

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

Public Notice

In reply refer to Public Notice No.

LRH-2012-00147

Issuance Date:

September 10, 2018

Stream:

N/A

Closing Date:

September 10, 2023

Please address all comments and inquiries to:

U.S. Army Corps of Engineers, Huntington District

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

502 Eighth Street

Huntington, West Virginia 25701-2070

Phone: (304) 399-5710

**REGIONAL GENERAL PERMIT FOR STREAM RESTORATION ACTIVITIES TO BE
PERFORMED BY THE WEST VIRGINIA CONSERVATION AGENCY WITHIN THE
HUNTINGTON AND PITTSBURGH DISTRICTS
IN THE STATE OF WEST VIRGINIA**

TO WHOM IT MAY CONCERN: In accordance with Title 33 CFR 325.5(c)(1) as published on November 13, 1986, in the Federal Register, Volume 51, Number 219, the district engineers of the Huntington District and Pittsburgh District United States (U.S.) Army Corps of Engineers (Corps), have re-issued the Regional General Permit (RGP) for Stream Restoration Activities to the West Virginia Conservation Agency (WVCA), with modifications, pursuant to Section 10 of the Rivers and Harbors Act of 1899 (Section 10) and Section 404 of the Clean Water Act (Section 404). This RGP is effective and available for use within the entire State of West Virginia by the WVCA to authorize WVCA-sponsored projects that require the discharge of dredged and/or fill material into waters of the U.S. and/or work within navigable waters of the U.S. to alleviate hazards to life and property resulting from sudden watershed impairments.

BACKGROUND: RGPs are general permits issued by a district or division engineer on a regional basis to streamline the authorization of activities that result in no more than minimal individual and cumulative adverse environmental effects. The WVCA provides assistance to public and private landowners in alleviating hazards to life and property resulting from sudden watershed impairments. WVCA-sponsored projects, as described below, may involve the discharge of dredged or fill material into waters of the U.S. and/or work within navigable waters of the U.S. that would require authorization from the Corps under Section 404 and/or Section 10. The Corps had previously issued a RGP to the WVCA for this purpose. The previous RGP for WVCA projects was issued under Public Notice LRH-2012-147 dated April 13, 2012. The previous RGP expired on April 13, 2017. The Corps proposes to reissue the RGP with modifications.

SCOPE OF WORK: The purpose of the RGP is to expedite the Corps' review of requests for authorization(s) from the WVCA to perform projects in streams under the jurisdiction of the Corps for the purposes of alleviating hazards to life and property resulting from sudden watershed impairments. This RGP may be used for the following activities, subject to all appropriate terms and conditions, that involve the discharge of dredged and/or fill material into waters of the U.S. and/or work within navigable waters of the U.S.: minor dredging, debris, and deposition removal; restoration of uplands damaged by discrete events; bank stabilization; and temporary construction access and dewatering.

The proposed RGP would not authorize work or the discharge of dredged and/or fill material into special aquatic sites, including wetlands, riffle and pool complexes, and vegetated shallows (unless associated with temporary matting for temporary access). This RGP applies to all streams under the jurisdiction of the Corps within the Huntington and Pittsburgh Districts in the State of West Virginia, except those excluded under conditions of the RGP or conditions imposed by the state water quality certification. The WVCA is responsible for ensuring the work is performed in accordance with the attached terms and conditions. Work performed under this authorization can be suspended, modified or revoked in accordance with 33 CFR 325.7 if a later determination is made by the Corps that the information provided was inaccurate, incomplete or done in bad faith. In the event of such a determination, the Corps may use the suspension, modification or revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The RGP is effective for five (5) years from the date of issuance.

WATER QUALITY CERTIFICATION: A copy of the required Section 401 Water Quality Certification issued by the West Virginia Department of Environmental Protection (WVDEP) for this RGP is attached.

RGP USAGE EVALUATION: The WVCA will generate a summary table (e.g., excel spreadsheet) at the end of each disaster declaration event. The WVCA would have up to 12 months from the close of the final disaster declaration for each event to submit the summary table. The summary table will include the: date of the disaster declaration with associated declaration number or other identification; project location (including stream name, county, and latitude and longitude); applicable conservation district; project type (debris removal, bank stabilization, etc.); length of stream fill; and the volume of debris removed, when applicable. The WVCA will provide the summary table directly to the WVDNR, the WVDEP, and the Corps.

RGP REVALUATION: The policies of this RGP are subject to review and consideration at any time. At the end of the five (5) years, a complete re-evaluation will be performed according to the regulations governing the use of the RGPs.

For further information contact:

U.S. Army Corps of Engineers
ATTN: CELRH-RD-S
502 8th Street
Huntington, West Virginia 25701-2070

U.S. Army Corps of Engineers
ATTN: CELRP-OP-F
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222-4186

CONDITIONS OF THE REGIONAL GENERAL PERMIT (RGP) ISSUED TO THE THE WEST VIRGINIA CONSERVATION AGENCY (WVCA)

A. **RGP Limitations:** Subject to the limits described below, this RGP authorizes the discharge of dredged or fill material into waters of the United States (perennial, intermittent, and ephemeral streams) and/or work within navigable waters of the United States (See Appendix A) for WVCA-sponsored projects for the purposes of alleviating hazards to life and property resulting from sudden watershed impairments. Categories of activities, as described below, authorized under this RGP are limited to: 1. minor dredging, debris and deposition removal; 2. restoration of uplands damaged by discrete events; 3. bank stabilization; and 4. temporary construction access and dewatering.

The following limitations apply to all categories of activities authorized under this RGP:

- The RGP will only apply to WVCA-sponsored projects for the purposes of alleviating hazards to life and property resulting from sudden watershed impairments in counties declared to be disaster areas by the Governor of West Virginia for the specific sudden watershed impairment.
- The proposed activity would not result in the discharge of dredged and/or or fill material into and/or work along greater than 1,000 linear feet of stream bank, as measured upstream to downstream, unless a waiver is granted by the district engineer as described below. For the purposes of compliance with this limitation, the linear footage applies to each stream bank. Activities along both banks of the stream are not aggregated for determining compliance with this limitation.
- Projects qualifying for this permit must be completed within 12 months from the closing date of the associated disaster declaration as stated by the Governor of West Virginia, unless a waiver is granted by the district engineer, and prior to the expiration date of the RGP.

Limits for specific categories of activities are as follows:

1. Minor Dredging, Debris, and Deposition Removal: This RGP authorizes minor dredging, debris and deposition removal within waters of the United States to restore streams affected by sudden watershed impairments (i.e. storms, floods, or other discrete event, etc.). All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under a separate authorization. Dredging and debris and deposition removal activity are limited to the amount necessary to restore the stream to the condition (i.e. location, contour, etc.) prior to the sudden watershed impairment.

2. Restoration of Uplands Damaged by Discrete Events: This RGP authorizes the discharge of dredged and/or fill material, including dredging or excavation, into all waters of the United States and work within navigable waters of the United States for activities associated with the restoration of upland areas damaged by sudden watershed impairments. The restoration of the damaged areas must not exceed the contours, or the ordinary high water mark, that existed before the damage occurred. Minor dredging is authorized, limited to the amount necessary to restore the damaged upland area. Dredging that significantly alters the pre-existing bottom elevation of the stream is not authorized.

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 and/or Section 10 permit, if the uplands are restored above the ordinary high water mark. (See also 33 CFR 328.5.) This RGP authorizes discharges of dredged and/or fill material into waters of the United States and/or work within navigable waters of the United States associated with the restoration of uplands.

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

- a. No material is placed in excess of the minimum needed for erosion protection;
- b. The activity is no more than 1,000 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;
- c. The activity will not exceed an average of one (1) cubic yard per running foot, as measured along the length of the treated bank, below the plane of the ordinary high water mark, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;
- d. No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States (e.g., dikes, etc.);
- e. No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored native trees and treetops may be used in low energy areas);
- f. Native and/or naturalized plants appropriate for current site conditions must be used for bioengineering or vegetative bank stabilization;
- g. The activity is not a stream channelization activity;
- h. Hard armoring techniques will be kept to a minimum, to the maximum extent practicable, and based on site specific conditions; and
- i. Proper installation of bank stabilization material is required for use of this RGP. This RGP does not authorize material that is dumped from the top of bank resulting in uncontrolled spilling of material over the bank into the waterway.

4. Temporary Construction Access and Dewatering: This RGP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the activities described in this RGP. 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. After construction, temporary fills must be removed in their entirety and the affected areas returned to

preconstruction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(Authorities: Sections 10 and 404)

This RGP **does not** authorize:

- Normal operation and maintenance activities;
- Work associated with impairments that existed prior to the sudden watershed impairment;
- Channel modification that increases the flow capacity beyond capacity prior to the watershed impairment;
- Work to reclaim lands lost to normal erosion processes over an extended period; or
- Work or the discharge of dredged and/or fill material into special aquatic sites, including wetlands, riffle and pool complexes, and vegetated shallows. (Temporary matting in wetlands for heavy equipment is authorized by this RGP.)

Note: The purpose of this RGP is to expedite the Corps' review of requests for authorization(s) from the WVCA to perform projects in waters under the jurisdiction of the Corps for the purposes of alleviating hazards to life and property resulting from sudden watershed impairments. In general, if a pre-construction notification (PCN) is required, the WVCA shall wait until the district engineer verifies in writing the proposed watershed protection and rehabilitation activity meets the terms and conditions of the RGP. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the PCN and any comments received as a result of agency coordination to decide whether the RGP authorization should be modified, suspended, or revoked.

Emergency processing procedures for the Corps regulatory program are described in 33 CFR 325.2(e)(4). An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. If such an "emergency" exists, the WVCA could request the Corps evaluate the emergency corrective actions under the Corps' emergency procedures.

B. RGP General Conditions: To qualify for authorization under the RGP, the activity must comply with the following general conditions, as applicable.

1. **PCN.** If the activity meets the terms and conditions of the RGP without the need for submission of a PCN under the conditions of the permit, the WVCA can proceed with the activity without written verification from the Corps. If a PCN is required under the terms and conditions of the RGP, the WVCA shall not begin the activity until the WVCA is notified in writing by the district engineer that the activity may proceed under the RGP.

a. **The WVCA must submit a PCN to the district engineer prior to commencing the activity if any of the following criteria are met:**

- i. A Section 10 permit is required (see attached list in Appendix A);
- ii. A waiver is required;
- iii. The activity is in the vicinity (~100') of a water supply intake (See RGP General Condition 8 below);
- iv. The activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status (See RGP General Condition 15 below);
- v. If the activity may affect any listed or proposed threatened or endangered species or designated critical habitat or any listed or proposed threatened or endangered species, or will take place within streams that harbor Federally threatened and endangered species (Refer to RGP General Condition 17(e) below);
- vi. If the activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously identified properties (See RGP General Condition 19 below);
- vii. If the activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a United States Army Corps of Engineers (USACE) federally authorized Civil Works project (a "USACE project") (See RGP General Condition 25 below);
- viii. All regulated activities located in the waterways listed below:
 1. New River;
 2. Bluestone River from the upstream boundary of Pipestem Park to Bluestone Reservoir;
 3. Meadow River from an area near the US 19 Bridge to its junction with the Gauley River;
 4. All streams within the Monongahela National Forest designated as National Wild and Scenic Study Rivers;
 5. 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
 6. 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.
 7. The Corps will consult with National Park Service and/or the United States Forest Service, as appropriate, upon receipt of the PCN; and
- ix. All regulated activities located in the following waterways:
 1. Greenbrier River from its confluence with Knapps Creek to its confluence with the New River;
 2. Anthony Creek from its headwaters to its confluence with the Greenbrier River;

3. Cranberry River from its headwaters to its confluence with the Gauley River;
 4. Birch River from Cora Brown Bridge in Nicholas County to its confluence with the Elk River; and
 5. New River from its confluence with the Greenbrier River to its confluence with the Gauley River.
- b. **Timing.** Where required by the terms of the RGP, the WVCA must notify the district engineer by submitting a PCN as early as possible. The district engineer must determine if the PCN is complete within 21 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the WVCA within that 21 day period to request the additional information necessary to make the PCN complete. The request must specify the information required to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the WVCA does not provide all of the requested information, then the district engineer will notify the WVCA 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.
- c. **Contents of PCN:** The PCN must be in writing and include the following information:
- i. Name(s), address(es) and telephone number(s) of the property owners;
 - ii. Location of the proposed activity on a USGS 7.5 minute topographic map with latitude and longitude noted;
 - iii. A description of the proposed activity. The description of the proposed activity should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. The description must include the following, as applicable:
 1. The amount of material to be discharged into waters of the United States (below the ordinary high water mark) in cubic yards;
 2. The type of fill material (i.e. rock, granular fill, etc.);
 3. The acreage of each aquatic resource that would be impacted by the proposed activity. Acreages should be calculated below the plane of the ordinary high water mark of the stream. The description should also include the linear footage of each stream that would be impacted by the proposed activity;
 4. If bank stabilization is proposed along both banks of a stream, the linear footage and cubic yardage below the ordinary high water mark should be provided separately for each bank;
 - iv. Project plan and cross section views depicting boundaries of waters of the United States and boundaries of the proposed work. Drawings 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;

- v. A description of the expected direct and indirect adverse environmental effects to aquatic resources the activity would cause;

- vi. A list of any other nationwide permit(s), RGP(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity;
- vii. The location of any water intakes in the vicinity of the project (See General Condition 8 below);
- viii. The name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity (See General Condition 17 below);
- ix. A statement regarding any historic property which might have the potential to be affected by the proposed activity or a vicinity map indicating the location of the historic property (See General Condition 19 below);
- x. For an activity that requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a USACE federally authorized civil works project, a statement confirming that the project proponent has submitted a written request for section 408 permission from the Corps office having jurisdiction over that USACE project (See General Condition 26 below); and
- xi. A restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions.

Note. For regulated activities that do not require the submission of a PCN to the Corps, it is the WVCA's responsibility to review and complete the regulated activity in accordance with the conditions of the RGP. A project that meets the terms and conditions of a RGP with no PCN to the Corps is only valid when accompanied by a blanket or individual 401 Water Quality Certification from the WVDEP. No work in waters of the United States may commence until the required 401 water quality certification (or waiver) has been obtained from the WVDEP.

2. *Navigation.*

- a. No activity may cause more than a minimal adverse effect on navigation within the streams listed in Appendix A.
- b. The WVCA 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 WVCA 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.

3. ***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. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the

crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

4. ***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 unless the West Virginia Division of Natural Resources (WVDNR) Coordination Unit has granted a waiver to allow work within the spawning season for the event or stream. Stream work in designated warm water streams and their adjacent tributaries during the fish spawning season, April to June, and trout waters and their adjacent tributaries during the trout water fish spawning season, September 15 to March 31, requires a spawning season waiver from the WVDNR Coordination Unit, at (304) 637-0245. For information about specific stream designations contact the WVDEP, Water Quality Standards Section at (304) 926-0495.

5. ***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.

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

7. ***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).

8. ***Water Supply Intakes.*** No activity may occur in the proximity (~100') of a public water supply intake unless the WVCA submits a PCN in accordance with General Condition 1 and obtains written verification from the Corps that the activity is authorized under the RGP. The PCN must identify the location of the intake.

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. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows.

10. ***Fills Within 100-Year Floodplains.*** The activity must comply with applicable Federal Emergency Management Agency approved state or local floodplain management requirements.

11. ***Equipment.*** Heavy equipment working in wetlands 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, must be permanently stabilized at the earliest practicable date. The WVCA is encouraged to perform work within

waters of the United States during periods of low-flow or no-flow to the maximum extent practicable.

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. ***Single and Complete Project.*** The activity must be a single and complete project with independent utility.

15. ***Wild and Scenic Rivers.***

- a. No RGP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.
- b. If a proposed RGP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, the WVCA must submit a PCN (see General Condition 1). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The WVCA shall not begin the RGP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed RGP activity will not adversely affect the Wild and Scenic River designation or study status.
- c. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, United States Forest Service, Bureau of Land Management, United States Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

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

17. ***Endangered Species.***

- a. No activity is authorized under this RGP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under this RGP which “may affect” a listed species or critical habitat, unless ESA Section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the RGP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the RGP activity and are later in time, but still are reasonably certain to occur.
- b. The WVCA must submit a PCN to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the 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 PCN must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The 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 WVCA of the Corps’ determination within 21 days of receipt of a complete PCN. In cases where the WVCA has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the WVCA shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species or critical habitat, or until ESA Section 7 consultation has been completed.
- c. As a result of formal or informal consultation with the United States Fish and Wildlife Service (USFWS) the district engineer may add species-specific permit conditions to the RGP verification.
- d. Authorization of an activity by this RGP does not authorize the “take” of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (*e.g.*, an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the USFWS, the ESA prohibits any person subject to the jurisdiction of the 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.
- e. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the USFWS at <http://www.fws.gov/>, the USFWS’s Information, Planning, and Conservation System (IPAC) at <http://www.fws.gov/ipac> and/or the USFWS, West Virginia Field Office, Ecological Services, who can be contacted by phone at (304) 636-6586 or by writing to 694 Beverly Pike, Elkins, West

Virginia, 26241. The USFWS can provide information to assist in complying with this general condition and General Condition 18 below pertaining to migratory birds and bald and golden eagles. The WVCA should contact the USFWS West Virginia Field Office to obtain the most updated information regarding potential locations known to inhabit threatened or endangered species.

18. *Migratory Birds and Bald and Golden Eagles.* The WVCA is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The WVCA is responsible for contacting appropriate local office of the United States Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether “incidental take” permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

19. *Historic Properties.*

- a. In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.
- b. The WVCA must submit a PCN to the district engineer if the RGP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously identified properties. For such activities, the PCN must state which historic properties might have the potential to be affected by the proposed RGP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties.
- c. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing PCNs, 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 in the PCN and these identification efforts, the district engineer shall determine whether the proposed RGP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of Section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect. Where the WVCA has identified historic properties on which the activity might have the potential to

cause effects and so notified the Corps, the WVCA shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA Section 106 consultation has been completed.

- d. The district engineer will notify the WVCA within 21 days of receipt of a complete PCN whether NHPA Section 106 consultation is required. If NHPA Section 106 consultation

is required, the WVCA cannot begin the activity until Section 106 consultation is completed.

- e. Section 110k of the NHPA (54 U.S.C. 306113) 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, the SHPO, 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.

20. *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 on the National Register of Historic Places.

21. *Mitigation.* 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). Given the nature of the activities that would be authorized under this RGP, in general, the need for mitigation is not expected. Losses of waters of the U.S. associated with the activities authorized under this RGP are expected to be minimal. PCN thresholds would limit the activities that could be conducted under the RGP without the need for a project-specific review by the Corps for activities that are minimal in the absence of any mitigation. For projects that require PCN, the Corps will conduct a project-specific review and determine if compensatory mitigation would be required to ensure the activity results in minimal adverse environmental effects. If compensatory mitigation is required, the mitigation project must comply with the applicable provisions of 33 CFR part 332.

22. *Water Quality.*

- a. If the State of West Virginia has not previously certified compliance of the RGP with the Clean Water Act Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.
- b. If the activity exceeds the limits of, or does not meet the terms of any 401 Water Quality Certification conditions issued by the WVDEP for this RGP, the WVCA must contact the WVDEP to obtain individual 401 Water Quality Certification.

23. ***Case-By-Case Conditions.*** The activity must comply with any case specific conditions added by the Corps or by the state in its section 401 Water Quality Certification.

24. ***Compliance Certification.*** If the WVCA receives a RGP verification letter from the Corps, the WVCA must provide a signed certification documenting completion of the authorized activity. The Corps will provide the WVCA with a copy of the compliance certification document with the RGP verification letter. If available, post-construction photographs will be submitted with the signed compliance certification.

25. ***Activities Affecting Structures or Works Built by the United States.*** If an RGP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a USACE federally authorized Civil Works project (a “USACE project”), as noted above, the WVCA must submit a PCN. An activity that requires Section 408 permission is not authorized by RGP until the appropriate Corps office issues the Section 408 permission to alter, occupy, or use the USACE project, and the district engineer issues a written RGP verification. Information on the location of federally authorized Civil Works projects in the State of West Virginia can be obtained by contacting the Corps District.

26. ***Pre-Construction Conditions.*** Streams must be restored to pre-construction conditions to the maximum extent practicable to achieve stable stream dimension, pattern, and profile.

27. ***Natural Stream Designs.*** All work shall be performed in an environmentally, technically, and economically sound manner and will incorporate natural stream design principles to the maximum extent practicable. The WVCA must indicate why natural design principles are not practicable for use in the project design.

28. ***West Virginia Office of Land and Streams (OLS) - Stream Activity Application.*** If a blanket waiver for the West Virginia OLS Stream Activity Authorization has not been issued by the WVDNR for a specific disaster declaration or for all activities under this RGP (as a whole), the WVCA is responsible for obtaining the West Virginia OLS Stream Activity Authorization from the WVDNR.

29. ***State-Listed Mussel Species.*** The WVCA is responsible for ensuring their action complies with the requirements for state listed mussel species. At the earliest possible date, the WVCA will provide the WVDNR and the USFWS West Virginia Field Office construction and location

details (e.g., county, stream name, type of work, and latitude and longitude) for review prior to initiation of work on streams supporting protected freshwater mussels. The most current information on stream reaches known to support state protected freshwater mussel species is available from the Natural Resource Program Manager, Coordination Unit, WVDNR, Post

Office Box 67, Elkins, West Virginia, 26241, by phone at (304) 637-0245 or by accessing Shapefiles or KMZ files at <https://www.wvdnr.gov/Mussels/Main.shtm>.

C. Agency Notification and Coordination

1. **Agency Notification:** Upon receipt of all PCNs, the Corps will notify the WVDEP and the WVDNR that a PCN has been received.

2. Agency Coordination:

- a. Agency coordination is required for:
 - i. projects that would result in the discharge of dredged and/or fill material into greater than 300 linear feet of stream and areas located in high quality resources such as trout, mussel or Tier 3 Streams; and
 - ii. projects where a waiver has been requested.
- b. 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 RGP and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.
- c. When agency coordination is required, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (USFWS, state natural resource or water quality agency, and United States Environmental Protection Agency). These agencies will have 10 calendar days, unless there is an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship, from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or email that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 10 calendar days before making a decision on the PCN. 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 RGP, including the need for mitigation to ensure the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will indicate in the administrative record associated with each PCN that the resource agencies' concerns were considered.

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 RGP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If the WVCA requests a waiver as described above, the district engineer will only grant the waiver upon a written

determination that the RGP activity will result in only minimal individual and cumulative adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the RGP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by RGP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the RGP activity, the type of resource that will be affected by the RGP activity, the functions provided by the aquatic resources that will be affected by the RGP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the RGP activity (*e.g.*, partial or complete loss), the duration of the adverse 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 or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the RGP authorization to address site-specific environmental concerns.

3. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the WVCA either:

- a. that the activity does not qualify for authorization under the RGP and instruct the WVCA on the procedures to seek authorization under an individual permit;
- b. that the activity is authorized under the RGP subject to the submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or
- c. that the activity is authorized under the RGP with specific modifications or conditions. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the WVCA submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory 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.

Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of the RGP.

2. This RGP does not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. This RGP does not grant any property rights or exclusive privileges.
4. This RGP does not authorize any injury to the property or rights of others.

5. This RGP not authorize interference with any existing or proposed Federal project (see General Condition 25).

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.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term “discharge” means any discharge of dredged or fill material into waters of the United States.

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

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

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

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

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps' Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-

phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

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

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

Loss of waters of the 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. 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 that do not require Department of the Army authorization, such as 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.

Navigable waters: Waters subject to Section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

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.

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

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

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by the RGP. The request may be a permit application, letter, or similar document that includes information about the proposed work and its

anticipated environmental effects. 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 the RGP.

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

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

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

Single and complete 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 RGP authorization.

Special aquatic sites: Special aquatic sites are defined in 40 CFR 230, Subpart E and include wetlands, riffle and pool complexes, and vegetated shallows. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.

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.

Tribal lands: Any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

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

Wetlands: Wetlands consist of areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.



west virginia department of environmental protection

Division of Water and Waste Management
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Charleston, WV 25304
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Austin Caperton, Cabinet Secretary
dep.wv.gov

July 27, 2018

Mr. Michael Hatten
Chief, Regulatory Branch
Huntington District, Corps of Engineers
502 Eighth Street
Huntington, West Virginia 25701-2070

Re: Public Notice LRH-2012-00147, State 401 Water Quality Certification, Reissuance of Regional General Permit (RGP) for Stream Restoration Activities to be performed by the West Virginia Conservation Agency (WVCA) within the Huntington and Pittsburgh Districts in the State of West Virginia.

Dear Mr. Hatten:

The West Virginia Department of Environmental Protection-Division of Water and Waste Management (WVDEP-DWWM), in conjunction with the West Virginia Division of Natural Resources - Wildlife Resources Section (WVDNR-WRS), has completed review of the above-referenced permit.

The purpose of this Regional General Permit is to expedite the US Army Corps of Engineers (COE) review of requests for authorizations from the WVCA to perform critical flood restoration projects in streams after declared disaster events to alleviate hazard to life and property. Such projects would include minor dredging, debris and deposition removal, bank stabilization, temporary construction access and dewatering, and restoration of uplands damaged by discrete events. Projects authorized under this proposed RGP must be completed within 12 months from the closing date of the typical Proclamation issued by the Governor for these events.

To help assure a streamline authorization process the WVDNR will not require the WVCA to submit a Stream Activity Application to the Office of Land and Streams for all projects authorized under this RGP. WVDNR-WRS requests that the WVCA avoid the planting

Mr. Michael Hatten

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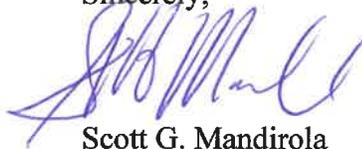
July 27, 2018

of any species listed in the Invasive Plant Species of West Virginia and species listed as Threat Level 1 species must not be planted. The complete list of West Virginia invasive plants can be downloaded at the following link: <https://www.wvdnr.gov/Wildlife/Handout%20Invasive%20Plants%20of%20WV%202009.pdf>

Although using Natural Stream Design is not practical in many cases for approved projects, designers should consider the use of a two-stage channel design methodology. Chapter 10 of the Natural Resources Conservation Service Part 654 Stream Restoration Design National Engineering Handbook details the construction of two-stage channels. Basically, the inner channel is designed to carry the 2-year return interval and the secondary channel (bench) is designed to convey the design discharge return interval of 5 to 100 years.

State 401 Certification, as required by Section 401(a)(1) of the Clean Water Act, is granted and becomes effective 15 days from the date of this certification. Pursuant to West Virginia Legislative Rule §47 CSR 5A Section 7, any person whose property or interest is directly affected by the approval or denial of certification, may request a hearing within 15 days of the certification decision. The request must identify the interest directly affected and set forth the manner in which the person is aggrieved or adversely affected. It should be directed to: Cabinet Secretary, West Virginia Department of Environmental Protection, 601 57th Street SE, Charleston, West Virginia 25304: ATTENTION: 401 Certification Program.

Sincerely,



Scott G. Mandirola
Director

SGM/wir

cc: Corps of Engineers, Pittsburgh District
U.S. Environmental Protection Agency - Jessica Martinsen
U.S. Fish and Wildlife Service – John Schmidt
WVDNR-Wildlife Resources Section, Elkins – Danny Bennett