

NATIONWIDE PERMITS FOR THE STATE OF WEST VIRGINIA

NWP 12

12. Utility Line Activities. Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

Utility lines: This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours. A “utility line” is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term “utility line” does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel

roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 31.) **(Sections 10 and 404)**

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

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 3: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 4: For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Nationwide Permit 12 Specific Regional Conditions:

- For those utility line projects requiring notification, a USGS topographical map shall be provided showing the overall project area identifying beginning and ending termini.
- Notification is required for utility lines not regulated by a State or Federal agency (Federal Energy Regulatory Commission, Public Service District, etc.) or to individual family residences.
- Notification is required for all work in waters of the U.S. associated with the construction of utility line substations.
- Notification is required for all work in streams (perennial, intermittent, and ephemeral) associated with the construction of foundations for overhead utility line towers, poles, and anchors.
- The maximum allowable timeframe for temporary work in waters of the U.S. is limited to one year, unless the permittee receives prior written approval from the Corps of Engineers granting a time extension.
- Notification for aerial transmission lines over Section 10 waters must include the nominal system voltage and the additional clearance above low steel for bridges, if available, or above maximum high water elevation.
- Note: All aerial crossings will have the following minimum clearances above the clearance required for bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed crossing. These clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length or span, and type of supports as outline in the Nation Electrical Safety Code. **For any non-electrical cable, the crossing must have a minimum clearance of 20 feet above the clearance required for bridges.**

| <u>NOMINAL SYSTEM VOLTAGE, KV</u> | <u>ADDITIONAL CLEARANCE, FEET</u> |
|-----------------------------------|-----------------------------------|
| 115 and below | 20 |
| 138 | 22 |
| 161 | 24 |
| 230 | 26 |
| 350 | 30 |
| 500 | 35 |
| 700 | 42 |
| 750-765 | 45 |

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

West Virginia 401 Water Quality Certification Special Conditions:

- A. Points of ingress and egress to streams 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 with concurrence from the West Virginia Division of Natural Resources.

- B.** Certification is limited to pipelines 36 inches or less in diameter. Individual stream crossings must be completed in a continuous, progressive manner and within 72 hours under normal (normal or below stream flow) conditions. Crossings on the Ohio, Kanawha, New and Monongahela Rivers and the Little Kanawha River, below the confluence with Hughes Rivers, are exempt from the 72-hour requirements, as are stream crossings requiring blasting. Whatever the situation, all stream activities shall be conducted in a continuous, progressive manner and be completed as rapidly as possible.
- C.** Shoreline restoration will be completed and stabilized in accordance with standard condition 5. Equipment tracking in wetlands will utilize protective mats when practical. Restoration of the disturbed areas will be completed within 72 hours of the completion of pipeline installation across the watercourse.
- D.** Surface disturbance will not extend beyond the right-of-way limits. Stream crossings will be conducted as close to a right angle to the watercourse as practical and the area of disturbance will be limited to reduce in stream activity.
- E.** Dredging for backfill material is not allowed.
- F.** Submarine-type pipeline crossings must be designed and constructed to prevent flotation and the possibility of leakage or rupture and the top of pipelines must be buried a minimum of three (3) feet below the stream bottom.
- G.** Where it is apparent that small boats, inner tubes, swimmers, etc. could be using the stream in the work area, easily seen warning signs must be placed a minimum of 50 feet upstream and downstream of the stream crossings construction site to advise stream users of the potential danger.
- H.** Individual State Water Quality Certification is required for pipelines transporting hazardous materials/substances as defined by the Toxic Substances Control Act, except pipelines carrying natural gas are exempt from this condition.
- I.** Individual State Water Quality Certification is required for utility lines within wetlands that would use or consider the use of herbicides for right-of-way maintenance.
- J.** Written notification to the Director of the Division of Water and Waste Management detailing the amount of water to be withdrawn by the intake structures is required. The proposed water withdrawal notification shall include sufficient detail to allow the resource agencies to determine if the proposed water withdrawal will have minimal impacts on aquatic resources.

- K. Individual State Water Quality Certification is required for an activity impacting greater than 200 linear feet on one or more of the streams listed in West Virginia State Certification, Standard Condition 15.
- L.  Individual State Water Quality Certification is required for perennial and intermittent stream impacts greater than 300 linear feet.
- M. No structure authorized by this permit shall entrain or impinge fish or any other aquatic life or impede or prevent fish movement upstream or downstream without specific written authorization from the West Virginia Department of Environmental Protection, Division of Water and Waste Management with concurrence from West Virginia Division of Natural Resources.

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR §§ 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR § 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. Navigation. (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. Aquatic Life Movements. No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably

culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

3. Spawning Areas. Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. Migratory Bird Breeding Areas. Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. Shellfish Beds. No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. Suitable Material. No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

7. Water Supply Intakes. No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. Adverse Effects From Impoundments. If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. Management of Water Flows. To the maximum extent practicable, the 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. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

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

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

12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are

encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

13. 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.

14. Proper Maintenance. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. Single and Complete Project. The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. Wild and Scenic Rivers. 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. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

17. Tribal Rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. Endangered Species. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a 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 NWP which “may affect” a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will review the documentation and determine whether it is sufficient to address ESA compliance for the NWP activity, or whether additional ESA consultation is necessary.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification

must include the name(s) of the endangered or threatened species that might be affected by the proposed work or that utilize the designated critical habitat that might be affected by the proposed work. The district engineer will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have “no effect” on listed species or critical habitat, or until Section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWP.

(e) Authorization of an activity by a NWP does not authorize the “take” of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the U.S. FWS or the NMFS, The Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word “harm” in the definition of “take” means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.noaa.gov/fisheries.html> respectively.

19. Migratory Birds and Bald and Golden Eagles. The permittee is responsible for obtaining any “take” permits required under the U.S. Fish and Wildlife Service’s regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The permittee should contact the appropriate local office of the U.S. Fish and Wildlife Service to determine if such “take” permits are required for a particular activity.

20. Historic Properties. (a) In cases where the district engineer determines that the activity may affect 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) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will review the documentation and determine whether it is sufficient to address section 106 compliance for the NWP activity, or whether additional section 106 consultation is necessary.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may 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 pre-construction notification must state which historic properties may be affected by the proposed work 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 resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties on which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR §800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. Discovery of Previously Unknown Remains and Artifacts. If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer 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. The district engineer will initiate the Federal, Tribal and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

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

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 31, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. Mitigation. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that 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 United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the 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 pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse effects of the proposed activity are minimal, and provides a project-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment. Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in minimal adverse effects on the aquatic environment.

(2) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(3) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) – (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(4) 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.

(5) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream rehabilitation, enhancement, or preservation, to ensure that the activity results in minimal adverse effects on the aquatic environment.

(e) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any project resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWPs.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the restoration or establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. 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 district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to establish a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or establishing a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(g) Permittees may propose the use of mitigation banks, in-lieu fee programs, or separate permittee-responsible mitigation. For activities resulting in the loss of marine or estuarine resources, permittee-responsible compensatory mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine

credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

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

25. Water Quality. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

29. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office

to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

(Transferee)

(Date)

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

- (a) A statement that the authorized work was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;
- (b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(1)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and
- (c) The signature of the permittee certifying the completion of the work and mitigation.

31. Pre-Construction Notification. (a) **Timing.** Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

- (1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or
- (2) 45 calendar days have passed from the district engineer’s receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general

condition 18 that listed species or critical habitat might be affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 20 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is “no effect” on listed species or “no potential to cause effects” on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWP 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee’s right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

- (1) Name, address and telephone numbers of the prospective permittee;
- (2) Location of the proposed project;
- (3) A description of the proposed project; the project’s purpose; direct and indirect adverse environmental effects the project would cause, including the anticipated amount of loss of water of the United States expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project 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 permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. 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 prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse effects are minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee 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 project, or if the project is located in designated critical habitat, for non-Federal applicants

the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(c) **Form of Pre-Construction Notification:** The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

(d) **Agency Coordination:** (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWP and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(2) For all NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States, for NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed, and for all NWP 48 activities that require pre-construction notification, the district engineer will immediately provide (e.g., via e-mail, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects to the aquatic environment of the proposed activity are minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(3) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential

Fish Habitat conservation recommendations, as required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(4) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. 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 NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to intermittent or ephemeral streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51 or 52, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in minimal adverse effects. When making minimal effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

2. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed activity are minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will

expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

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

E. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project.

F. 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.

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.

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

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

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

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

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 United States: Waters of the United States 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 United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities eligible for exemptions under Section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

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

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic

resource. 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 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term “single and complete project” is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term “single and complete project” is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of “independent utility”). Single and complete non-linear projects may not be “piecemealed” to avoid the limits in an NWP authorization.

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

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

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

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

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a wetland (i.e., water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(d).

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWP, a waterbody is a jurisdictional water of the United States. If a jurisdictional wetland is adjacent – meaning bordering, contiguous, or neighboring – to a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1)-(6), that waterbody and its 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.

G. Regional General Conditions

Regional General Condition 1

Full Agency Pre-construction Notification: In an effort to expedite full agency permit review it is requested that all pre-construction notifications (PCNs) submitted for activities requesting a waiver and for those activities resulting in the loss of greater than ½ acre of waters of the United

States (U.S.), include one original hard copy and five (5) additional copies of the PCN package. Applicants are encouraged to submit the five agency copies in electronic format as CDs, in order to minimize the use of paper and postage resources.

Regional General Condition 2

Pre-Construction Notification Submittals: In addition to the PCN requirements listed in NWP General Condition 31, all PCNs should include the following information:

- Graphic illustrations on 8 1/2" x 11" paper. The illustrations must clearly depict the project boundaries, including all elements and phases of the proposed project. Three types of illustrations are needed to properly depict the work to be undertaken. These illustrations or drawings are identified as a Vicinity Map {a location map such as the U.S. Geological Survey (USGS) 7.5 Minute Series topographical map is highly encouraged}, a Plan View and a Typical Cross-Section Map. Each illustration should identify the project, the applicant, and the type of illustration (vicinity map, plan view or cross-section). In addition, each illustration should be identified with a figure or attachment number and the project Latitude and Longitude.
- A written description of the proposed project including acreage(s) of waters of the U.S. (according to aquatic resource type) proposed to be directly or indirectly affected as a result of the proposed project, the linear footage of proposed direct and indirect stream impacts associated with the project, and cubic yards of fill proposed to be discharged.
- A description of the ways in which the project has been designed to avoid and minimize adverse impacts to waters of the U.S.
- Information concerning whether the proposed activity would affect any historic properties listed, determined to be eligible, or which they have reason to believe may be eligible, for listing on the National Register of Historic Places.
- Basic information about the general project area (encompassing a search radius of 2 miles centered on the project area) including USGS 7.5' series topographic maps, National Register of Historic Places (NRHP) files including Historic Districts, and county atlases, histories and/or any historic USGS 15' series topographic map(s), brief description of the terrain and topography of the project area, acreage of the project area, proximity of the project area to major waterways, past land uses in the project area, and any past cultural resources studies or coordination for the project area, if available, along with photographs, keyed to mapping, showing the project area and any buildings or structures on adjacent parcels.
- The submittal of ground photographs to illustrate current conditions of the overall project site and impact site is highly encouraged.

Regional General Condition 3

Compensatory Mitigation: Compensatory mitigation will typically be required as indicated in accordance the terms and conditions of the NWP's in addition to all General and Regional conditions for projects with impacts that result in the conversion of a water of the U.S. to uplands or the conversion of one aquatic resource type to another.

Regional General Condition 4

Passage of Aquatic Life: Culverted crossings should be sized in a manner that allow the passage of aquatic life and freely pass bankfull flows. The only exception to this requirement would involve culvert placement in bedrock and/or extremely high gradient streams, in which countersinking of culverts is determined not to be practicable. In the event proposed crossings do not meet these criteria, compensatory mitigation may be required.

Regional General Condition 5

Endangered Species: Federally listed endangered species, subject to Section 7 of the Endangered Species Act, are located in nearly every county within West Virginia. As part of the PCN process, the district engineer (DE) will assume responsibility for determining project-related effects to endangered species. For projects that do not require a PCN, it is the applicant's responsibility to ensure that all elements of a proposed single and complete project comply with Section 7 of the Endangered Species Act.

Regional General Condition 6

Endangered Species Habitat: Due to the potential presence of endangered species or their habitats applicants are required to provide notification to the U.S. Fish and Wildlife Service Elkins Field Office, 694 Beverly Pike, Elkins, West Virginia 26241, for any work in the following waterways:

U.S. Army Corps of Engineers Huntington District

Upper Kanawha River (Kanawha Falls to Watson Island, River Mile 75.5), Fayette and Kanawha counties: Tubercled-blossum pearl mussel (*Epioblasma torulosa torulosa*), Pink mucket pearl mussel (*Lampsilis abrupta*) and Fanshell (*Cyprogenia stegaria*).

Elk River (Sutton Dam to slackwater below Coonskin Park), Braxton, Clay, and Kanawha Counties: Clubshell (*Pleurobema clava*), Northern riffleshell (*Epioblasma torulosa rangiana*), Rayed bean (*Villosa fabalis*) and Pink mucket pearl mussel (*Lampsilis abrupta*).

Ohio River (Upper Greenup, R.C. Byrd, Racine, and Belleville Navigation Pools), Cabell, Jackson, Mason, Pleasants, Wayne, and Wood Counties: Pink mucket pearly mussel (Lampsilis abrupta) and Fanshell (Cyprogenia stegaria).

Meathouse Fork of Middle Island Creek, Doddridge County: Clubshell (Pleurobema clava).

Middle Island Creek, Doddridge, Tyler, and Pleasants Counties: Clubshell (Pleurobema clava).

South Fork of the Hughes River, Ritchie County: Clubshell (Pleurobema clava).

Potts Creek and South Fork of Potts Creek, Monroe County: James spinymussel (Pleurobema collina).

Greenbrier River, Greenbrier County: Virginia spiraea (Spiraea virginiana).

Lower Gauley River (Summersville Dam to Swiss), Nicholas and Fayette Counties: Virginia spiraea (Spiraea virginiana).

Lower Meadow River (Nallen to Gauley River), Nicholas and Fayette Counties: Virginia spiraea (Spiraea virginiana).

Bluestone River (Bluestone Gorge to slackwater Bluestone Reservoir), Mercer and Summers Counties: Virginia spiraea (Spiraea virginiana).

Dingess Branch and Millers Camp Branch of Marsh Fork and associated palustrine emergent and scrub-shrub wetlands, Raleigh County: Virginia spiraea (Spiraea virginiana).

U.S. Army Corps of Engineers Pittsburgh District

Hackers Creek of the West Fork River, Lewis County: Clubshell (Pleurobema clava).

Sleepy Creek and the Great Cacapon River, Morgan County: Harperella (Ptilimnium nodosum).

Back Creek, Berkeley County: Harperella (Ptilimnium nodosum).

Wetlands in Berkeley and Hardy Counties: Northeastern bulrush (Scirpus ancistrochaetus).

Jefferson and Berkeley Counties – streams, springs, and wetlands connected to the groundwater system including caves, areas near sinkholes, and other groundwater/surface interfaces, from the Potomac River west to Opequon Creek, especially in the Rippon and Leetown Areas, and the Evitts Run Watershed: Madison cave isopod (Antrolana lira).

Regional General Condition 7

All PCNs involving work in the below listed waters require notification to the National Park Service and/or the Forest Service.

- 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.

Regional General Condition 8

West Virginia Natural Stream Preservation Act: In accordance with the 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:

West Virginia Natural Stream Preservation Act

- 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.

Regional General Condition 9

Tier 3 Protected Waters: All PCNs involving work in Tier 3 Protected Waters (West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2) shall include prior written notification to the West Virginia Department of Environmental Protection, Division of Water and Waste Management. Tier 3 Protected 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.

Regional General Condition 10

Archeological Sites and Human Remains: In the event any archeological sites or human remains are uncovered during construction, the permittee shall cease all work immediately and contact the appropriate Corps District office, the West Virginia Division of Culture and History at 304-558-0240 and the appropriate county Sheriff’s Office.

H. West Virginia State 401 Water Quality Certification Conditions for Nationwide Permits

The following are West Virginia's Section 401 Water Quality Certification standard and special conditions that apply to the Nationwide Permits 1-52 as published on February 21, 2012 in Part III of the *Federal Register* (77 FR 10184), 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(s). 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 Water Quality Certifications, with all attendant standard conditions and special 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. 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 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 : Cadmium 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. 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 of like 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 or other state stormwater permit requirements as established by the West Virginia Department of Environmental Protection, Division of Water and Waste Management, if applicable. Best Management Practices for Sediment and Erosion Control, as described in the West Virginia Department of Environmental Protection's Erosion and Sediment Control Best Management Practice Manual, 2006, or similar documents prepared by the West Virginia Division of Highways may be used. These handbooks are available from the respective agency offices.
8. 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 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-March 31st requires a spawning season waiver from the West Virginia Division of Natural Resources, Wildlife Resources

Section. For information about specific stream designations contact DEP's Water Quality Standards Section at 304-926-0495. The Wildlife Resources Section, Trout Fisheries Program at 304-637-0245 or Warm Water fisheries Program 304-558-2771 should be contacted if a waiver is needed. 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.

10. 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.
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 Lands and Streams, Building 74, Room 200, 324 Fourth Avenue, South Charleston, West Virginia 25303, or by contacting them at 304-558-3225. 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.dhsem.wv.gov/mitigation/floodplain/Pages/default.aspx
14. The deposit of dredged or fill materials in island back channels, embayments or stream mouths on Section 10 Rivers 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 prior written authorization from the West Virginia Department of Environmental Protection, Division of Water and Waste Management for use of any of the Nationwide Permits for all work in Outstanding National Resource Waters listed within Section A 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 3, 6, 7, 12, 13, 14, 16, 17, 18, 19, 27, 29, 33, 39, 40, 41, 42, 45, and 48 in any of the streams listed in Sections B and C as follows, except as may be provided for in the individual nationwide permit:

- A. Tier 3 Protection-- West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2. **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_Maps_20101006.pdf
- 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. '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 ½ 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.

3. “West Virginia Stream Wetland Valuation Metric” (SWVM) will be used to assist with the determination of required mitigation. The metric is available at the Huntington and Pittsburgh Army Corps of Engineers web sites:

In all instances, mitigation for all impacts incurred through use of these Nationwide Permits must first be directed to elimination of the impacts, then minimization of the impacts and lastly through compensatory mitigation. In many cases, the environmentally preferable compensatory mitigation may be provided through approved mitigation banks 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.

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:

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

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

Impacts to shrub-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 to every one (1) acre impacted.

NOTE: The ratio of created/restored 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-scrub 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/emergent wetlands and

15 to 1 for scrub-scrub and forested wetlands

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 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. Third party oversight of the conservation easement by a non-profit conservation organization is preferred.

Streams. Compensatory mitigation projects for stream impacts should attempt to replace lost functions. Mitigation will be determined on a case-by-case basis based on the pre and post condition stream quality and complexity of the mitigation project utilizing the SWVM worksheets. Compensatory mitigation 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 or contain protected habitat of mussels on the Federal Endangered Species list. 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.

Applicants should also give consideration to utilizing WVDNR's Wildlife Data Base Inquiry process. 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 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.

HUNTINGTON DISTRICT

James River Drainage

J-1

Potts Creek

J-1-E

South Fork Potts Creek

| | |
|------------|---------------------------------|
| J-3 | Cove Creek |
| | Big Sandy River Drainage |
| BS | Big Sandy River |
| BST | Tug Fork River |
| | Kanawha River Drainage |
| K | Kanawha River |
| K-1 | Crooked Creek |
| K-12 | Thirteenmile Creek |
| K-14 | Sixteenmile Creek |
| K-21 | Buffalo Creek |
| K-22 | Hurricane Creek |
| K-22-F | Mill Creek (Tackett Branch ?) |
| K-24 | Little Hurricane Creek |
| K-26 | Guano Creek |
| KC | Coal River |
| KC-10 | Little Coal River |
| KE | Elk River |
| KE-23 | Big Sandy Creek |
| KE-23-N | Granny Creek |
| KE-23-Q-.5 | Hollywood Trace Fork |
| KE-31 | King Shoals Run |
| KE-37 | Laurel Creek |
| KE-74 | Strange Creek |
| KE-76 | Birch River |
| KE-9 | Little Sandy Creek |
| KN | New River |
| KN-51 | Indian Creek |
| KNB | Bluestone River |
| KNG | Greenbrier River |
| KNG-18 | Wolf Creek |
| KNG-22 | Muddy Creek |
| KNG-22-B | Mill Creek |
| KNG-23 | Second Creek |
| KNG-53 | Knapp Creek |
| KNG-61 | Clover Creek (Cloverlick Creek) |
| KNG-66 | Sitlington Creek |
| KNG-68 | Deer Creek |
| KNG-79 | West Fork Greenbrier River |
| KP | Pocatalico River |
| KP-17 | Pocatalico Creek (Left Fork) |
| KP-17-B | Middle Fork Pocatalico Creek |
| KP-33-E | Cox Fork |
| KP-39 | Big Lick |
| KP-41 | Rush Creek |

| | |
|----------|-------------------------------------|
| KP-45 | Cranes Nest Run |
| | Little Kanawha River Drainage |
| LK | Little Kanawha River |
| LK- 86 | Sand Fork |
| LK-11 | Slate Creek |
| LK-23 | Tucker Creek |
| LK-25 | Reedy Creek |
| LK-25-? | Left Fork Reedy Creek |
| LK-25-R | Middle Fork Reedy Creek |
| LK-31 | Spring Creek |
| LK-31-AA | Right Fork Spring Creek |
| LK-31-Z | Left Fork Spring Creek |
| LK-39 | Straight Creek |
| LK-40 | Leading Creek |
| LK-45 | Yellow Creek |
| LK-53 | Pine Creek |
| LK-66 | Tanner Creek |
| LK-72 | Cedar Creek |
| LK-75 | Leading Creek |
| LK-75-K | Cove Creek |
| LK-75-N | Fink Creek |
| LK-86 | Sand Fork |
| LK-94 | Oil Creek |
| LK-95 | Saltlick Creek |
| LKH | Hughes River |
| LKH-10 | North Fork Hughes River |
| LKH-10-C | Gillespie Run |
| LKH-10-G | Devilhole Creek |
| LKH-10-J | Addis Run |
| LKH-10-R | Bonds Creek |
| LKH-4 | Goose Creek |
| LKH-9 | South Fork Hughes River |
| LKH-9-AA | Middle Fork South Fork Hughes River |
| LKH-9-J | Indian Creek |
| LKH-9-M | Leatherbark Creek |
| LKH-9-R | Spruce Creek |
| LKH-9-W | Slab Creek |
| LKH-9-X | Bone Creek |
| LKH-9-Y | Otterslide Creek |
| LKS | Steer Creek |
| LKS-10 | Left Fork Steer Creek |
| LKS-9 | Right Fork Steer Creek |
| LKW | West Fork Little Kanawha River |
| LKW-15 | Henry's Fork |
| LKW-15-F | Laurel Run |

| | |
|----------|--|
| LKW-15-J | Beech Fork |
| LKW-31 | Left Fork West Fork Little Kanawha River |
| | Guyandotte River Drainage |
| OG | Guyandotte River |
| OG | Barboursville Lake |
| OG-14 | Charley's Creek |
| OG-24 | TwOMile Creek |
| OGM | Mud River |
| OGM-12-A | Kilgore Creek |
| OGM-20 | Trace Fork |
| OGM-22 | Buffalo Creek |
| OGM-25 | Middle Fork Mud River |
| OGM-33 | Big Laurel Creek |
| | Middle Island Creek Drainage |
| OMI | Middle Island Creek |
| OMI-4 | McKim Creek |
| OMI-9 | Sugar Creek |
| OMI-21 | Sancho Creek |
| OMI-23 | Point Pleasant Creek |
| OMI-23-A | Pursley Creek |
| OMI-23-B | Elk Fork |
| OMI-29 | Indian Creek |
| OMI-30 | McElroy Creek |
| OMI-40 | Arnold Creek |
| OMI-43 | Bluestone Creek |
| OMI-46 | Meathouse Fork |
| OMI-46-E | Toms Fork |
| OMI-46-J | Indian Fork |
| OMI-47 | Buckeye Creek |
| OMI-46-E | Toms Fork |
| OMI-46-J | Indian Fork |
| OMI-47 | Buckeye Creek |
| | Ohio River Direct Drainage |
| O | Ohio River |
| O-2 | Twelvepole Creek |
| O-2-H | Beech Fork |
| O-2-P | West Fork Twelvepole Creek |
| O-2-Q | East Fork Twelvepole Creek |
| O-9 | Guyan Creek |
| O-30-A | Tombleson Run embayment |
| O-31 | Little Mill Creek |
| O-32 | Mill Creek |
| O-32-D | Cow run |
| O-32-H | Parchment Creek |
| O-32-L-7 | Grasslick Creek |

| | |
|----------|-----------------------|
| O-32-L-8 | Bear Fork |
| O-32-M | Elk Fork |
| O-32-N | Little Mill Creek |
| O-36 | Sandy Creek |
| O-36-D | Crooked Fork |
| O-36-J | Left Fork Sandy Creek |
| O-36-J-5 | Nesselroad Run |
| O-38 | Little Sandy Creek |
| O-43-D | Little Pond Creek |
| O-44 | Lee Creek |
| O-44-A | South Fork Lee Creek |
| O-44-B | North Fork Lee Creek |

PITTSBURGH DISTRICT

Ohio River Direct Drainage

| | |
|----------|--------------------------|
| | Ohio River |
| O-57 | French Creek |
| O-69 | Fishing Creek |
| O-69-N | South Fork Fishing Creek |
| O-69-O | North Fork Fishing Creek |
| O-77 | Fish Creek |
| O-77-J | Valley Run |
| O-77-O | WV Fork Fish Creek |
| O-77-O-8 | Long Drain Creek |
| O-88 | Wheeling Creek |
| O-88-D-2 | Middle Wheeling Creek |
| O-88-L | Turkey Run |
| O-88-O | Enlow Fork |
| O-88-O-? | Dunkard Fork |
| O-92 | Buffalo Creek |

Cheat River Drainage

| | |
|-----------|--|
| M | Monongahela River |
| M-1 | Dunkard Creek |
| M-1-? | Blacks Run |
| M-1-C | Days Run |
| M-1-E | Miracle Run |
| M-1-E-? | Right Branch Miracle Run |
| M-1-F | WV Fk Dunkard |
| M-1-F-6 | North Fork WV Fork Dunkard Creek |
| M-1-F-6-A | Camp Run |
| M-1-F-7 | South Fork WV Fork Dunkard Creek |
| MT | Tygart Valley River |
| MW | West Fork River |
| MW-13 | Tenmile Creek upstream of Little Tenmile |

| | |
|------------|---|
| MW-13-I-4 | Jacob's Fork |
| MW-13-I-4 | Salem Fork |
| MW-2 | Booths Creek |
| MW-21 | Elk Creek |
| MW-21-G | Brushy Fork of Elk Creek |
| MW-21-M | Gnatty Creek |
| MW-29 | Isaacs Creek |
| MW-31 | Hackers Creek |
| MW-31-C | Jesse Run |
| MW-32 | Kincheloe Creek |
| MW-36 | Freemans Creek |
| MW-36-D | Right Fork Freemans Creek |
| MW-38 | Stonecoal Creek |
| MW-55 | Right Fork West Fork River |
| MC-60-D | Blackwater River |
| MC-60-D-10 | Sand Run |
| MC-60-D-8- | |
| A ? | Glade Run |
| MC-60-K-16 | West Fork Glady |
| P | Potomac River Drainage |
| P-4-M | Mill Creek |
| P-6 | Back Creek |
| P-9 | Sleepy Creek |
| PC | Cacapon River |
| PC-24 | Lost River |
| PC-7 | North River |
| PNB-4 | Patterson Creek |
| PNB-4-EE | North Fork Patterson Creek (below dam near mouth) |
| PSB | South Branch Potomac River |
| PSB-21 | South Fork South Branch |

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.

APPENDIX A

Streams with potential presence of Federally listed threatened and endangered species or their habitat

HUNTINGTON DISTRICT:

1. Big Sandy Creek; Kanawha County: Snuffbox.
2. Bluestone River; Mercer and Summers counties (Bluestone Gorge to slackwater of Bluestone Reservoir): Virginia spiraea.
3. Cedar Creek; Braxton and Gilmer counties: Snuffbox.
4. Cove Creek; Monroe County: James spinymussel.
5. Elk River; Braxton, Clay, and Kanawha counties (Sutton Dam to slackwater below Coonskin Park), including the lower one-half mile reaches of its tributaries Birch River, Blue Creek, and Laurel Creek: Clubshell, Pink mucket pearlymussel, Northern riffleshell, Rayed bean, and Snuffbox. The Elk River also contains the Diamond darter (candidate).
6. Gauley River; Fayette and Nicholas counties (Summersville Dam to Swiss): Virginia spiraea.
7. Greenbrier River; Greenbrier and Pocahontas counties: Virginia spiraea.
8. Henry Fork; Calhoun and Roane counties: Snuffbox.
9. Hughes River; Ritchie and Wirt counties, including the lower one-half mile reach of its tributary Goose Creek: Snuffbox.
10. Kanawha River; Fayette, Kanawha, Mason, and Putnam counties: Fanshell, Pink mucket pearlymussel, Sheepnose, Spectaclecase, and Tubercled-blossum pearlymussel.
11. Leading Creek; Gilmer and Lewis counties, including the lower one-half mile reach of its tributary Fink Creek: Snuffbox.
12. Little Kanawha River; Braxton, Calhoun, Gilmer, Wirt, and Wood counties, including the lower one-half mile reaches of its tributaries Leading Creek (Calhoun Co., different stream than 5.d. above), Pine Creek, Sand Fork, Slate Creek, Straight Creek, Tanner Creek, Tucker Creek, and Walker Creek: Snuffbox.

13. Marsh Fork River including Dingess Branch and Millers Camp Branch and associated palustrine emergent and scrub-shrub wetlands; Raleigh County: Virginia spiraea.
14. McElroy Creek; Doddridge and Tyler counties: Snuffbox.
15. Meadow River; Fayette, Greenbrier, and Nicholas counties: Virginia spiraea.
16. Meathouse Fork of Middle Island Creek; Doddridge County, including the lower one-half mile reaches of its tributary Toms Fork: Clubshell and Snuffbox.
17. Middle Island Creek; Doddridge, Pleasants, and Tyler counties, including the lower one-half mile reaches of its tributaries Arnold Creek, Bluestone Creek, Buckeye Creek, Indian Creek, McKim Creek, Point Pleasant Creek, and Sancho Creek: Clubshell, Rayed bean, and Snuffbox.
18. New River (Lower); Fayette County (Route 19 to Gauley Bridge): Virginia spiraea.
19. North Fork Hughes River; Ritchie and Wirt counties, including the lower one-half mile reaches of its tributaries Addis Run, Bonds Creek, Devilhole Creek, and Gillespie Run: Snuffbox.
20. Ohio River; Cabell, Jackson, Mason Pleasants, Tyler, Wetzel, and Wood counties: Fanshell, Pink mucket pearlymussel, Sheepnose, and Snuffbox.
21. Potts Creek and South Fork of Potts Creek; Monroe County: James spinymussel.
22. Reedy Creek; Roane and Wirt counties: Snuffbox.
23. South Fork Hughes River; Doddridge, Ritchie, and Wirt counties, including the lower one-half mile reaches of its tributaries Bone Creek, Indian Creek, Leatherbark Creek, Otterslide Creek, Slab Creek, and Spruce Creek: Clubshell and Snuffbox.
24. Spring Creek; Roane and Wirt counties: Snuffbox.
25. Steer Creek; Calhoun and Gilmer counties: Snuffbox.
26. Sugar Creek; Pleasants County: Snuffbox.
27. West Fork Little Kanawha River; Calhoun, Roane, and Wirt counties: Snuffbox.

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28. Back Creek; Berkeley County: Harperella.
29. Cacapon River; Morgan County: Harperella.

30. Dunkard Creek; Monongalia County: Snuffbox.
31. Fish Creek; Marshall County: Snuffbox.
32. Fishing Creek; Wetzel County: Snuffbox. Note – the mouth of Fishing Creek at the Ohio River is regulated by the Huntington District.
33. Hackers Creek (of the West Fork River); Harrison and Lewis counties: Clubshell and Snuffbox.
34. Potomac River; Morgan County (from the mouth of the Cacapon River to the mouth of Sleepy Creek): Harperella.
35. Sleepy Creek; Morgan County: Harperella.
36. West Fork River; Harrison, Lewis, and Marion counties: Snuffbox.
37. Streams, springs, and wetlands connected to the groundwater system including caves, areas near sinkholes, and other groundwater/surface interfaces, from the Potomac River west to Opequon Creek, especially in the Rippon and Leetown Areas, and the Evitts Run Watershed; Jefferson and Berkeley counties: Madison Cave isopod.

Wetlands; Berkeley and Hardy counties: Northeastern bulrush.