



**U S Army Corps  
of Engineers**  
Huntington District

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# Public Notice

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In reply refer to Public Notice No.

LRH-2019-158-1

Issuance Date:

**October 25, 2019**

Stream: N/A

Closing Date:

**October 25, 2024**

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Please address all comments and inquiries to:

U.S. Army Corps of Engineers, Huntington District

ATTN: CELRH-RD-S Public Notice No. (*reference above*)

502 Eighth Street

Huntington, West Virginia 25701-2070

Phone: (304) 399-5710

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## **REGIONAL GENERAL PERMIT FOR THE STATE OF WEST VIRGINIA, DEPARTMENT OF TRANSPORTATION (WVDOT)**

To Whom It May Concern: On February 15, 2019, in accordance with Title 33 CFR 325.5(c)(1) as published on November 13, 1986, in the Federal Register, Volume 51, Number 219, the District Engineer of the Huntington District U.S. Army Corps of Engineers, issued a public notice under Department of Army (DA) number LRH-2019-158, proposing a Regional General Permit (RGP) for the West Virginia Department of Transportation that would authorize certain linear transportation projects pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act (CWA).

As of the date of this public notice, the RGP is effective and authorizes activities in waters of the United States (U.S.) including work, structures, and filling (both temporary and permanent) associated with linear transportation projects and the maintenance of existing transportation infrastructure conducted by the West Virginia Department of Transportation in the State of West Virginia. Categories of activities authorized under the RGP would include (A) certain linear transportation projects, (B) certain maintenance projects, and (C) certain bank stabilization activities. This RGP authorizes activities in such waters except those excluded by the attached general permit conditions.

The West Virginia Department of Transportation is responsible for ensuring that projects are in full compliance with all conditions of the permit. The permittee's authorization could be suspended, modified or revoked in accordance with 33 CFR 325.7 if a determination is made by the Corps of Engineers (Corps) that the permittee's request was inaccurate, incomplete, or made in bad faith. Enforcement action may be initiated if such a determination is made.

An integral part of the Corps' regulatory program is the concept of general permits for minor activities. RGPs are activity specific and are designed to relieve some of the administrative burdens associated with permit processing for both the applicant and the Federal government. This RGP is issued by the District Engineer of the Huntington District U.S. Army Corps of Engineers and is intended to apply to the West Virginia Department of Transportation throughout the State of West Virginia.

Conditions and limitations for the activities authorized by this regional permit are attached. The permit remains in effect for a period of five years unless modified or rescinded. At the end of five years, a complete re-evaluation will be performed according to regulations governing the use of regional permits.

RGPs are not valid until the appropriate state agency certifies the discharge does not violate state water quality standards. In response to the February 15, 2019 public notice, on August 23, 2019, the West Virginia Department of Environmental Protection (WVDEP) granted Section 401 Water Quality Certification (WQC) with general and special limitations and conditions for this RGP.

If you have any questions concerning this Public Notice or the RGP, please contact Sarah Workman of the South/Transportation Branch by telephone at (304) 399-5710 or by email at [sarah.m.workman@usace.army.mil](mailto:sarah.m.workman@usace.army.mil).

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**Categories of Activities Covered by the Regional General Permit (RGP):** This RGP authorizes activities in waters of the United States (U.S.) including work, structures, and the discharge of fill (both temporary and permanent) associated with linear transportation projects and the maintenance of existing transportation infrastructure conducted by the West Virginia Department of Transportation (WVDOT) in the State of West Virginia. Authorized activities would include the following categories of activities, referred to as RGP A, RGP B, and RGP C.

**RGP A - Linear Transportation Projects:** Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads and highways) in waters of the U.S. The discharge cannot cause the loss of greater than 1/2 acre of waters of the U.S. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project. Such modifications must be in the immediate vicinity of the project.

Examples of authorized activities include the discharge of fill material or structures into waters of the U.S. associated with new roadway alignments; roadway realignments; roadway widening; construction of roadway embankments and bridge abutments; installation of additional traffic lanes to existing roadways; intersection improvements; new bridges, including bridge piers, bike paths, and roadway and railway grade separations.

RGP A also authorizes temporary structures, fills, and work necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills within waters of the U.S. must consist of suitable materials and be placed in a manner that will not be eroded by expected high flows. After project completion, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. See General Conditions 8 and 15.

**Notification:** The WVDOT must submit a Pre-Construction Notification (PCN) to the District Engineer (DE) prior to commencing the activity:

- (1) if the loss of waters of the U.S. exceeds 1/10 acre for any single and complete project;
- (2) if there is a discharge in a special aquatic site, including wetlands;
- (3) for all regulated activities in Section 10 waters; and
- (4) when the discharges of dredged or fill material would result in a loss of 300 linear feet for combined ephemeral, intermittent and perennial streams for any single and complete project.

**Note 1:** For linear transportation projects 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 RGP authorization.

**Note 2:** Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

**Note 3:** For RGP A activities that require a PCN, the PCN must include any other RGP(s), NWP(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 a PCN. The DE will evaluate the PCN in accordance with the DE's Decision section below. The DE may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects.

**Note 4:** RGP A cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, and construction of staging, borrow, and disposal sites.

#### **RGP A West Virginia 401 Water Quality Certification Special Conditions:**

- A. Activities associated with temporary access fills, temporary cofferdams or other discharges related to accessing the stream for maintenance activities require the use of clean and coarse non-erodible materials with 15% or less of like fines that is properly sized to withstand expected high flows.
- B. Pipe, box, and arched culvert crossings:
  - i. The volume of fill for culverted structures is limited to the amount required to achieve transportation purpose.
  - ii. The inlet/outlets must be designed in such a manner as to maintain substrate in the bottom of the culvert (culverts installed in bedrock or with a stream gradient of 4% or greater do not need to be countersunk). Countersinking the culvert to the sub-pavement of the streambed, backwatering or the use of a bottomless culvert will generally fulfill this requirement.
  - iii. If fills associated with the crossing extend onto the floodplain, the use of floodplain culverts is strongly encouraged.
- C. The volume of fill for a bridge abutment or piers below the ordinary high water mark is not to exceed 200 cubic yards for a single bridge project without written authorization.
- D. The Secretary of the West Virginia Department of Environmental Protection, in the Secretary's sole discretion, reserves the right to require an individual water quality certification for an activity impacting greater than 200 linear feet on one or more of the streams identified in the 401 Water Quality Certification (WQC) General

Condition 17 Sections (A), (B), and (C) herein, and for all Section 10 rivers.

**RGP B - Maintenance:** RGP B authorizes the maintenance of existing transportation infrastructure conducted by the WVDOT as follows:

- (a) RGP B authorizes the discharge of fill material into waters of the U.S. associated with the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or fill, or any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This RGP also authorizes the removal of previously authorized structures or fill. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project or within the boundaries of the structure or fill. This RGP authorizes the repair, rehabilitation, or replacement of those structures or fill destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes, or tornadoes, this two-year limit may be waived by the DE, provided the WVDOT can demonstrate funding, contract, or other similar delays.
- (b) Excavation of accumulated sediments and debris does not require authorization from the Corps if there is no subsequent discharge of the dredged material into a water of the U.S., unless the dredging activity occurs in a Section 10 water. RGP B authorizes the removal of accumulated sediments and debris from Section 10 waters in the vicinity of existing structures (e.g., bridges, culverted road crossings, etc.). The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend more than 200 feet in any direction from the structure. All dredged or excavated materials must be deposited and retained in an area that has no waters of the U.S. unless otherwise specifically approved by the DE under separate authorization.
- (c) The discharge of new or additional riprap into waters of the U.S. for maintenance activities must be the minimum necessary to protect the structure or to ensure the safety of the structure. New or additional riprap cannot exceed 600 feet from the structure in either direction (e.g. 100 feet upstream plus 500 feet downstream from the structure). Any bank stabilization measures not directly associated with the structure will require a separate authorization from the DE.
- (d) RGP B also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills within waters of the U.S. must consist of

materials, and be placed in a manner, that will not be eroded by expected high flows. After conducting the maintenance activity, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. See General Conditions 8 and 15.

(e) This RGP does not authorize new stream channelization or stream relocation projects.

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

**Notification:** The WVDOT must submit a PCN to the DE prior to commencing the activity:

- (1) for all regulated activities in the Ohio River and the Kanawha River;
- (2) the activity is authorized by paragraph (b) of RGP B. The PCN must include information regarding the original design of the structure and approximate dimensions when built;
- (3) for temporary structures, work, and discharges (including cofferdams) necessary for access fills or dewatering of construction sites occurring in, and regulated under, Section 10 waters when the primary activity is otherwise authorized by the Corps of Engineers. The PCN must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions; and
- (4) for temporary discharges of fill material that would exceed one year.

**RGP B West Virginia 401 Water Quality Certification Special Conditions:**

- A. Prior written notification to the West Virginia Department of Environmental Protection, Division of Water and Waste Management is required for use of this permit on streams identified in the 401 WQC General Condition 17 Sections (A), (B), and (C) herein, and for all Section 10 rivers.

**RGP C – Bank Stabilization:** RGP C authorizes bank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, bioengineering, sills, rip rap, revetment, gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques, provided the activity meets all of the following criteria:

- (a) No material is placed in excess of the minimum needed for erosion protection;
- (b) The activity is no more than 500 feet in length along the bank, unless the DE waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects (an exception is for bulkheads – the DE cannot issue a waiver for a bulkhead that is greater than 1,000 feet in length along the bank);

(c) The activity will not exceed an average of one cubic yard per running foot, as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line, unless the DE waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the DE waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the U.S.;

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

(g) Native plants appropriate for current site conditions must be used for bioengineering or vegetative bank stabilization;

(h) The activity is not a stream channelization activity; and

(i) The activity must be properly maintained, which may require repairing it after severe storms or erosion events. This RGP authorizes those maintenance and repair activities if they require authorization.

RGP C also authorizes temporary structures, fills, and work necessary to conduct the bank stabilization activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills within waters of the U.S. must consist of suitable materials, and be placed in a manner, that will not be eroded by expected high flows.

After conducting the bank stabilization activity, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. See General Conditions 8 and 15.

Notification: The WVDOT must submit a PCN to the DE prior to commencing the activity:

- (1) if the activity involves discharges into special aquatic sites;
- (2) if the activity is in excess of 500 feet in length;
- (3) if the activity will involve the discharge of greater than an average of one cubic yard per running foot as measured along the length of the treated bank, below the plane of the ordinary high water mark; and
- (4) for all regulated activities in the Ohio River and the Kanawha River.

**Note 1:** Proper installation is required for the use of this RGP. This RGP does not authorize material that is dumped from the top of bank resulting in uncontrolled spilling of material over the bank into the waterway.

**RGP C West Virginia 401 Water Quality Certification Special Conditions:**

- A. Except for activities under Section 14 of the 1946 Flood Control Act, the Secretary of the West Virginia Department of Environmental Protection, in the Secretary's sole discretion, reserves the right to require an Individual State Water Quality Certification for bank stabilization activities:
  - i. Greater than 1,000 linear feet of perennial and intermittent stream bank authorized by the U.S. Army Corps of Engineers.
  - ii. Activities impacting greater than 200 linear feet on one or more of the streams identified in 401 WQC General Condition 17 Sections (A), (B), and (C) herein, and for all Section 10 rivers.
- B. Pre-construction notification shall be provided to the West Virginia Department of Environmental Protection, Division of Water and Waste Management and West Virginia Division of Natural Resources, Coordination Unit allowing 45 days for a determination to be made as to whether the stabilization activity will negatively impact the nursery functions of an embayment, island back channel, or stream mouth on a Section 10 river. Based on review of pre-construction notification further review may be necessary or Individual Water Quality Certification may be required at the discretion of the Secretary of the West Virginia Department of Environmental Protection.
- C. Bank protection measures may not be extended into the bed of the stream except as necessary to provide proper footing of the bank stabilization measure.
- D. Stabilized streambanks, where possible and practicable, should be sloped and revegetated for erosion control purposes.
- E. The use of unconsolidated river gravel (river jack) for streambank stabilization is not allowed. Unconsolidated river material may be used to reconstruct streambanks or form bankfull benches provided they are stabilized by material and/or methods which prevent further erosion under normal or expected high flows. Acceptable material and/or methods are; quarried or shot rock, clean concrete rubble, gabions, cribbing, woody vegetation, and flow diversion structures such as rock vanes. All of the foregoing are to be used in combination with appropriate sloping and engineering specifications.



**RGP General Conditions:** To qualify for authorization under the RGP, the WVDOT must comply with the following general conditions, as appropriate, in addition to case-specific conditions imposed by the DE for a specific project.

1. For all regulated activities located in the waterways listed below PCN in accordance with General Condition 30 is required:
  - New River;
  - Bluestone River from the upstream boundary of Pipestem Park to Bluestone Reservoir;
  - Meadow River from an area near the US 19 Bridge to its junction with the Gauley River;
  - All streams within the Monongahela National Forest designated as National Wild and Scenic Study Rivers;
  - All streams and other bodies of water in State and National Forests and Recreation Areas (included are streams and bodies of water located within the Spruce Knob, Seneca Rocks and Gauley River National Recreation Areas); and
  - Streams and their tributaries as contained within the boundaries of the designated National Wilderness Areas or the headwaters of such rivers and their tributaries; Cranberry River, Red Creek, Laurel Fork and Otter Creek.

The Corps will consult or validate previous consultations with the National Park Service (NPS) and/or the U.S. Forest Service (USFS) upon receipt of the PCN.

2. Due to the ecological significance of the following waterways, PCN in accordance with General Condition 30 is required for all regulated activities within the following waterway:
  - 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.

### **3. 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 (USCG), through regulations or otherwise, must be installed and maintained at the WVDOT's expense on authorized facilities in navigable waters of the U.S.

(c) The WVDOT understands and agrees that, if future operations by the U.S. require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the WVDOT 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 U.S.. No claim shall be made against the U.S. on account of any such removal or alteration.

**4. 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.

**5. 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.

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

**7. Shellfish Beds.** No activity may occur in areas of concentrated shellfish populations.

**8. Suitable Material.** No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged into waters of the U.S. must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act). Bridge demolition debris may be used for temporary work/access pads provided it is free of exposed re-bar or other steel, and stabilized to prevent erosion.

**9. 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.

**10. 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.

**11. Management of Water Flows.** To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows.

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

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

**14. 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 must be permanently stabilized at the earliest practicable date. The WVDOT is encouraged to perform work within waters of the U.S. during periods of low-flow or no-flow.

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

**16. Proper Maintenance.** Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable RGP general conditions, as well as any activity-specific conditions added by the DE to a specific RGP authorization.

**17. Single and Complete Project.** The activity must be a single and complete project as defined in the definition section of this RGP. RGP A, RGP B, or RGP C cannot be used more than once for the same single and complete project.

**18. Wild and Scenic Rivers.** a) No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed RGP 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 WVDOT must submit a PCN to the DE. The DE will coordinate the PCN with the Federal agency with direct management responsibility for that river. The WVDOT shall not begin the RGP activity until notified by the DE that the Federal agency with direct management responsibility for that river has determined in writing that the proposed RGP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) 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., NPS, USFS, Bureau of Land Management (BLM), U.S. Fish and Wildlife Service[USFWS]). Information on these rivers is also available at: <http://www.rivers.gov/>.

**19. Tribal Rights.** No RGP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

**20. Endangered Species.** (a) No activity is authorized under any RGP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any RGP which “may affect” a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the RGP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the RGP activity and are later in time, but still are reasonably certain to occur.

(b) *Conditions when Federal Highways Administration (FHWA) is the Lead Federal Agency:*

The FHWA may be the lead Federal agency for the transportation project with ultimate responsibility to ensure compliance with Section 7 of the ESA. In such cases, the FHWA should follow their own procedures for complying with the requirements of the ESA.

PCN requirements when FHWA is the lead Federal agency:

- i. PCN required:
  - a. **Excluding projects described in General Condition (20)(b)(ii) below**, PCN is required if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat.
  - b. PCN is required for all projects when the FHWA has determined the proposed project is **likely to adversely affect** any federally listed species or designated critical habitat in the vicinity of the activity.

In the PCN, the WVDOT must provide the DE with the appropriate documentation to demonstrate compliance with the requirements of the ESA. The DE 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. The FHWA is responsible for fulfilling its obligation under Section 7 of the ESA.

- ii. PCN not required: Under the following conditions, PCN is not required under General Condition 20 (see Note 1 below),
  - a. If the FHWA has determined the proposed project will have **no effect** on any listed species or designated critical habitat, PCN under General Condition 20 (see Note 1) is not required, provided the following:
    - i. The scope of the project has not changed since the determination was made, and
    - ii. No new species or critical habitat have been federally listed since the determination was made.
  - b. If the FHWA has determined the proposed project **may affect, but is not likely to adversely affect** any federally listed species or designated critical habitat in the vicinity of the activity, PCN under General Condition 20 (see Note 1 below) is not required provided the following:
    - i. FHWA/WVDOT has received the USFWS’ concurrence on the determination, either programmatically or through project-specific consultation, and

- ii. The scope of the project has not changed since the determination was made, and
- iii. No new species or critical habitat have been federally listed since the determination was made, and
- iv. The WVDOT complies with and conditions and/or commitments resulting from programmatic and/or project-specific ESA consultation.

In the event that the scope of the project has changed and/or new species or critical habitat has been listed, FHWA should follow their own procedures for complying with the requirements of the ESA.

(c) Conditions when the Corps is the Lead Federal Agency: If the Corps is the lead Federal agency responsible for compliance with the requirements of the ESA:

- i. PCN is not required under General Condition 20 (see Note 1 below), provided all of the following conditions apply:
  - a. The project has been evaluated under the terms of the *Memorandum of Agreement Among the U.S. Fish and Wildlife Service, the West Virginia Department of Transportation, and the U.S. Army Corps of Engineers Regarding Implementation of the Federal-Aid Transportation Program in West Virginia* (MOA), and
  - b. The scope of the project has not changed since the evaluation under the MOA, and
  - c. No new species or critical habitat have been federally listed since the evaluation under the MOA, and
  - d. The WVDOT complies with any conditions and/or commitments resulting from the evaluation under the MOA.
- ii. PCN under General Condition 20 is required:
  - a. If the project is not evaluated under the MOA described above, or if the project does not qualify for evaluation under the MOA. In such cases, the WVDOT must submit a PCN to the DE if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the DE that the requirements of the ESA have been satisfied and that the activity is authorized.

For activities that might affect federally listed endangered or threatened species or designated critical habitat, the PCN must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The DE will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the WVDOT of the Corps’ determination within 45 days of receipt of a complete PCN. In cases where the WVDOT has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the WVDOT shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species or critical habitat,

or until ESA Section 7 consultation has been completed. If the WVDOT has not heard back from the Corps within 45 days, the WVDOT must still wait for notification from the Corps.

(d) As a result of consultation with the USFWS, the DE may add species-specific conditions to a specific RGP verification.

(e) Authorization of an activity by an RGP 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 USFWS, the ESA prohibits any person subject to the jurisdiction of the U.S. 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.

(f) If the WVDOT 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 RGP activity, the WVDOT must provide a copy of that ESA Section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The DE will coordinate with the agency that issued the ESA Section 10(a)(1)(B) permit to determine whether the proposed RGP 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 RGP 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 DE does not need to conduct a separate ESA Section 7 consultation for the proposed RGP activity. The DE will notify the WVDOT within 45 days of receipt of a complete PCN whether the ESA Section 10(a)(1)(B) permit covers the proposed RGP activity or whether additional ESA Section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the office of the USFWS or their web page at <http://www.fws.gov/> or <http://www.fws.gov/ipac>.

**Note 1:** While PCN may not be required under General Condition 20, PCN may be required under other conditions of the RGP. In cases where PCN is required under other conditions of the RGP, the PCN must include the documentation described in General Condition 30.

**21. Migratory Birds and Bald and Golden Eagles.** The WVDOT is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The WVDOT is responsible for contacting appropriate local office of the USFWS to determine applicable measures to reduce impacts 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.

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

(b) The FHWA may be the lead Federal agency with ultimate responsibility to ensure compliance with Section 106 of the NHPA. FHWA should follow their own procedures for complying with the requirements of Section 106 of the NHPA. If FHWA is the lead Federal agency and if a PCN is required under other conditions of this RGP, the PCN must include documentation demonstrating compliance with Section 106 of the NHPA. The DE will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under Section 106 of NHPA may be necessary. The respective Federal agency is responsible for fulfilling its obligation to comply with Section 106 of NHPA.

(c) If FHWA is not the lead Federal agency, WVDOT must submit a PCN to the DE if the RGP 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 PCN must state which historic properties might have the potential to be affected by the proposed RGP 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 (SHPO), Tribal Historic Preservation Officer (THPO), or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing PCNs, the DE will comply with the current procedures for addressing the requirements of Section 106 of the NHPA. The DE shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted in the PCN and these identification efforts, the DE shall determine whether the proposed RGP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the DE 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 DE determines that the activity has the potential to cause effects on historic properties. The DE 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. Where the WVDOT has identified historic properties on which the activity might have the potential to cause effects and so notified the Corps, the WVDOT shall not begin the activity until notified by the DE either that the activity has no potential to cause effects to historic properties or that Section 106 of the NHPA consultation has been completed.

(d) If FHWA is not the lead Federal agency, the DE will notify WVDOT within 45 days of receipt of a complete PCN whether Section 106 of NHPA consultation is required. If Section 106 of NHPA consultation is required, the DE will notify the WVDOT that he or she cannot begin the activity until Section 106 consultation is completed. If the WVDOT has not heard back from the Corps within 45 days, the WVDOT must still wait for notification from the Corps.

(e) WVDOT 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 the WVDOT 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 WVDOT. 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 WVDOT, 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.

**23. Discovery of Previously Unknown Remains and Artifacts.** Discovery of any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the DE of what you 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.

(a) If the FHWA is the lead Federal agency, the WVDOT must immediately contact the Corps and the FHWA. The FHWA will be responsible for the Federal, state, and tribal 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.

(b) If the Corps is the lead Federal agency, the WVDOT must immediately contact the DE. The DE 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.

#### **24. Designated Critical Resource Waters.**

(a) A PCN is required for any activity proposed in designated critical resource water, including wetlands adjacent to those waters. Discharges of dredged or fill material into waters of the U.S. under RGP A are not authorized for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. The DE may authorize activities under RGP B and RGP C only after it is determined that the impacts to the critical resource waters will be no more than minimal.

(b) Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The DE 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 DE may also designate additional critical resource waters after notice and opportunity for public comment.

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

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

(b) Mitigation sequencing (avoidance, minimization, compensation for loss of waters of the U.S. and associated functions) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require PCN, unless the DE 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 PCN, the DE 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) For losses of streams or other open waters that require PCN, the DE may require compensatory mitigation to ensure that the activity results in no more than 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 RGP 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. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the DE 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, 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 DE 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 DE 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 WVDOT 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 RGPs, 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 DE, the DE may approve the use of permittee-responsible mitigation.
2. The amount of compensatory mitigation required by the DE 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)).
3. 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 considered for permittee-responsible mitigation.
4. If permittee-responsible mitigation is the proposed option, the WVDOT is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the DE to make the decision on the RGP 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 DE before the WVDOT begins work in waters of the U.S., unless the DE 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)).
5. If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.
6. 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 RGP 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 RGPs. For example, if an RGP has an acreage limit of 1/2-acre, it cannot be used to authorize any RGP activity resulting in the loss of greater than 1/2-acre of waters of the U.S., 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 RGP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the RGPs.

(h) WVDOT may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the WVDOT must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For permittee-responsible mitigation, the special conditions of the RGP 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 U.S. are permanently adversely affected by a regulated activity, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

**26. Case-By-Case Conditions.** The activity must comply with any conditions that may have been added by the Division Engineer and with any case-specific conditions added by the Corps, or by the state in its Section 401 Water Quality Certification.

**27. Use of Multiple Permits.** The use of more than one RGP category for a single and complete project is prohibited, except when the acreage loss of waters of the U.S. authorized by the RGPs does not exceed the acreage limit of the RGP category with the lowest specified acreage limit. For example, if a road crossing is constructed under RGP A, with associated bank stabilization authorized by RGP C, the maximum acreage loss of waters of the U.S. for the total project cannot exceed 1/2-acre.

**28. Compliance Certification.** If the WVDOT receives a RGP verification letter from the Corps, the WVDOT must provide a signed certification documenting completion of the authorized activity and 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 DE. The Corps will provide the permittee the certification document with the RGP verification letter. The certification document will include:

(a) A statement that the authorized work was done in accordance with the RGP verification, including any general 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 WVDOT secured the appropriate number and resource type of credits; and

(c) The signature of the WVDOT certifying the completion of the activity and mitigation.

**29. Activities Affecting Structures or Works Built by the U.S.** If an RGP activity also requires 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 WVDOT must submit a PCN (see paragraph (b)(9) of General Condition 30). An activity that requires Section 408 permission is not authorized by an RGP until the appropriate Corps office issues the Section 408 permission to alter, occupy, or use the USACE project, and the DE issues a written RGP verification.

### **30. Pre-Construction Notification (PCN).**

(a) Timing. Where required by the terms of the RGP, the WVDOT must notify the DE by submitting a PCN as early as possible. The DE 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 WVDOT within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information required to make the PCN complete. As a general rule, the DE will request additional information necessary to make the PCN complete only once. However, if the WVDOT does not provide all of the requested information, then the DE will notify the WVDOT 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 DE. The WVDOT shall not begin the activity until either:

1. The WVDOT is notified in writing by the DE that the activity may proceed under the RGP with any special conditions imposed by the DE; or

2. 45 calendar days have passed from the DE’s receipt of the complete PCN and the WVDOT has not received written notice from the DE. However, if the WVDOT was required to notify the Corps pursuant to General Condition 20 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 22 that the activity might have the potential to cause effects to historic properties, the WVDOT cannot begin the activity until receiving written notification from the Corps that any consultation required under Section 7 of the ESA (see 33 CFR 330.4(f)) and/or Section 106 of the NHPA (see 33 CFR 330.4(g)) has been completed. If the DE notifies the WVDOT in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the WVDOT cannot begin the activity until an individual permit has been obtained. Subsequently, the WVDOT’s right to proceed under the RGP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 325.7.

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

1. Location of the proposed activity;

2. Identify the specific RGP or RGP(s) the WVDOT proposes to use to authorize the proposed activity;

3. 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 RGP 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 RGP(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 PCN. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the DE 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. For single and complete linear projects, 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. Sketches should be provided when necessary to show that the activity complies with the terms of the RGP. (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);

4. The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The WVDOT 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.

5. If the proposed activity will result in the loss of greater than 1/10-acre of wetlands and a PCN is required, the WVDOT 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 WVDOT may submit a conceptual or detailed mitigation plan;

6. If any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (See General Condition 20), the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity.

- a) If FHWA is the lead Federal agency and a PCN is required, the PCN must provide documentation demonstrating compliance with the ESA;
- b) If FHWA is not the lead Federal agency, the PCN must include the name(s) of those federally listed endangered or threatened species that might be affected by the proposed RGP activity or utilize the designated critical habitat that may be affected by the proposed RGP activity;

7. If the RGP 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 (See General Condition 22), 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.

- a) If FHWA is the lead Federal agency, they have ultimate responsibility to ensure compliance with Section 106 of the NHPA. In such cases where a PCN is required, the WVDOT must provide the DE with the appropriate documentation to demonstrate compliance with the requirements of Section 106 of the NHPA.
- b) If FHWA is not the lead Federal agency, the PCN must state which historic property might be affected by the proposed RGP activity or include a vicinity map indicating the location of the historic property;

**8.** 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 18);

**9.** For an activity that requires 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 federally authorized civil works project, the PCN must include a statement confirming that the WVDOT has submitted a written request for Section 408 permission from the Corps office having jurisdiction over that USACE project.

(c) Form of PCN: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is an RGP PCN and must include all of the applicable information required in paragraphs (b)(1) through (9) of this general condition. A letter containing the required information may also be used. WVDOT may provide electronic files of PCNs and supporting materials.

(d) Agency Coordination: The DE will consider any comments from Federal and state agencies concerning the proposed activity’s compliance with the terms and conditions of the RGPs and the need for mitigation to reduce the activity’s adverse environmental effects so that they are no more than minimal.

For all RGP activities requiring PCN that result in the loss of greater than 1/2-acre of waters of the U.S. or for a waiver of any RGP criteria, the DE will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (USFWS, USEPA, WVDNR, WVDEP, the West Virginia Department of Arts, Culture and History). The agencies will then have 10 calendar days from the date the material is transmitted to notify the DE that they intend to provide substantive, site-specific comments. If so contacted by an agency, the DE will wait an additional 15 calendar days before making a decision on the PCN. The DE will fully consider agency comments received within the specified time frame concerning the proposed activity’s compliance with the terms and conditions of the RGPs, including the need for mitigation to ensure the net adverse environmental effects of the proposed activity are no more than minimal. The DE will provide no response to the resource agency. The DE will indicate in the administrative record associated with each PCN that the resource agencies’ concerns were considered.

**31. Water Quality.** Where the WVDEP has not previously certified compliance of a RGP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The DE or State may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

**District Engineer's Decision:**

1. In reviewing the PCN for the proposed activity, the DE will determine whether the activity authorized by the RGP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. When WVDOT requests authorization by a specific RGP category, the DE should issue the RGP verification for that activity if it meets the terms and conditions of that RGP category, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse environmental effects 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 individual crossings to determine whether they individually satisfy the terms and conditions of the RGP(s), as well as the cumulative effects caused by all of the crossings authorized by the RGP and other permits. If the WVDOT requests a waiver of any RGP criteria, the DE will only grant the waiver upon a written determination that the RGP activity will result in only minimal individual and cumulative adverse environmental effects.
2. When making minimal effects determinations the DE will consider the direct and indirect effects caused by the RGP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by the RGP and other permits whether those cumulative adverse environmental effects are no more than minimal. He or she will also consider site specific factors, such as the environmental setting in the vicinity of the RGP activity, the type of resource that will be affected by the RGP activity, the functions provided by the aquatic resources that will be affected by the RGP 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 RGP activity (e.g., partial or complete loss), the duration of the adverse environmental effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the DE. If an appropriate functional assessment method is available and practicable to use, that assessment method may be used by the DE to assist in the minimal adverse environmental effects determination. The DE may add case-specific special conditions to the RGP 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, and/or a loss of 300 linear feet of stream, it is recommended the WVDOT submit a mitigation proposal with the PCN. WVDOT may also propose compensatory mitigation for RGP activities projects with smaller impacts, or for impacts to other types of waters (e.g., ditches, ponds, lakes). The DE will consider any proposed compensatory mitigation or other mitigation measures the WVDOT has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed activity are

no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the DE determines that the activity complies with the terms and conditions of the RGP and that the adverse environmental effects on the aquatic environment are no more than minimal, after considering mitigation, the DE will notify the WVDOT and include any activity-specific conditions in the RGP verification the DE deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The DE must approve the final mitigation plan before the WVDOT commences work in waters of the U.S., unless the DE 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 WVDOT elects to submit a compensatory mitigation plan with the PCN, the DE will expeditiously review the proposed compensatory mitigation plan. The DE must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure the RGP activity results in no more than minimal adverse effects environmental effects on the aquatic environment. If the net adverse environmental effects of the RGP activity project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the DE to be no more than minimal, the DE will provide a timely written response to the WVDOT. The response will state that the RGP activity project can proceed under the terms and conditions of the RGP, including any activity-specific conditions added to the RGP authorization by the DE.

4. If the DE determines that the adverse environmental effects of the proposed activity work are more than minimal, then the DE will notify the WVDOT that either: (a) That the activity project does not qualify for authorization under the RGP and instruct the WVDOT on the procedures to seek authorization under an individual permit; (b) that the project is authorized under the RGP subject to the WVDOT's submission of a mitigation plan that would reduce the adverse environmental effects on the aquatic environment to the so that they are not more than minimal level; or (c) that the activity project is authorized under the RGP with specific modifications or conditions. Where the DE determines that mitigation is required to ensure no more than minimal adverse environmental effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with General Conditions 20, 22, 29, and/or 31), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation or a requirement that the WVDOT submit a mitigation plan that would reduce the adverse environmental effects on the aquatic environment so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the U.S. may occur until the DE has approved a specific mitigation plan.

#### **Further Information:**

**A. Congressional Authorities:** Proposed activities under these RGPs would be authorized under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344).



**B. Limits of this authorization:**

- (1) DEs have authority to determine if an activity complies with the terms and conditions of an RGP.
- (2) This RGP does not obviate the need to obtain other Federal, state, or local authorizations required by law
- (3) This RGP does not grant any property rights or exclusive privileges.
- (4) This RGP does not authorize any injury to the property or rights of others.
- (5) This RGP does not authorize interference with any existing or proposed Federal project (see General Condition 29).

**C. Limits of Federal Liability:** In issuing this RGP, the Federal Government does not assume any liability for the following:

- (1) Damages to the permitted project or uses hereof as a result of other permitted or unpermitted activities or from natural causes.
- (2) Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the U.S. in the public interest.
- (3) Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.
- (4) Design or construction deficiencies associated with the permitted work.
- (5) Damage claims associated with any future modification, suspension, or revocation of this permit.

**D. Reevaluation of Permit Decision:** Should circumstances warrant, this office may reevaluate its decision on the RGP. Circumstances that could require reevaluation include but are not limited to the following:

- (1) Failure to comply with the terms and conditions of this RGP.
- (2) If information provided in support of the project description is false, incomplete, or inaccurate.
- (3) Significant new information surfaces which was not considered in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring compliance with the terms and conditions of the permit and for the initiation of legal action where appropriate. The WVDOT would be required to pay for any corrective measures ordered by this office, and for failure to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contact or otherwise and bill the WVDOT for the costs. In addition, unpermitted work or violation of permit conditions may result in civil, criminal or administrative penalties (33 U.S.C. 1319 c, d, and g.).

## **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 U.S.

**Enhancement:** The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

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

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

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

**Independent utility:** A test to determine what constitutes a single and complete 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.

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

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

**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. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

**Open water:** For purposes of the RGP, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of “open waters” include rivers, streams, lakes, and ponds.

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

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

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

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

**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.

**Protected tribal resources:** Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.

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

**Riffle and pool complex:** Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a 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 adjacent 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 25.)

**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 U.S. (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 RGP 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 the RGP authorization.

**Special Aquatic Sites:** Those sites identified in 40 CFR Part 230, subpart E.

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

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

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

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

**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.

**Suitable Material:** Clean, non-erodible materials including hard fill that is free of toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act). Trash, debris, car bodies, and asphalt are examples of unsuitable material. However, bridge demolition debris may be used for temporary work/access pads provided it is composed of suitable material, free of exposed rebar or other steel, and stabilized to prevent erosion.

**Temporary:** A finite period of time limited to the duration of the construction or maintenance of a transportation project, but never to exceed 2 years.

**Tribal lands:** Any lands title to which is either: 1) held in trust by the U.S. for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the U.S. 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 RGP, a waterbody is a jurisdictional water of the U.S. If a wetland is adjacent to a waterbody determined to be a water of the U.S., that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of “waterbodies” include streams, rivers, lakes, ponds, and wetlands.

**West Virginia State 401 Water Quality Certification Conditions for the West Virginia Department of Transportation Regional General Permit**

1. Any permitted activity for which the U.S. Army Corps of Engineers (Corps) requires pre- construction notification (PCN) in accordance with Regional General Permit Conditions and/or General Condition 30 the WVDOT must submit the same information to the West Virginia Department of Environmental Protection, Division of Water and Waste Management (WV DEP DWWM) prior to construction. To expedite

coordination between WVDEP-DWWM and the West Virginia Division of Natural Resources, Coordination Unit (WV DNR CU) a copy of the PCN is to be provided to the WVDNR-CU at the time of submission to WVDEP-DWWM.

2. The WVDOT must provide written documentation of compensatory mitigation (as outlined in Standard Condition 18 below) to WV DEP DWWM prior to construction for a project with permanent stream impacts greater than 300 linear feet or causing the permanent loss of greater than 1/10 acre of wetlands.
3. Culverted crossings should 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.
4. The WVDOT will investigate for the presence of water supply intakes or other activities within 1/2 mile downstream, which may be affected by suspended solids and turbidity increases caused by work in the watercourse. The WVDOT will give notice to operators of any such water supply intakes and such other water quality dependent activities as necessary before beginning work in the watercourse in sufficient time to allow preparation for any change in water quality.
5. Excavation, dredging or filling in the watercourse will be done only to the extent necessary to achieve the project's purpose, and at each wetland crossing the top 12 inches of topsoil shall be removed and stockpiled separately from other excavated material. In addition, at each stream crossing, substrate in the channel is to be removed and stockpiled separately from other excavated material. This native material must be re-used in restoration of the wetland and/or stream bed.
6. Spoil materials from the watercourse or onshore operations, including sludge deposits, will not be dumped in the watercourse, or deposited in wetlands or other areas where the deposit may adversely affect the surface or ground waters of the state.
7. The WVDOT will employ measures to prevent or control spills from fuels, lubricants or any other materials used in connection with construction and restrict them from entering the watercourse. Storage areas for chemicals, explosives, lubricants, equipment fuels, etc., as well as equipment refueling areas, must include containment measures (e.g., liner systems, dikes, etc.) to ensure that spillage of any material will not contact surface or ground waters. Storage areas and refueling areas shall be a minimum distance of 100 feet from any surface water body. All spills shall be promptly reported to the State Center for Pollution, Toxic Chemical and Oil Spills, 1-800-642-3074.
8. Upon completion of in-stream operations, all disturbances below the ordinary high water mark will be properly stabilized within 24 hours to prevent soil erosion. Where possible, stabilization shall incorporate revegetation using bioengineering as an alternative to rip rap. If rip rap is utilized, it is to be of such weight and size that bank stress or slump conditions will not be created due to its placement. Fill is to be clean,

nonhazardous and of such composition that it will not adversely affect the biological, chemical or physical properties of the receiving waters. Unsuitable materials include but are not limited to: copper chromium arsenate (CCA) and creosote treated lumber, car bodies, tires, large household appliances, construction debris, 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 inches in its longest dimension and tires are prohibited. 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.

9. Runoff from any storage areas or spills will not be allowed to enter storm sewers without acceptable removal of solids, oils and toxic compounds. Discharges from retention/detention ponds must comply with permit requirements of the National Pollutant Discharge Elimination System permit program of the West Virginia Department of Environmental Protection, Division of Water and Waste Management.
10. Land disturbances, which are one (1) acre or greater in total area, must comply with the National Pollutant Discharge Elimination System or other state stormwater permit requirements as established by the WV DEP DWWM, 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 WVDOT.
11. Concrete will not be permitted to enter the watercourse unless contained by tightly sealed forms or cells. Concrete handling equipment shall not discharge waste washwater into wetlands or watercourses at any time without adequate wastewater treatment as approved by the WV DEP DWWM.
12. 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 WV DNR CU, 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. In-stream work may occur during the respective spawning season in ephemeral waters without a waiver if all reasonable measures are taken to minimize turbidity and sedimentation downstream associated with the proposed project.
13. Removal of well-established riparian vegetation not directly associated with the project construction is prohibited. Disturbance and removal of vegetation from project construction area is to be avoided, where possible, and minimized when necessary. Removal of vegetation shall not be allowed where stream bank stability under normal flow conditions would be compromised.



14. Operation of equipment instream is to be minimized and accomplished during low flow periods when practical. Ingress and egress for equipment shall be within the work site. Location of ingress and egress outside the immediate work area requires prior approval of the WV DEP DWWM in concurrence with the WV DNR.
15. The WVDOT will comply with water quality standards as contained in the West Virginia Requirements Governing Water Quality Standards, Title 47 of Code of State Regulations, Series 2.
16. Any activity within the Federal Emergency Management Agency delineated 100-year floodplain requires approval from the appropriate Floodplain Manager. The following website provides a statewide listing of Floodplain Managers in West Virginia:  
<http://www.dhsem.wv.gov/MitigationRecovery/Pages/Floodplain-Management.aspx>
17. Prior notification describing the project location and impacts must be given to the WV DEP DWWM and WV DNR CU for use of this Regional General Permit for all work in streams set forth in Sections A, B, and C below.
  - A. Tier 3 Protection. West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2A. Outstanding National Resource Waters: Outstanding National Resource Waters 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 subsection 7.1 of 60CSR5, those waters whose unique character, ecological or recreational value, or pristine nature constitutes a valuable national or state resource. The listing of Tier 3 streams is located at:  
[http://www.dep.wv.gov/WWE/Programs/wqs/Documents/Tier%203%20Info/WV\\_Tier\\_3\\_Nov2013\\_web.xlt](http://www.dep.wv.gov/WWE/Programs/wqs/Documents/Tier%203%20Info/WV_Tier_3_Nov2013_web.xlt)
  - B. All naturally-reproducing trout streams. For information about specific streams contact WV DNR, Wildlife Resource Section, Trout Fisheries Program at 304-637- 0245.
  - C. West Virginia Natural Stream Preservation Act - W.V. Code Chapter 22 Article 13. The following streams or rivers are protected from activities that would impound, divert or flood the body of water: Greenbrier River from its confluence with Knapps Creek to its confluence with the New River, Anthony Creek from its headwaters to its confluence with the Greenbrier River, Cranberry River from its headwaters to its confluence with the Gauley River, Birch River from Cora Brown Bridge in Nicholas County to the confluence of the river with the

Elk River, and New River from its confluence with the Greenbrier River to its confluence with the Gauley River:

18. Wetland and stream mitigation guidelines. The discharge of dredged or fill material into a stream or wetland is authorized based upon the following criteria:
  - A. Permanent impact to one-tenth to 1/2 acre of wetland(s) (including wetland type conversion) requires prior notification describing the project location and impacts and plan for mitigation to be submitted to the WV DEP DWWM for approval.
  - B. The amount of fill in a wetland, wetland complex or wetland system without mitigation is not to exceed 1/10 acre.
  - C. The amount of stream to be filled as part of a project without mitigation is not to exceed 300 linear feet. West Virginia Stream Wetland Valuation Metric (SWVM) is the preferred method to assist with the determination of required mitigation for impacts to streams.

In all instances, mitigation for all impacts incurred through use of this Regional General Permit 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 8-digit Hydrologic Unit Code (HUC-8) 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 HUC 8 in which the impact has occurred until such time as mitigation banks or in-lieu projects have appropriate credits available in each HUC-8.

### **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 resource, the replacement ratio may be reduced to as low as one (1) acre created/restored for every one (1) acre impacted. Purchase from an approved Mitigation Bank or the Permittee Responsible As-Built documentation will be required to substantiate qualification for a reduction in the mitigation ratio.

In certain instances, the WVDEP DWWM may consider the acquisition of existing wetlands. Crediting ratios will be based on the functional values of the wetland(s) proposed for preservation.

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

All wetlands acquired, using the acquisition method of mitigation, will either be deeded to the WV DNR Public Land Corporation for management by the Wildlife Resources Section or placed under a conservation easement and protected from disturbance, by the WVDOT or their designee. Third party oversight of the conservation easement by a non-profit conservation organization (long-term steward) is preferred. If alternate stewardship options are required coordination with the WVDEP-DWWM is required.

#### 19. Streams with Mussel populations

- A. Should native freshwater mussels be encountered during the use of this Regional General Permit, all activity 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.
- B. Work in streams known to have protected “no take” mussel populations or contain protected habitat of mussels on the Federally Threatened and Endangered Species list must be approved by the WV DNR, Wildlife Diversity Program. If the WVDOT wishes to conduct projects in such streams, they should contact the program at (304) 637-0245. The most current list of these waters and other mussel information can be found here: <http://www.wvdnr.gov/Mussels/Main.shtm>
- C. WVDOT should consider utilizing WV DNR Wildlife Data Base Inquiry process. This resource is designed as an informative preplanning tool. It allows the applicant to know, in advance, if they will be encountering any federally-listed endangered species (ES), state species of concern and high quality fish and wildlife habitats such as trout streams, warm water fisheries, wetlands, karst and cave habitats. This inquiry can be obtained from the: Wildlife Data Base

Coordinator, PO Box 67, Elkins, West Virginia 26241. Information on what to submit to receive an inquiry should be directed to data base coordinator at 304-637-0245.

Notes: **Isolated State Waters:** In some cases, the Corps may determine that an activity will not impact waters of the United States because the water is an isolated wetland or stream, and therefore does not require a 404 permit. However, under West Virginia Code §22-11- 8(b)(3), a permit is needed to place waste into any water of the State. Accordingly, when proposing to impact an isolated water WVDOT must contact WV DEP DWWM to obtain all necessary approvals for activities impacting any isolated State waters.

**A Waiver:** The Secretary of the West Virginia Department of Environmental Protection reserves the right, in the Secretary's sole discretion and as provided in Section 401(a) of the Federal Water Pollution Control Act [33 U.S.C. § 1341(a)], to waive any Standard or Special Conditions of the State 401 Water Quality Certification Applicable to this Regional General Permit.