

## **Standard Conditions of State 401 Water Quality Certification Applicable to Nationwide Permits**

The following Standard Conditions are set in accordance with the Water Pollution Control Act W. Va. Code §22-11 (2014), Requirements Governing Water Quality Standards §47-2 (2025), Rules for Individual State Certification of Activities Requiring a Federal Permit §47-5A (2014), Antidegradation Implementation Procedures §60-5 (2008), and/or Wildlife Resources Declaration of Policy, W. Va. Code §20-2-4 (2017).

1. To ensure project compliance with state water quality requirements applicable to these Nationwide Permits, notification is to be provided prior to construction to the West Virginia Department of Environmental Protection (WVDEP) for any permitted activity for which the U.S. Army Corps of Engineers (USACE) requires pre-construction notification (PCN), in accordance with Nationwide Permit General Condition 32.
2. To compensate for unavoidable impacts to aquatic resources as a result of the discharge of dredged or fill material, the applicant must provide proof of compensatory mitigation (as outlined in West Virginia 401 Water Quality Certification Standard Condition 15 below) to WVDEP prior to construction, for an activity resulting in cumulative permanent impacts to streams greater than 300 linear feet or causing the loss of greater than 1/10 acre of wetlands. This condition is required in accordance with Rules for Individual State Certification of Activities Requiring a Federal Permit §47-5A-6 (2014).
3. To protect the biological integrity of the aquatic ecosystem, culverted crossings shall be sized and installed in a manner to allow the passage of aquatic life and freely pass bankfull flows. Exceptions to this requirement would be when culvert placement is on bedrock, or when stream gradient is equal to or greater than 4%, or when bankfull elevation is greater than final surface elevation.
4. To protect the designated uses of waters of the state, the permittee shall investigate for the presence of water supply intakes or other activities within 1/2 mile downstream of the activity, which may be affected by increased suspended solids and turbidity, caused by work in the watercourse. The permittee shall give notice to operators of any such water supply intakes and such other water quality dependent activities as necessary before beginning work in the watercourse in sufficient time to allow preparation for any change in water quality.
5. To ensure temporary stream and wetland crossings have no significant adverse impact to aquatic resources, the following procedures and requirements shall be followed. At each stream crossing, substrate in the channel will be removed and stockpiled separately from other excavated material. This native material must be reused in restoration of the stream channel, which is to be completed within 72 hours or as soon as practicable after completion of the crossing. Upon final stream bed restoration, the stream must have similar physical characteristics to include substrate, pattern, profile, dimension and embeddedness of the original stream channel. At each wetland crossing, any excavated material from the top 12 inches of soil will be removed and stockpiled separately from other excavated material. This native material must be reused in restoration of the wetlands temporarily impacted by the open cut crossing and restoration must be completed within 72 hours or as soon as practicable after completion of the crossing. Stream crossings will be conducted as close to a right angle to the watercourse as

practicable and the area of in-stream activity will be limited to reduce disturbance.

6. Spoil materials from the watercourse or onshore operations, including sludge deposits, shall not be dumped in the watercourse, or deposited in wetlands or other areas where the deposit may adversely affect the surface waters of the state consistent with the requirements set forth in the Water Pollution Control Act, W. Va. Code §22-11-4.a.16 (2014).
7. To protect aquatic resources from unauthorized discharge of pollutants, storage and refueling areas shall not be located within any surface water body. All spills shall be promptly reported to the State Center for Pollution, Toxic Chemical and Oil Spills, 1-800-642-3074.
8. To reduce sedimentation of aquatic resources and increased turbidity, it is required that proper stabilization of all disturbances below the ordinary high-water mark of waters shall be installed within 24 hours or as soon as practicable to prevent erosion. Where possible, stabilization shall incorporate revegetation using bioengineering as an alternative to riprap. If riprap is utilized, it must be of such weight and size that bank stress or slump conditions shall not be created due to its placement. Fill must be clean, nonhazardous and of such composition that it shall not adversely affect the biological, chemical or physical properties of the receiving waters. Unsuitable materials include but are not limited to: copper chromium arsenate (CCA) and creosote treated lumber, car bodies, tires, large household appliances, and asphalt. To reduce potential slope failure and/or erosion behind the material, fill containing concrete must be of such weight and size that promotes stability during expected high flows. Loose large slab placement of concrete sections from demolition projects greater than 36 inches in its longest dimension are prohibited. Rebar or wire in concrete shall not protrude further than one inch. All activities require the use of clean and coarse non-erodible materials with 15% or less of like fines that is properly sized to withstand expected high flows.
9. To protect the water quality of aquatic resources, runoff from any storage areas or spills shall not be allowed to enter storm sewers without acceptable removal of solids, oils and toxic compounds. Discharges from retention/detention ponds must comply with permit requirements of the National Pollutant Discharge Elimination System (NPDES) permit program of the WVDEP. This condition is required in accordance with the Water Pollution Control Act, W. Va. Code §22-11-4.a.16 (2014).
10. To protect aquatic resources from discharge associated with land disturbance activities, which are one acre or greater in total area, the project proponent must comply with the NPDES or other state stormwater permit requirements as established by the WVDEP, if applicable. Any land disturbances are required to use Best Management Practices (BMPs) for Sediment and Erosion Control, as described in the latest WVDEP's Erosion and Sediment Control Best Management Practice Manual, or similar documents prepared by the West Virginia Division of Highways. These handbooks are available from the respective agency offices. This condition is required in accordance with WV Water Pollution Control Act, W. Va. Code §22-11-4.a.16 (2014).
11. To protect aquatic resources from unpermitted discharges consistent with the requirements of the Water Pollution Control Act, W. Va. Code §22-11-4.a.16 (2014), concrete shall not be permitted to enter the watercourse unless contained by tightly sealed forms or cells. Concrete handling equipment shall not discharge waste washwater into wetlands or watercourses at any time without adequate wastewater treatment as approved

by the WVDEP.

12. To protect stream stability and avoid unnecessary degradation of aquatic resources, the project proponent should avoid removal of riparian vegetation to the greatest extent practicable.
13. To protect aquatic life and reduce turbidity and disturbance to aquatic resources, the operation of equipment in-stream shall be minimized and accomplished during low flow periods when practical. Ingress and egress for equipment outside the immediate work area requires prior approval of the WVDNR Office of Land and Stream.
14. The following mitigation guidelines are established to ensure no significant adverse impact to the chemical, physical, hydrologic or biological integrity of wetlands and streams without compensating for the aquatic resource functions that will be lost as a result of the permitted activity. The discharge of dredged or fill material into a stream or wetland is authorized based upon the following criteria:
  - A. Greater than 1/10 acre of cumulative permanent impact to wetland(s) (including wetland type conversion) requires prior notification describing the project location, impacts, and plan for mitigation to be submitted to the WVDEP.
  - B. The amount of fill in a wetland, wetland complex or wetland system without mitigation is not to cumulatively exceed 1/10 acre. The West Virginia Wetland Rapid Assessment Method (WVWRAM) is the preferred assessment methodology to assist with the determination of required mitigation. The metric is available at <https://dep.wv.gov/WWE/watershed/wetland/Pages/WVWRAM.aspx>.
  - C. Cumulative permanent impacts to perennial and/or intermittent streams greater than 300 linear feet require prior notification describing the project location, impacts, and plan for mitigation to be submitted to the WVDEP. The West Virginia Stream Wetland Valuation Metric (SWVM) is the preferred assessment methodology to assist with the determination of required mitigation. The metric is available at the USACE Huntington and Pittsburgh Districts websites. A link to SWVM is also available at (<https://dep.wv.gov/WWE/watershed/wetland/Pages/WVWRAM.aspx>). In all instances, mitigation for all impacts incurred through use of this RGP must first be directed to elimination of the impacts, then minimization of the impacts and lastly through compensatory mitigation. In many cases, the environmentally preferable compensatory mitigation may be provided through an approved mitigation bank or the West Virginia In-Lieu Fee Program. Permittee-responsible compensatory mitigation may be performed using the methods of: restoration, enhancement, establishment, and in certain circumstances, preservation. In general, the required compensatory mitigation should be located in the same watershed as the impact site and located where it is most likely to successfully replace lost functions and services as the impacted site. However, the use of mitigation banks or in-lieu fee for in-kind replacement is not restricted to the major watershed in which the impact has occurred until such time as mitigation banks or in-lieu projects are developed in each major watershed.

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### **Wetland Acquisition**

In certain instances, the WVDEP Division of Water and Waste Management (DWWM) may consider the acquisition of existing wetlands. Acquisition ratios are the following:

- 5 to 1 for open water wetlands
- 10 to 1 for wet meadow/emergent wetlands
- 15 to 1 for scrub-shrub and forested wetlands

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

All wetlands acquired, using the acquisition method of mitigation, shall either be deeded to the WVDNR Public Land Corporation for management by the Wildlife Resources Section or placed under a conservation easement and be protected from disturbance by the permittee or their designee. Third party oversight of the conservation easement by a non-profit conservation organization is preferred.

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

These requirements are established in accordance with the Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 33 C.F.R. §332 (2008).

15. To ensure the protection of West Virginia's high quality and special aquatic resources, written notification must be provided to the WVDEP for use of these nationwide permits resulting in work in streams set forth in Sections A, B, and/or C below.
  - A. Tier 3 Protection is provided for Outstanding National Resource Waters to include, but are not limited to, all streams and rivers within the boundaries of Wilderness Areas designated by The Wilderness Act 16 U.S.C. §1131; all Federally designated rivers under The Wild and Scenic Rivers Act 16 U.S.C. §1271; 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 16 U.S.C. §461; and pursuant to Antidegradation Implementation Procedures §60-5 (2008), those waters whose unique character, ecological or recreational value, or pristine nature constitutes a valuable national or state resource. This condition is

required in accordance with Tier 3 Protection Review Procedures of Antidegradation Implementation Procedures §§60-5-6, 7 (2008). A current shapefile and listing of Tier 3 streams are located on the Water Quality Standards webpage at: <https://dep.wv.gov/wqe/programs/wqs/pages/default.aspx>.

- B. Naturally-Reproducing Trout Streams are protected to ensure the continued propagation and maintenance of naturally-reproducing trout. For information about specific streams contact WVDEP Water Quality Standards and Assessment Section (304-926-0440).
  - C. West Virginia Natural Stream Preservation Act identifies the following streams or rivers as protected from activities that would impound, divert or flood the body of water: Greenbrier River from its confluence with Knapps Creek to its confluence with the New River, Anthony Creek from its headwaters to its confluence with the Greenbrier River, Cranberry River from its headwaters to its confluence with the Gauley River, Birch River from Cora Brown Bridge in Nicholas County to the confluence of the river with the Elk River, and New River from its confluence with the Greenbrier River to its confluence with the Gauley River. This condition is required consistent with the authority and requirements of the Natural Streams Preservation Act W. Va. Code §22-13 (2011).
16. To protect freshwater mussel populations and ensure compliance with state and federal wildlife protection laws, applicants must complete all necessary coordination prior to submitting a PCN for any activity that may affect the bed or bank of a Section 10 waterway. For streams with known mussel populations, applicants must coordinate with the West Virginia Division of Natural Resources (WVDNR) to determine if a mussel survey is required. For streams that may support federally listed mussel species, coordination with the U.S. Fish and Wildlife Service (USFWS) is also required. Any required surveys must follow the *West Virginia Mussel Survey Protocol* and be conducted by qualified personnel. This condition is required in accordance with the West Virginia Mussel Survey Protocol, WVDNR (2022) and W. Va. Code §20-2-4 (Wildlife Resources Declaration of Policy), §58-60-5.15 (Fishing Regulations).
  17. In some cases, the USACE may determine that an activity does not impact federally jurisdictional water and therefore does not require a §404 Clean Water Act permit. Any applicant proposing to impact federally non-jurisdictional waters should contact WVDEP to obtain necessary approvals.
  18. Authorization under this certification does not relieve the permittee of the responsibility to obtain any other federal, state, or local permits that may be required.
  19. All activities authorized under this certification shall ensure no activity causes or contributes to a violation of any applicable numeric or narrative water quality criteria, designated uses, or antidegradation provisions of the receiving waters.
  20. To protect the chemical, physical and biological integrity of waters of the state, any applicant proposing to conduct Horizontal Directional Drilling (HDD) beneath a Section 10 waterway must prepare and submit the following plans for review and approval by the WVDEP prior to commencement of construction:
    - **Inadvertent Return Contingency Plan (IRCP):** Must identify potential locations of drilling fluid loss, include a probability analysis of inadvertent return risk (considering geology, drilling depth and pressures), describe monitoring



protocols, containment and cleanup procedures and notification requirements. The IRCP must also specify operational responses, including cessation of drilling activities if pressure loss is detected or if visible drilling fluid is observed in surface waters or wetlands.

- **Groundwater Protection Plan (GPP):** Must be prepared in accordance with WVDEP Groundwater Protection Rules. Submission of the full GPP is not required; however, documentation demonstrating WVDEP approval of the plan must be provided.
- **Operations Contingency Plan (OCP, if applicable):** Required only if the utility line transports a substance other than water. This plan must outline site-specific emergency response procedures for drilling fluid releases, line breaches, or equipment failures.

All plans must be prepared in accordance with the Groundwater Protection Regulations §47-58 (1994).

21. To protect water quality and ensure compliance with West Virginia Water Quality Standards, the WVDEP reserves the right to require an Individual Section 401 Water Quality Certification for any activity proposed under these nationwide permits when the nature, scope, or location of the activity presents a potential for significant degradation of aquatic resources. This includes, but is not limited to, situations where cumulative or secondary impacts, site-specific sensitivities, or the presence of high-quality or special resource waters indicate that general certification may be inadequate to ensure compliance with applicable standards.
22. Applicants proposing surface water withdrawals associated with activities authorized under the Nationwide Permits in Section 10 waters shall not exceed withdrawal thresholds for watershed size and streamflow as defined by guidance provided under the West Virginia Water Resources Protection Act. Documentation of compliance must be included in the Pre-Construction Notification provided to WVDEP per West Virginia 401 Water Quality Certification Standard Condition 1. Projects that do not meet this condition require an individual Section 401 Water Quality Certification.
23. Any activity that constructs, replaces, modifies, or maintains structures to improve the passage of fish or other aquatic organisms (including fishways, bypass channels, culvert replacements, tidal gate modifications, and fish screens) shall be planned, designed, and implemented to maintain or enhance biological connectivity and minimize adverse impacts to aquatic life and water quality. Project proponents must demonstrate that proposed structures will not cause or contribute to the violation of state water quality standards, aquatic life protection criteria, or designated uses.

## NOTES

- To ensure appropriate agency coordination stream activities permitted under the nationwide permits may require that a West Virginia Public Lands Corporation Right of Entry be obtained. Application for Stream Activity should be made to the WVDNR Office of Lands and Streams (<https://wvdnr.gov/lands-waters/office-of-lands-and-streams/> 304-558-3225).

- Activity within the Federal Emergency Management Agency delineated 100-year floodplain may require notification to the appropriate county 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>).
- Applicants should give consideration to utilizing WVDNR's West Virginia Natural Heritage Program database at <https://wvdnr.gov/guidelines-for-data-requests>. This resource is designed for the applicant as an informative preplanning tool. It allows the applicant to know, in advance, if they will be encountering any federally listed threatened or endangered species, 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 Database Coordinator, PO Box 67, Elkins West Virginia 26241. Information on what to submit to receive an inquiry should be directed to the database coordinator (304-637-0245).
- If applicable, the permittee must measure and report Large Quantity Water use pursuant to the Water Resources Protection Act, W. Va. Code §22-26-1 (2014).