

## **CLEAN WATER ACT SECTION 404 PERMIT AND 401 CERTIFICATION**

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

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

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

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

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

US EPA and the Corps of Engineers have recently issued guidance on the Clean Water Act’s definition of “Waters of the United States.” Read more about the guidance in the [Reference Section](#).

#### 404 Review Process:

- **Jurisdictional Determination:** Prior to submitting a permit application, applicants are encouraged to prepare and submit a Jurisdictional Determination (JD) Report. This report provides descriptions and mapping to identify the limits of a project site, in addition to the limits of waters of the U.S. The JD report typically includes information such as location maps; plan views of all waters of the U.S., field data sheets, and photographs. Upon completion of JDs, applicants are encouraged to design projects to avoid work in waters of the U.S. The permit application process can be avoided if proposed work occurs exclusively in uplands.
- **Pre-Application Meetings:** For complex and/or controversial projects, applicants are encouraged to submit preliminary information to the Corps and request a pre-application meeting. Such meetings provide applicants with early input and feedback on projects, recommendations for avoidance minimization, and consideration of the need for compensatory mitigation. Pre-application meetings may involve Corps project managers, in addition to representatives of federal and state resource agencies.

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

- **Individual Permit:** Individual permits involve the comprehensive evaluation of specific information related to a proposed project. The process includes the solicitation of input from the public and resource agencies through publication and distribution of a public notice, an evaluation of the aquatic resource effects of the project relative to the Section 404(b) (1) Guidelines, full public interest review pursuant to the National Environmental Policy Act of 1969 (NEPA), and ultimately the preparation of an environmental assessment (EA) or environmental impact statement (EIS). The review time of an Individual Permit varies depending on the overall impacts, level of complexity, and degree of controversy.
- **Letter of Permission:** Letters of permission (LOPs) are a form of abbreviated standard permit process. This process includes coordination with federal and state resource agencies. LOPs may be used to authorize activities subject to Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, or both. Proposed work being evaluated through this process includes projects that are minor in nature, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition. LOP procedures serve to reduce administrative procedures and expedite permit decisions. The review time for LOPs varies depending on the level of agency coordination required, but may range from one to several months.

- **Nationwide Permits:** Nationwide permits (NWP) are a type of general permit issued nationally for a category of activities that are typically similar in nature and result in not more than minimal adverse individual and cumulative impacts and satisfy other public interest factors. Some NWPs and/or established thresholds require applicants to submit a Pre-construction Notification to the Corps prior to commencing regulated work, while other NWPs may be used by applicants without prior notification, provided applicants comply with all terms and conditions of the NWPs, including any applicable Regional Conditions. Some examples of NWPs include NWP 12 for Utility Line Activities, NWP 14 for Linear Transportation Projects, NWP 21 for Surface Coal Mining Operations, NWP 27 for Stream and Wetland Restoration and NWP 37 for Emergency Watershed Protection and Rehabilitation. The review time for most NWPs is 45 days from receipt of a complete application. Some NWPs, including those associated with mining, do not have specified timeframes.
- **Regional Permits:** Regional Permits (RPs) are a type of general permit issued on a statewide or regional basis for a category of activities that are typically similar in nature and result in not more than minimal adverse individual and cumulative impacts and satisfy other public interest factors. Regional Permits are coordinated with federal and state resource agencies during their development and provide an expedited permit process for types of work resulting in minimal adverse individual and cumulative effects. Some examples of RPs include the Regional Permit for Boat Docks, the Regional Permit for Stream Restoration by Individual Landowners, and the Regional Permit for Abandoned Mine Lands (being finalized). The review time for RPs is generally similar to those associated with NWPs, typically 45 days from receipt of a complete application.

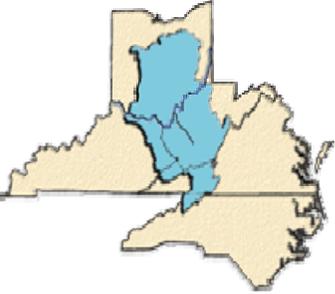
**401 Certification:** An applicant for a 404 permit must also submit an application to the state for certification under Section 401. The state is required to determine application completeness within 60 days of receipt. The applicant must then publish a class 1 legal advertisement in a local newspaper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

**Permit Cost:** 401 permit application fee: \$ 250  
404 permit application fee: Not to exceed \$100.00

For a brochure on 401 Certification regarding streams and wetland go to:  
[http://www.wvca.us/news/upload/wvwn\\_publications/931\\_rb-cwa%20627.pdf](http://www.wvca.us/news/upload/wvwn_publications/931_rb-cwa%20627.pdf)

For a brochure about stream restoration after flooding go to:  
[http://www.wvca.us/news/upload/wvwn\\_publications/930\\_Strm%20Rstoratn%20after%20Flooding.pdf](http://www.wvca.us/news/upload/wvwn_publications/930_Strm%20Rstoratn%20after%20Flooding.pdf)

## Contact Information:

<p>U.S. Army Corps of Engineers, Huntington District</p> <p>CELRH, Huntington 502 Eighth Street Huntington, WV 25701 (304) 399-5710</p> <p>District Website <a href="http://www.lrh.usace.army.mil/permits">http://www.lrh.usace.army.mil/permits</a></p> <p>Headquarters Website <a href="http://www.usace.army.mil/">http://www.usace.army.mil/</a></p> 	<p>U.S. Army Corps of Engineers, Pittsburgh District</p> <p>Attention: CELRP-OP-F Federal Building 1000 Liberty Avenue Pittsburgh, PA 15222-4186 Phone: 412-395-7155 FAX: 412-644-4211</p> <p>District Website <a href="http://www.lrp.usace.army.mil/">http://www.lrp.usace.army.mil/</a> Includes portions of western Pennsylvania, northern West Virginia, eastern Ohio, western Maryland and southwestern New York</p>	<p>For Section 401 Certification - for all filling activities, except coal and quarries:</p> <p>West Virginia Department of Environmental Protection / Division of Water and Waste Management 601 - 57th Street, SE Charleston, WV 25304 (304) 926-0495</p> <p>West Virginia Department of Environmental Protection's Website <a href="http://www.wvdep.org">http://www.wvdep.org</a></p>
---	--	---



[Pre-application meeting with Corps, Deckers Creek, Monongalia County](#)