity, and location of open waters must be

maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, 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 preconstruction 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, or during low tides.

**13. Removal of Temporary Structures and Fills.** Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. Temporary fills must be removed in their entirety and the affected areas returned to preconstruction 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 and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

**15. 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.

**16. Wild and Scenic Rivers.**

- a. No NWP 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
- b. 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.

- c. If a proposed NWP activity will 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, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.
- d. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

**17. 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.

**18. Endangered Species.**

- a. No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a
- b. species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of “effects of the action” for the purposes of ESA section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding “activities that are reasonably certain to occur” and “consequences caused by the proposed action.”
- c. Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer

will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

- d. Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, 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 species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. 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. For activities where the non-Federal applicant has identified listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing or designated critical habitat (or critical habitat proposed for such designation), or until ESA section 7 consultation or conference has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.
- e. As a result of formal or informal consultation or conference with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.
- f. Authorization of an activity by an 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 FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where “take”

means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word “harm” in the definition of “take” means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

- g. If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP
- h. activity or whether additional ESA section 7 consultation is required.
- i. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.nmfs.noaa.gov/pr/species/esa/> respectively.

**19. Migratory Birds and Bald and Golden Eagles.** The permittee is responsible for ensuring that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether “incidental take” permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

**20. Historic Properties.**

- a. No activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register

- of Historic Places 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 (see 33 CFR 330.4(g)(1)). If preconstruction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.
  - c. Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, 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 preconstruction notification must state which historic properties might have the potential to be affected by the proposed NWP activity 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 properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: No historic properties affected, no adverse effect, or adverse effect.
  - d. Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has

- 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 to historic properties or that NHPA section 106 consultation has been completed. For non-federal permittees, 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. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.
- e. Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) 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, 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.

**21. Discovery of Previously Unknown Remains and Artifacts.** Permittees that discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by an NWP, they must immediately notify the district engineer of what they have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

**22. Designated Critical Resource Waters.** Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters

or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public 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, 50, 51, 52, 57 and 58 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, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

**23. Mitigation.** The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than 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 for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than 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 preconstruction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require preconstruction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.
- d. Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100-acre and require preconstruction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 3/100-

- acre or less that require preconstruction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult to-replace resources (see 33 CFR 332.3(e)(3)).
- e. Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. 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. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. 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 minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.
  - f. Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.
    1. The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the
    2. district engineer may approve the use of permittee-responsible mitigation.
    3. The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse

- environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)
4. Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option
  5. considered for permittee-responsible mitigation.
  6. If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)). If permittee responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.
  7. If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).
  8. Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).
- g. 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 NWP activity 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 an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.
  - h. (h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory

mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

- i. Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert 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 environmental effects of the activity to the no more than minimal level.

**24. Safety of Impoundment Structures.** To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state or federal, dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

**25. Water Quality.**

- a. Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by an NWP.
- b. If the NWP activity requires preconstruction notification and the certifying authority has not previously certified compliance of an NWP with CWA section 401, the proposed discharge is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a water quality certification for the proposed discharge, the permittee must submit a copy of the certification to the district engineer. The discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied by the issuance of a water quality certification or a waiver.

- c. The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

**26. 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)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by an NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

**27. 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 CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

**28. Use of Multiple Nationwide Permits.** The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

- a. If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters 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.
- b. If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed their respective specified acreage limits. For example, if a commercial development is constructed under NWP 39, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the commercial development under NWP 39 cannot exceed 1/2-acre, and the total acreage loss of waters of United States due to the NWP 39 and 46 activities cannot exceed 1 acre.

**29. 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.”

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(Transferee)

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(Date)

**30. Compliance Certification.** Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

- a. A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;
- b. A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and
- c. The signature of the permittee certifying the completion of the activity and mitigation. The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

**31. Activities Affecting Structures or Works Built by the United States.** If an NWP activity also requires review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a “USACE project”), the prospective permittee must submit a pre-construction notification. See paragraph

(b)(10) of general condition 32. An activity that requires section 408 permission and/or review is not authorized by an NWP until the appropriate Corps office issues the section 408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

### 32. 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, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers 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. 45 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 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there 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 Act (see 33 CFR 330.4(g)) has been completed. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not 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 activity;
  3. Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;
  4.
    - i. A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and 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, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.
    - ii. For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs.
    - iii. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a

conceptual plan), but do not need to be detailed engineering plans);

5. The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial and intermittent streams, 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 on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45-day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;
6. If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.
7. For non-federal permittees, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;
8. For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;
9. For an activity that will 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, the PCN must identify the Wild and Scenic River or the “study river” (see general condition 16); and

10. For an NWP activity that requires permission from, or review by, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from, or review by, the Corps office having jurisdiction over that USACE project.
- c. **Form of Pre-Construction Notification:** The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.
  - 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 activity’s adverse environmental effects so that they are no more than minimal.
    2. Agency coordination is required for:
      - i. All NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States;
      - ii. NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and
      - iii. NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.
    3. When agency coordination is required, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or email that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the preconstruction notification. The district engineer will fully consider agency comments

received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWP, including the need for mitigation to ensure that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer 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.

4. 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.
5. Applicants are encouraged to provide the Corps with either electronic files or multiple copies of preconstruction notifications to expedite agency coordination.

#### **E. District Engineer's Decision**

1. 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 a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the single and complete crossings of waters of the United States that require PCNs to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings of waters of the United States authorized by an NWP. If an applicant requests a waiver of an applicable limit, as provided for in NWPs 13, 36, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.
3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters. The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than 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 environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. 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 proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure that the NWP activity results in no more than

minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) That the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity 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 environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

#### **F. 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 (see general condition 31).

**G. Standard Conditions of State 401 Water Quality Certification Applicable to the 2021 Nationwide Permits**

1. To ensure project compliance with state water quality requirements applicable to these Nationwide Permits, notification is to be provided prior to construction to West Virginia Department of Environmental Protection (WV DEP) for any permitted activity for which the U.S. Army Corps of Engineers (USACE) requires pre-construction notification (PCN), in accordance with Nationwide Permit General Condition 32. This condition is required through authority provided in State Certification of Activities Requiring a Federal License or Permit, 40 C.F.R §121.3 (2020) and WV Water Pollution Control Act, W.Va. Code §22-11-1, et seq. (2014).
2. To compensate for unavoidable impacts to aquatic resources as a result of the discharge of dredge or fill material, the applicant must provide proof of compensatory mitigation (as outlined in Standard Condition 16 below) to WV DEP prior to construction, for an activity resulting in cumulative permanent impacts to streams greater than 300 linear feet or causing the loss of greater than 1/10 acre of wetlands. This condition is required in accordance with the following; Rules for Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-6 (2014), Antidegradation Implementation Procedures, W.Va. C.S.R §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1 et seq. (2016).
3. To protect the biological integrity of the aquatic ecosystem, culverted crossings shall be sized and installed in a manner to allow the passage of aquatic life and freely pass bankfull flows. Exceptions to this requirement would be when culvert placement is on bedrock, or when stream gradient is equal to or greater than 4%, or when bankfull elevation is greater than final surface elevation. This condition is required in accordance with Antidegradation Implementation Procedures, W.Va. C.S.R §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
4. To protect the designated uses of waters of the state, the permittee shall investigate for the presence of water supply intakes or other activities within 1/2 mile downstream of the activity, which may be affected by increased suspended solids and turbidity, caused by work in the watercourse. The permittee shall 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. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-7.2.a.2 (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R §60-5-1, et seq (2008).

5. To ensure that temporary stream and wetland crossings have no significant adverse impact to aquatic resources, the following procedures and requirements shall be followed and met in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008). At each stream crossing, substrate in the channel will be removed and stockpiled separately from other excavated material. This native material must be reused in restoration of the stream channel, which is to be completed within 72 hours or as soon as practicable after completion of the crossing. Upon final stream bed restoration, the stream must have similar physical characteristics to include substrate, pattern, profile, dimension and embeddedness of the original stream channel. At each wetland crossing, any excavated material from the top 12 inches of soil will be removed and stockpiled separately from other excavated material. This native material must be reused in restoration of the wetlands temporarily impacted by the open cut crossing and restoration must be completed within 72 hours or as soon as practicable after completion of the crossing. Stream crossings will be conducted as close to a right angle to the watercourse as practicable and the area of in stream activity will be limited to reduce disturbance.
6. Spoil materials from the watercourse or onshore operations, including sludge deposits, shall not be dumped in the watercourse, or deposited in wetlands or other areas where the deposit may adversely affect the surface waters of the state consistent with the requirements set forth in WV Water Pollution Control Act, W.Va. Code §22-11-4.a.16 (2014) and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
7. To protect aquatic resources from unauthorized discharge of pollutants, storage and refueling areas shall not be located within any surface water body. All spills shall be promptly reported to the State Center for Pollution, Toxic Chemical and Oil Spills, 1-800-642-3074. This condition is required in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016) and WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014).
8. To reduce sedimentation of aquatic resources and increased turbidity, it is required that proper stabilization of all disturbances below the ordinary high-water mark of waters shall be installed within 24 hours or as soon as practicable to prevent erosion. Where possible, stabilization shall incorporate revegetation using bioengineering as an alternative to riprap. If riprap is utilized, it must be of such weight and size that bank stress or slump conditions shall not be created due to its placement. Fill must be clean, nonhazardous and of such composition that it shall not adversely affect the biological, chemical or physical properties of the receiving waters. Unsuitable materials include but are not limited to: copper chromium arsenate (CCA) and creosote treated lumber, car bodies, tires, large household appliances, and asphalt. 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 (36) inches in its longest dimension are prohibited. Rebar or wire in concrete shall not protrude further than one (1) inch. All activities require the use of clean and coarse non-erodible materials with 15% or less of like fines that is properly sized to withstand expected high flows. This condition is required in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016), WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).

9. To protect the water quality of aquatic resources, runoff from any storage areas or spills shall 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 WV DEP. This condition is required in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-4.a.16 (2014) and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
10. To protect aquatic resources from discharge associated with land disturbance activities, which are one (1) acre or greater in total area, the project proponent must comply with the National Pollutant Discharge Elimination System or other state stormwater permit requirements as established by the WV DEP, if applicable. Any land disturbances are required to use Best Management Practices for Sediment and Erosion Control, as described in the latest West Virginia Department of Environmental Protection's Erosion and Sediment Control Best Management Practice Manual, or similar documents prepared by the West Virginia Division of Highways. These handbooks are available from the respective agency offices. This condition is required in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-4.a.16 (2014) and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016).
11. To protect aquatic resources from unpermitted discharges consistent with the requirements of WV Water Pollution Control Act, W.Va. Code §22-11-4.a.16 (2014) and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), concrete shall 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 WV DEP.
12. To maintain the biological integrity of the state's fisheries, a spawning waiver is required for in-stream work in designated warm water streams and their adjacent

tributaries during the fish spawning season of April to June and for trout waters and their adjacent tributaries during the trout water fish spawning season of September 15 to March 31. Fish spawning waivers may be requested from West Virginia Division of Natural Resources (WV DNR) Coordination Unit, at (304) 637-0245. For information about specific stream designations contact West Virginia Department of Environmental Protection, Water Quality Standards Section at (304) 926-0440. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016) and Wildlife Resources Declaration of Policy, W.Va. Code §20-2-4 (2017).

13. To protect stream stability and avoid unnecessary degradation of aquatic resources, the project proponent should avoid removal of riparian vegetation to the greatest extent practicable. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
14. To protect aquatic life and reduce turbidity and disturbance to aquatic resources, the operation of equipment in-stream shall be minimized and accomplished during low flow periods when practical. Ingress and egress for equipment outside the immediate work area requires prior approval of the WV DNR Office of Land and Stream. This condition is required in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016) and Wildlife Resources Declaration of Policy, W.Va. Code §20-2-4 (2017).
15. To ensure the protection of West Virginia's high quality and special aquatic resources, notification must be provided to the WV DEP 60-days prior to construction describing the project purpose, location, and impacts for use of any Nationwide Permit(s) resulting in work in streams set forth in Sections A, B, and C below. The WV DEP will provide applicant coordination within 15 days of receipt of a complete notification.
  - A. Tier 3 Protection is provided for aquatic resources in accordance with West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Antidegradation Policy, Title 47, Series 2, Section 4 for Outstanding National Resource Waters to include, but are not limited to, all streams and rivers within the boundaries of Wilderness Areas designated by The Wilderness Act (16 U.S.C. §1131, et seq.) within the state, all federally designated rivers under the Wild and Scenic Rivers Act, 16 U.S.C. §1271, et seq.; all streams and other bodies of water in state parks which are high quality waters or naturally reproducing trout streams; waters in national parks and forests which are high quality waters or naturally reproducing trout streams; waters designated under the National Parks and Recreation Act of 1978, as amended; and pursuant to W.Va. C.S.R. §§60-5-6, 7 (2008) those

waters whose unique character, ecological or recreational value, or pristine nature constitutes a valuable national or state resource. This condition is required in accordance with Tier 3 Protection Review Procedures, W.Va. C.S.R. §§60-5-6, 7 (2008). The listing of Tier 3 streams is located at: [https://dep.wv.gov/WWE/Programs/wqs/Documents/Tier%203%20Info/WVTier\\_3\\_Nov2013\\_web.xlt](https://dep.wv.gov/WWE/Programs/wqs/Documents/Tier%203%20Info/WVTier_3_Nov2013_web.xlt)

- B. Naturally-Reproducing Trout Streams are protected to ensure the continued propagation and maintenance of naturally-reproducing trout. For information about specific streams contact WV DEP, Water Quality Standards, at 304-926-0440. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
  - C. West Virginia Natural Stream Preservation Act identifies the following streams or rivers as 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. This condition is required consistent with the authority and requirements of the Natural Streams Preservation Act, W.Va. Code §22-13-1, et seq. (2011).
16. The following mitigation guidelines are established to ensure no significant adverse impact to the chemical, physical, hydrologic, or biological integrity of wetlands and streams without compensating for the aquatic resource functions that will be lost as a result of the permitted activity. The discharge of dredged or fill material into a stream or wetland is authorized based upon the following criteria:
- A. Greater than one-tenth (1/10) acre of cumulative permanent impact to wetland(s) (including wetland type conversion) requires prior notification describing the project location, impacts, and plan for mitigation to be submitted to the WV DEP.
  - B. The amount of fill in a wetland, wetland complex or wetland system without mitigation is not to cumulatively exceed 1/10 acre.
  - C. Cumulative permanent impacts to stream(s) greater than 300 linear feet requires prior notification describing the project location, impacts, and plan for mitigation to be submitted to the WV DEP. The West Virginia Stream Wetland

Valuation Metric (SWVM) is the preferred assessment methodology to assist with the determination of required mitigation. The metric is available at the Huntington and Pittsburgh USACE web sites.

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 compensatory mitigation. In many cases, the environmentally preferable compensatory mitigation may be provided through an approved mitigation bank or the West Virginia In-Lieu Fee Program. Permittee responsible compensatory mitigation may be performed using the methods of; restoration, enhancement, establishment, and in certain circumstances, preservation. In general, the required compensatory mitigation should be located in the same watershed as the impact site and located where it is most likely to successfully replace lost functions and services as the impacted site. However, the use of mitigation banks or in-lieu fee for in-kind replacement is not restricted to the same watershed in which the impact has occurred until such time as mitigation banks or in-lieu projects are developed in each major watershed.

**Wetlands.** When permittee responsible in-kind replacement mitigation is used, it is to be accomplished at the following ratios until such time an approved functional assessment methodology is established for the state of West Virginia.

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

Permanent impacts to wet meadow/emergent wetlands are to be two (2) acres replaced for one (1) acre impacted.

Permanent 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 aquatic resource, the replacement ratio may be reduced to as low as one (1) acre created/restored to every one (1) acre impacted.

**NOTE:** The ratio of created/restored wetlands to impacted wetlands not only ensures no net loss but assures 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 WV DEP DWWM may consider the acquisition of existing wetlands. Acquisition ratios include the following:

Five (5) to one (1) for open water wetlands;

Ten (10) to one (1) for wet meadow/emergent wetlands; and  
Fifteen (15) to (1) for scrub-shrub and forested wetlands.

Under extenuating circumstances, the Secretary may accept lower ratios for high quality wetlands under significant threat of development.

All wetlands acquired, using the acquisition method of mitigation, shall either be deeded to the WVDNR 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. Third party oversight of the conservation easement by a non-profit conservation organization is preferred.

**Streams.** When proposing permittee responsible compensatory mitigation, projects shall attempt to replace lost functions for permanent stream impacts. Mitigation shall be determined on a case-by-case basis based on the pre- and post- condition stream quality and complexity of the mitigation project preferably utilizing the most current version of the SWVM worksheets. Compensatory mitigation may require protection through deed restrictions or conservation easements by the permittee or their designee.

These requirements are established in accordance with; Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016), WV Water Pollution Control Act, W.Va. Code §22-11-1, et seq. (2014), Rules for Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-6 (2014), and Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 33 C.F.R. §332 (2008).

17. To protect mussel populations in accordance with state and federal requirements, should native freshwater mussels be encountered during the use of any Nationwide Permit, all activity reasonably expected to jeopardize the population is to cease immediately and the WV DNR 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. This condition is required in accordance with; Rules for Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-3.1 (2014), Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), Possession of Wildlife, W.Va. Code §20-2-4 (2017) and Fishing Regulations W.Va. C.S.R. §58-60-5.11 (2020).

## **H. 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 (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting 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.

**Direct effects:** Effects that are caused by the activity and occur at the same time and place.

**Discharge:** The term “discharge” means any discharge of dredged or fill material into waters of the United States.

**Ecological reference:** A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

**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.

**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.

**High Tide Line:** The line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due

to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

**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 non-linear 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.

**Indirect effects:** Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

**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. The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation 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 or wetlands 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. 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 that do not require Department of the Army authorization, such as 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.

**Navigable waters:** Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

**Non-tidal wetland:** A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Nontidal 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 NWP, 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 flowing or standing 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:** The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

**Perennial stream:** A perennial stream has surface water flowing continuously year-round during a typical year.

**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. Preconstruction 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 preconstruction 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. Reestablishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

**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: Reestablishment 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 coarse 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 next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

**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 linear project:** A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term “single and complete project” is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes 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 or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. 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.

**Single and complete non-linear project:** For non-linear projects, 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 non-linear project must have independent utility (see definition of “independent utility”). Single and complete non-linear projects may not be “piecemealed” to avoid the limits in an NWP authorization.

**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 jurisdictional 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 jurisdictional wetland that is inundated by tidal waters. 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.

**Tribal lands:** Any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

**Tribal rights:** Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

**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 NWP, a waterbody is a “water of the United States.” If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)).