

Clean Water Act Section 404 Permit and 401 Certification

Purpose: The physical alteration of water bodies in West Virginia, including wetlands and streams, is regulated by federal and state statutes under Section 401 (Certification) and Section 404 (Permits) of the Federal Clean Water Act.

Section 404 of the Clean Water Act: the U.S. Army Corps of Engineers (Corps) regulates the discharge of dredged and/or fill material in waters of the U.S. Under Section 10 of the Rivers and Harbors Act of 1899, the Corps regulates work in navigable waters of the U.S.

1. The Corps jurisdiction for waters of the U. S. is based on the definitions and limits of jurisdiction contained in 33 CFR 328, which states navigable waters, their tributaries, and adjacent wetlands are, in part, waters of the U.S. Some examples of jurisdictional waters may include ephemeral, intermittent, and perennial streams, wetlands, lakes, and ponds.
2. The term fill material means material placed in waters of the U.S., where the material has the effect of replacing any portion of a water of the U. S. with dry land or changing the bottom elevation of any portion of a water. Examples of “fill material” include rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in waters of the U.S. Placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills and placement of overburden, slurry, or tailings or similar mining-related materials are also defined as discharge of fill material and regulated under section 404.
3. Projects involving the discharge of dredged and/or fill material into waters of the U.S. require authorization from the Corps of Engineers.

Section 401 of the Clean Water Act requires that any applicant for a Section 404 permit also obtain a Water Quality Certification from the State. The purpose of the certification is to confirm that the discharge of fill materials will be in compliance with the State’s applicable Water Quality Standards. The West Virginia Department of Environmental Protection (WVDEP), in conjunction with the West Virginia Division of Natural Resources certifies physical alterations under section 401 of the Clean Water Act and state water quality standards [Title 46, Series 1, Legislative Rules Governing Water Quality Standards].

Anything with a defined bed and banks is a stream. Be careful not to assume that ditches are exempt from regulation.

Note: Performing unauthorized work in waters of the U.S. or failure to comply with the terms and conditions of an issued permit can have serious consequences. Resolutions to unauthorized or non-compliance work can include mandatory restoration, extensive after the fact permitting, additional compensatory mitigation, and the potential for monetary penalties.

404 Review Process:

- **Jurisdictional Determination:** Prior to submitting a permit application, applicants are encouraged to prepare and submit a Jurisdictional Determination (JD) Report. This report provides descriptions and mapping to identify the limits of a project site, in addition to the limits of waters of the U.S. The JD report typically includes information such as location maps; plan views of all waters of the U.S., field data sheets, and photographs. Upon completion of JDs, applicants are encouraged to design projects to avoid work in waters of the U.S. The permit application process can be avoided if proposed work occurs exclusively in uplands.

- **Pre-Application Meetings:** For complex and/or controversial projects, applicants are encouraged to submit preliminary information to the Corps and request a pre-application meeting. Such meetings provide applicants with early input and feedback on projects, recommendations for avoidance minimization, and consideration of the need for compensatory mitigation. Pre-application meetings may involve Corps project managers, in addition to representatives of federal and state resource agencies.

404 Permit Types: There are two categories of permits pursuant to Section 404 and Section 10. These include Standard Permits and General Permits. Standard Permits include Individual Permits and Letters of Permission (LOPs). General Permits include Nationwide Permits and Regional Permits. Each permit type is further summarized below.

- **Individual Permit:** Individual permits involve the comprehensive evaluation of specific information related to a proposed project. The process includes the solicitation of input from the public and resource agencies through publication and distribution of a public notice, an evaluation of the aquatic resource effects of the project relative to the Section 404(b) (1) Guidelines, full public interest review pursuant to the National Environmental Policy Act of 1969 (NEPA), and ultimately the preparation of an environmental assessment (EA) or environmental impact statement (EIS). The review time of an Individual Permit varies depending on the overall impacts, level of complexity, and degree of controversy.
- **Letter of Permission:** Letters of permission (LOPs) are a form of abbreviated standard permit process. This process includes coordination with federal and state resource agencies. LOPs may be used to authorize activities subject to Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, or both. Proposed work being evaluated through this process includes projects that are minor in nature, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition. LOP procedures serve to reduce administrative procedures and expedite permit decisions. The review time for LOPs varies depending on the level of agency coordination required, but may range from one to several months.
- **Nationwide Permits:** Nationwide permits (NWP) are a type of general permit issued nationally for a category of activities that are typically similar in nature and result in not more than minimal adverse individual and cumulative impacts and satisfy other public interest factors. Some NWPs and/or established thresholds require applicants to submit a Pre-construction Notification to the Corps prior to commencing regulated work, while other NWPs may be used by applicants without prior notification, provided applicants comply with all terms and conditions of the NWPs, including any applicable Regional Conditions. Some examples of NWPs include NWP 13 for Bank Stabilization, NWP 14 for Linear Transportation Projects, NWP 50 for Underground Coal Mining Activities, NWP 27 for Stream and Wetland Restoration and NWP 37 for Emergency Watershed Protection and Rehabilitation. The review time for most NWPs is 45 days from receipt of a complete application, however, practical experience demonstrates that it can take from 3 – 9 months. Some NWPs, including those associated with coal mining, do not have specified timeframes.
- **Regional Permits:** Regional Permits (RPs) are a type of general permit issued on a statewide or regional basis for a category of activities that are typically similar in nature and result in not more than minimal adverse individual and cumulative impacts and satisfy other public interest factors. Regional Permits are coordinated with federal and state resource agencies during their development and provide an expedited permit process for types of work resulting in minimal adverse individual and cumulative effects. Some examples of RPs include the

Regional Permit for Boat Docks and the Regional Permit for Abandoned Mine Lands. The review time for RPs is generally like those associated with NWP, typically 45 days from receipt of a complete application, however, practical experience demonstrates that it can take from 3 – 9 months.

401 Certification: For Individual 404 permits, an applicant must also apply to the state for Certification under Section 401. The state is required to determine application completeness within 60 days of receipt. The applicant must then publish a class 1 legal advertisement in a local newspaper for a 30-day comment period. The state has up to one year to issue, deny, or waive certification. Since the Section 404 permit is contingent on the state's certification, the Corps may not issue a permit if state certification is denied.

Permit Cost: 401 permit application fee: \$ 350 if an individual certification is required
404 permit application fee: Not to exceed \$100.00

For Nationwide and Regional General Permits, notification to WVDEP for Section 401 Certification as well as notification to US Fish and Wildlife Service for endangered species consultation and the State Historic Preservation Office for cultural and historic resource considerations are made by the Corps as part of the Section 404 application process.

For information on 401 Certification regarding streams and wetland go to:
<http://www.dep.wv.gov/WWE/Programs/Pages/401Certification.aspx>

For a brochure about removal of wood debris go to: <http://www.wvca.us/wvwn/publications.cfm>

Clean Water Act Section 404 Permit and 401 Certification for Individual Landowners

The Corps, WVCA, WVDEP, and WVDNR have signed an interagency memorandum for the coordination of requests by individual landowners or for WVCA sponsored projects to perform in-stream work under the Clean Water Act Section 10 and Sections 404 and 401.

Purpose: On behalf of individual landowners, or for WVCA-sponsored projects, the WVCA may perform a site visit to provide guidance to landowners proposing work within streams and to collect the information required for the development of a Stream Management Plan (SMP). The SMP typically includes pre- and proposed construction plan and cross section drawings of the reach of stream in which the landowner of WVCA is proposing restoration and/or maintenance. Drawings in the SMP typically include dimensions and the amount and types of materials to be placed within, or excavated from, the stream.

The SMP has become a valuable tool for the interagency review of proposed stream work within the State. The SMP may also provide the information necessary for the Corps to evaluate the proposal and determine permit requirements, if any. The SMP also provides a clear, concise document and plan for the individual landowner or WVCA to complete the project.

Eligible Activities Include:

4. Excavation
5. Streambank stabilization
6. Debris removal
7. Channel restoration
8. Maintenance

This permit program is promoted as a one-stop shop because the WVCA notifies all other government agency permit programs that may be involved in the process. This would normally require many months of planning and preparation on the part of the landowner.

Review Process: Landowner contacts WVCA to request assistance with in-stream activity. WVCA will assess their current workload to determine if resources are available to perform a site visit and develop a SMP. If resources are not available, the WVCA will advise the landowner to contact the appropriate Corps office. The Corps will then process the request following their standard procedures.

If WVCA resources are available, the WVCA will arrange a site visit to provide guidance to the landowner and develop the SMP. WVCA will then submit the SMP to WVDEP and WVDNR to determine the requirement for Individual 401 Water Quality Certification and for potential field review. WVDNR will forward the SMP to the Corps.

Upon Corps review, if it is determined the project would result in a discharge of dredged or fill material into waters of the U.S. and the discharge may be authorized under an existing general permit, such as a Nationwide Permit (NWP), the Corps will provide the landowner written verification that the work, as proposed in the SMP, is authorized or the conditions for authorization. The Corps will provide the landowner with a copy of the SMP, and copy(s) of the applicable NWP(s), any conditions for authorization, and a form to return to the Corps when the work is complete.

If it is determined the project would not result in a discharge of dredged or fill material into waters of the U.S., or if the project qualifies for an exemption, the Corps will provide the landowner written verification that authorization from the Corps is not required, based on the description of the proposed work in the SMP. The landowner will be provided a copy of the SMP.

Restrictions and limitations: There are certain restrictions and/or projects that may not qualify through this process. Larger projects such as those encompassing greater than 1000 linear feet of stream or the excavation of more than 3000 cubic yards of material may not qualify. In addition, there are certain restrictions regarding the removal of woody vegetation. In most cases, riparian buffer plantings and no disturbance of existing vegetation are important aspects of all projects. Islands that have woody vegetation cannot be disturbed.

Permit Cost: 401 permit application fee: \$ 350 if an individual certification is required
404 permit application fee: Not to exceed \$100.00

Contact Information:

West Virginia Conservation Agency
Phone: 304-872-4302

Landowners can do the following without a permit:

- Fallen trees may be pulled from a stream by vehicle or motorized equipment from **top of streambanks** using winches, chains or cables.
- Handheld tools like chainsaws, axes and handsaws may be used to cut debris in the waterway into smaller pieces.
- Downed trees still attached to streambanks can be cut to the stump. Do not remove the stumps. They keep streambanks from eroding.
- All trees and brush removed from the waterway must be removed from the floodplain.

A permit is required if the work will:

- Disturb the stream bed or bank
- Requires the use of machinery like excavators or backhoes in the stream channel or **below the top** of the stream bank.

For a brochure about removal of wood debris go to:
<http://www.wvca.us/wvwn/publications.cfm>