



west virginia department of environmental protection

Division of Mining and Reclamation
601 57th Street SE
Charleston, WV 25304
Telephone: (304) 926-0490
Fax: (304) 926-0456

Joe Manchin III, Governor
Randy C. Huffman, Cabinet Secretary
www.wvdep.gov

September 8, 2008

District Engineer
Huntington District
U.S. Army Corps of Engineers
502 Eighth Avenue
Huntington, West Virginia 25070-2070

RE: Modification of State 401 Certification dated
October 12, 2007
Nationwide Permit Reissuance for the State of
West Virginia, Public Notice No. LRH-2006-2227-
WV, issuance date March 26, 2007

Dear Sir:

The West Virginia Department of Environmental Protection Division of Mining and Reclamation has modified its previous State 401 Certification and recertifies the following Nationwide Permit Nos. 21, 49, and 50 with the following revised Standard Conditions. The Specific Certification Conditions of Nationwide Permit Nos. 21, 49, and 50 remain as previously certified as enclosed herein.

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

The following are revised Standard Conditions of West Virginia's State 401 Water Quality Certification that apply to the Nationwide Permit Nos. 21, 49, and 50 as published on March 12, 2007, in Part II of the Federal Register (72FR 11092), by the U.S. Army Corps of Engineers. These conditions must be implemented into any activity authorized by a U.S. Army Corps of Engineers Nationwide Permit Nos. 21, 49, and 50. The State's certification of these Nationwide Permit activities does not replace the need for the applicant proposing an activity under the Nationwide Permit Program from obtaining other applicable permits/authorizations from the West Virginia Department of Environmental Protection and/or the Division of Natural Resources. Each permittee shall, if they do not understand or are not aware of applicable Nationwide Permit conditions, contact the Corps of Engineers prior to conducting any activity authorized by a Nationwide Permit in order to be advised of applicable conditions. These 401

Promoting a healthy environment.

Water Quality Certifications, with all attendant Standard Conditions and Specific Conditions, are applicable to Corps of Engineers Civil Works Projects in West Virginia.

1. The permittee will investigate for the presence of water supply intakes or other activities within 1/2 mile downstream, which may be affected by suspended solids and turbidity increases caused by work in the watercourse. The permittee will give notice to operators of any such water supply intakes and such other water quality dependent activities as necessary before beginning work in the watercourse in sufficient time to allow preparation for any change in water quality.
2. Excavation, dredging or filling in the watercourse will be done only to the extent necessary to achieve the project's purpose.
3. Spoil materials from the watercourse or onshore operations, including sludge deposits, will not be dumped in the watercourse, or deposited in wetlands or other areas where the deposit may adversely affect the surface or ground waters of the state.
4. The permittee will employ measures to prevent or control spills from fuels, lubricants or any other materials used in connection with construction and restrict them from entering the watercourse. Storage areas for chemicals, explosives, lubricants, equipment fuels, etc., as well as equipment refueling areas, must include containment measures (e.g., liner systems, dikes, etc.) to ensure that spillage of any material will not contact surface or ground waters. Storage areas and refueling areas shall be a minimum distance of 100 feet from any surface water body. Storage and refueling areas must be located outside the West Virginia Division of Health's established wellhead protection zone when domestic water supply wells are present. All spills shall be promptly reported to the State Center for Pollution, Toxic Chemical and Oil Spills, 1-800-642-3074.
5. Upon completion of earthwork operations, all fills in the watercourse or onshore and all other areas onshore disturbed during construction will be properly stabilized to prevent soil erosion. Where possible, stabilization shall incorporate revegetation using bioengineering as an alternative to rip rap. If rip rap is utilized, it is to be of such weight and size that bank stress or slump conditions will not be created due to its placement. Fill is to be clean, nonhazardous and of such composition that it will not adversely affect the biological, chemical or physical properties of the receiving waters. To reduce potential slope failure and/or erosion behind the material, fill containing concrete must be of such weight and size that promotes stability during expected high flows. Loose large slab placement of concrete sections from demolition projects greater than thirty-six inches in its longest dimension and tires are prohibited. Rebar or wire in concrete should not extend further than one (1) inch. All activities require the use of clean and coarse non erodible materials with 15% or less fines, that is properly sized to withstand expected high flows.
6. Runoff from any storage areas or spills will not be allowed to enter storm sewers without acceptable removal of solids, oils and toxic compounds. Discharges from retention/detention ponds must comply with permit requirements of the National Pollutant Discharge Elimination System permit program of the West Virginia Department of Environmental Protection, Division of Water and Waste Management.

7. Land disturbances, which are integral to the completion of the permitted activity and are one (1) acre or greater in total area, must comply with the National Pollutant Discharge Elimination System stormwater permit requirements as established by the West Virginia Department of Environmental Protection, Division of Water and Waste Management. Best Management Practices for Sediment and Erosion Control, as described in the West Virginia Department of Environmental Protections Erosion and Sediment Control Best Management Practice Manual, 2006, or similar documents prepared by the West Virginia Division of Highways, U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS), or West Virginia Department of Environmental Protection's, Division of Mines and Reclamation may be used. These handbooks are available from the respective agency offices.
8. Green concrete will not be permitted to enter the watercourse unless contained by tightly sealed forms or cells. Concrete handling equipment shall not discharge waste washwater into wetlands or watercourses at any time without adequate wastewater treatment as approved by the West Virginia Department of Environmental Protection, Division of Water and Waste Management.
9. In stream work in warm water fishery streams and their adjacent tributaries during the fish spawning season, April - June and trout waters and their adjacent tributaries during the trout water fish spawning season September 15-February 28 requires a spawning season waiver from the West Virginia Division of Natural Resources, Wildlife Resources Section. For information about specific streams contact Wildlife Resources Section, Trout Fisheries Program at 304-637-0245 or Warm Water fisheries Program 304-558-2771. In stream work may occur during the respected spawning season in waters not considered fisheries without a waiver if all reasonable measures are taken to minimize turbidity and sedimentation downstream associated with the proposed project and the in-stream work is less than 1 day in duration.
10. Removal of mature riparian vegetation not directly associated with the project construction is prohibited. Disturbance and removal of vegetation from project construction area is to be avoided, where possible, and minimized when necessary. Removal of vegetation shall not be allowed where stream bank stability under normal flow conditions would be compromised.
11. Operation of equipment instream is to be minimized and accomplished during low flow periods when practical. Ingress and egress for equipment shall be within the work site. Location of ingress and egress outside the immediate work area requires prior approval of the West Virginia Department of Environmental Protection, Division of Water and Waste Management in concurrence with the West Virginia Division of Natural Resources.
12. The permittee will comply with water quality standards as contained in the West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2.
13. Stream activities permitted under the Nationwide Permit Program require that a West Virginia Public Lands Corporation Right of Entry be obtained. Application for this authorization should be made to the West Virginia Division of Natural Resources, Office of Real Estate Management, Capitol Complex, Building 3, Room 643, Charleston, West Virginia 25305. Any activity within the 100-year floodplain requires approval from the

appropriate Floodplain Manager. The following website provides a statewide listing of Floodplain Managers in West Virginia: www.wvdhsem.gov/fplain_mgt1.htm.

14. The deposit of dredged or fill materials in island backchannels, embayments or stream mouths is not certified for any of the Nationwide Permits. Stream mouth is defined as the area extending 100 feet upstream and 100 feet downstream on receiving streams that are classified as a Section 10 stream.
15. This Standard Condition requires an Individual State Water Quality Certification for Nationwide Permits; 7, 21, 29, 33, 39, 45, 48, 49, and 50 for work in any of the rivers or streams listed in Sections A through D below. Prior written notification to the West Virginia Department of Environmental Protection, Division of Water and Waste Management, is required for use of Nationwide Permits 6, 12, 13, 14, 16, 17, 18, 19, 27, 40, 41, and 42 in any of the streams listed in Sections A through D as follows, except as may be provided for in the individual nationwide permit:
 - A. 'Waters of Special Concern' – includes all of those waters listed in Appendix A of 60 CSR 5, Waters of Special Concern, including but not limited to, naturally reproducing trout streams, federally designated rivers under the Wild and Scenic Rivers Act, Public law 95-542, as amended, 16 U.S.C. §§ 1271 et. seq. (Bluestone River from the upstream boundary of Pipestem State Park to Bluestone Reservoir, Meadow River from near the US 19 bridge to its junction with the Gauley River, also included are all rivers within the Monongahela National Forest designated as National Wild and Scenic Study Rivers), waters in state parks and forests, waters in National Parks and Forests, waters designated under the National Parks and Recreation Act of 1978, and waters with unique or exceptional aesthetic, ecological, or recreational value.
 - B. All naturally reproducing trout streams in the following counties; Barbour, Fayette, Grant, Greenbrier, Hampshire, Hardy, Mercer, Mineral, Monroe, Nicholas, Pendleton, Pocahontas, Preston, Raleigh, Randolph, Summers, Tucker, Upshur and Webster. For information about specific streams contact Wildlife Resource Section, Trout Fisheries Program at 304-637-0245;
 - C. 'Outstanding National Resource Waters' - In all cases, waters that constitute an Outstanding National Resource shall be maintained and protected as necessary; included are the following rivers and their tributaries as contained within the boundaries of the designated National Wilderness Areas or the headwaters of such rivers and their tributaries; Cranberry River, Red Creek, Laurel Fork, and Otter Creek. West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2.
 - D. 'West Virginia Natural Stream Preservation Act' - The following streams or rivers are protected from activities that would impound, divert or flood the body of water: Greenbrier River from its confluence with Knapps Creek to its confluence with the New River, Anthony Creek from its headwaters to its confluence with the Greenbrier River, Cranberry River from its headwaters to its confluence with the Gauley River, Birch River from Cora Brown Bridge in Nicholas County to the confluence of the river with the Elk River, and New River

from its confluence with the Greenbrier River to its confluence with the Gauley River.

16. Wetland and Stream Mitigation guidelines - The discharge of fill material into a stream or wetland is authorized based upon the following criteria:
1. One-tenth to $\frac{1}{2}$ acre of wetland impact requires a Pre-Construction Notice (PCN) and plan for mitigation to be submitted to the Corps of Engineers along with the proposed plan for mitigation provided to the state for approval.
 2. The amount of fill in a wetland, wetland complex or wetland system without mitigation is not to cumulatively exceed 1/10 acre.

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

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

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

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

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

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

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

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

5 to 1 for open water wetlands;

10 to 1 for wet meadow wetlands and

15 to1 for scrub-shrub and forested wetlands.

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

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

Streams. Compensatory mitigation projects for stream impacts should attempt to replace stream functions. Acceptable functional assessments can be used to assess impacts and ecological lift from a proposed project. Mitigation ratios will be determined on a case-by-case basis based on the pre and post condition stream quality and complexity of the mitigation project. Riparian zones used for compensatory mitigation purposes may require protection through deed restrictions or conservation easements by the permittee or their designee.

17. Streams with Mussel populations.

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

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

HUNTINGTON DISTRICT

James River Drainage
 South Fork of Potts Creek
Kanawha River Drainage
 Pocatalico River
 Kanawha River above Charleston
 Coal River
 Elk River (downstream of Webster Springs)
 Big Sandy Creek
New River
 Bluestone River
 Greenbrier River
 Indian Creek

Little Kanawha River Drainage
Little Kanawha River
Hughes River
North and South Fork of Hughes River
Steer Creek
Cedar Creek
Leading Creek
Reedy Creek
Spring Creek
Spruce Creek
Henry's Fork
Goose Creek
Middle Island Creek Drainage
Middle Island Creek
Meathouse Fork (below Indian Fork)
Buckeye Creek
Mud River Drainage
Mud River
Middle Fork
Trace Fork
Ohio Direct Drainage
Twelvepole Creek
Beech Fork
Tug Fork River (up stream of Kermit, WV)
Mill Creek (Jackson County)
Hurricane Creek

PITTSBURGH DISTRICT

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

18. Isolated Wetlands.

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

Water and Waste Management to obtain all necessary approvals for activities impacting any isolated wetlands.

Specific Conditions of State 401 Water Quality Certification
Applicable to Individual Nationwide Permits

Nationwide Permit No. 21 -- Surface Coal Mining Operations

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

*West Virginia 401 Water Quality Certification Special Conditions:

- A. Individual State Water Quality Certification is **required** for activities impacting any classification of stream listed in West Virginia 401 Water Quality Certification Standard Condition No. 15.
- B. Individual State Water Quality Certification is **required** for activities impacting an Intermittent or Perennial Stream(s).
- C. Individual State Water Quality Certification is **required** for Intermittent or Perennial Stream, crossing (linear transportation projects) e.g. haulroads, access roads, conveyor belts, and pipelines, greater than 100 linear feet per each crossing.
- D. Individual State Water Quality Certification is **required** for wetland impacts equal to or greater than ½ acre.

Nationwide Permit 49 -- Coal Remining Activities.

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

*West Virginia 401 Water Quality Certification Special Conditions:

- A. Individual State Water Quality Certification is **required** for activities impacting any classification of stream listed in West Virginia 401 Water Quality Certification Standard Condition No. 15.
- B. Individual State Water Quality Certification is **required** for activities impacting an Intermittent or Perennial Stream(s).
- C. Individual State Water Quality Certification is **required** for Intermittent or Perennial Stream, crossing (linear transportation projects) e.g. haulroads, access roads, conveyor belts, etc., greater than 100 linear feet per each crossing.
- D. Individual State Water Quality Certification is **required** for wetland impacts equal to or greater than ½ acre.

Nationwide Permit 50 -- Underground Coal Mining Activities.

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

*West Virginia 401 Water Quality Certification Special Conditions:

- A. Individual State Water Quality Certification is **required** for activities impacting any classification of stream listed in West Virginia 401 Water Quality Certification Standard Condition No. 15.
- B. Individual State Water Quality Certification is **required** for activities impacting an Intermittent or Perennial Stream(s).
- C. Individual State Water Quality Certification is **required** for Intermittent or Perennial Stream, crossing (linear transportation projects) e.g. haulroads, access roads, conveyor belts, etc., greater than 100 linear feet per each crossing.
- D. Individual State Water Quality Certification is **required** for wetland impacts equal to or greater than ½ acre.

State 401 Certification, as required by the Clean Water Act, is granted subject to the above special conditions and the standard conditions for Nationwide Permits in West Virginia. Certification shall be effective fifteen (15) days after receipt unless appealed under Title 47, Series 5A, Section 7, of the Code of State Regulations, State Certification of Activities Requiring Federal Licenses and Permits. The appeal must be in writing and set forth action complained of and the grounds upon which the appeal is based and sent to: Director, Division of Mining and Reclamation, West Virginia Department of Environmental Protection, 601 57th Street SE, Charleston, West Virginia 25304, Attention: 401 Certification Program.

Sincerely,



Thomas L. Clarke, Director

cc: U.S. Environmental Protection Agency
U.S. Fish and Wildlife Service
WVDNR - Wildlife Resources Section
WVDEP- Division of Water and Waste Management