



west virginia department of environmental protection

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Division of Water and Waste Management
§401 Water Quality Certification Program
Certification of the September 15, 2020 Proposal
to Reissue the Nationwide Permits

On October 23, 2020, the WV Department of Environmental Protection (WVDEP) Division of Water & Waste Management commenced a thirty day public comment period to accept written comments on the proposed issuance of a §401 Water Quality Certification (WQC) applicable to the U.S. Army Corps of Engineers, September 15, 2020, Proposal to Reissue the Nationwide Permits. WVDEP received eight comment letters and appreciates every person and organization who participated in this public process. WVDEP thanks you for providing your views and concerns and specific responses to comments may be found below.

Written Comments and Responses to the §401 WQC of the Nationwide Permits

1. *American Electric Power (AEP) expressed concern regarding the WVDEP’s issuance of §401 WQC “based on a draft version of the Nationwide Permits” and indicated it “may require reexamination once they are finalized.”*

The West Virginia Department of Environmental Protection (WVDEP) was provided a request for certification from the United States Army Corps of Engineers (Corps) on October 13, 2020. In accordance with the Clean Water Act Section 401 Certification Rule, 40 C.F.R. Part 121, the WVDEP was notified by the Corps that the reasonable period of time for review was 60-days. The WVDEP is required to provide certification by December 12, 2020 in accordance with applicable regulatory requirements or risk waiver of certification.

2. *AEP seeks clarification of the, “references to cumulative impacts throughout the general and special conditions” and suggests they “share the same interpretation of cumulative as the nationwide permits put forth by the U.S. Army Corps of Engineers for linear projects.”*

The Corps does not provide a definition for cumulative in Section H of the Nationwide Permits (NWP) and therefore the WVDEP interprets cumulative permanent impacts as the successive impacts associated with a single activity. This would require that linear projects and non-linear projects provide compensation for the total permanent impacts resulting from the proposed activity.

3. *AEP seeks clarification regarding Standard Condition 5 and the applicability to temporary vehicular crossing in comparison to utility line crossings.*

The WVDEP intends for this condition to apply to both utility line crossings and any other temporary crossing of a federally jurisdictional feature. It was removed from the special conditions section of NWP 12 and only included in the standard conditions to reduce redundancy and ensure permittees understood it would apply to all temporary crossings.

4. *AEP requested the removal of ephemeral waters from Standard Condition 12 due the fact they are considered non-federally jurisdictional resources and outside the scope of §401 WQC regulatory authority.*

The WVDEP has removed the reference to ephemeral waters from Standard Condition 12.

5. *Arch Resources (Arch), Equitrans Midstream (EQT), LP Mineral, LLC (LP), and the WV Coal Association (WVCA) express concern that they do not feel the WVDEP has satisfied the requirements of 40 C.F.R. Part 121.7(d) and suggests that WVDEP’s continued citation and reliance on its water quality standards and antidegradation policy to justify its certification conditions is not sufficient.*

The WVDEP does reference the Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1 et seq. (2016) and the Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1 et seq. (2008) along with a variety of other rules and regulations applicable to water quality requirements throughout the §401 WQC for the NWP's. The reliance on the water quality standards and antidegradation policy as a significant citation is appropriate since these two sources provide the primary basis for water quality requirements in the state.

6. *Arch, LP, and the WVCA suggests that the WVDEP is ignoring the existence of the extensive permitting process that exists under CWA Section 402 and SMCRA by issuing §401 WQC for the NWP's.*

The State §401 Water Quality Certification is required under §401 of the Federal Clean Water Act, 33 US Code §1341 to be provided to the USACE to certify the federal §404 Permit. WVDEP has an obligation to ensure permitted activities in intermittent and perennial streams will not cause a violation of West Virginia's water quality standards.

WVDEP's mining NPDES and SMCRA programs comply with all state and federal regulations. The information required to process applications under each program is extensive and many times duplicative. While the two programs have similarities, they are quite different in what they regulate. Being said, the NPDES permit cannot replace a SMCRA permit any more than a SMCRA permit can replace a NPDES permit.

The same is true in regard to a §404 Permit and a §401 Certification. Neither can be substituted by the NPDES permit or the SMCRA permit regardless of the same information reviewed or the extensive permitting process applied. The fact is simply they all should complement each other. While the SMCRA permits the activity, NPDES establishes discharge limitations and conditions related to the permitted activity that will protect the state's water quality standards. The USACE §404 permit authorizes any activity that will impact Waters of the United States, while the §401 Water Quality Certification certifies that the activity authorized by the §404 will not cause a discharge that will not comply with the state's water quality standards. In fact, the §404 permit and the §401 Certification rely on the review and issuance of the SMCRA and NPDES permits for justification for their issuance.

The USACE §404 Nationwide Permits (NWP) are general permits that authorize activity that can be justified as di minimis in Water of the United States. The USACE also establishes certain restrictions and conditions for each NWP and are applicable to all 50 states. The NWP's have a term of 5 years and must be reissued every five years. Due to changes made by the Waters of the United States and the CWA §401 Rule, all NWP's are being reissued early to comply with applicable changes.

7. *Arch, EQT, LP, WVCA, WV Division of Highways (WVDOH) and WVONGA raised concern with the language utilized in some of the Standard Conditions of the §401 WQC. They have concern that it suggests mitigation requirements and coverage of non-federally jurisdictional features or uplands.*

The WVDEP is not proposing to regulate non-federally jurisdictional features or uplands as part of the §401 WQC of the NWP. To ensure clarification of WVDEP's intent, modified language in Standard and Special Conditions will reference the applicable federal permit authorizing the stream and wetland impacts. Standard Condition 21 will also be removed from the §401 WQC and replaced with a note directing applicants to coordinate with the WVDEP on potential permitting requirements for federally non jurisdictional features in accordance with the WV Water Pollution Control Act, W.Va. Code §22-11-8(b)(1) et seq. (2014).

8. *EQT expressed concern regarding the duplicative nature of Standard Condition 3 and the Corps General Condition regarding Aquatic Life Movement. EQT also questions if WVDEP's citation of Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016) is applicable to the condition.*

Standard Condition 2 regarding culvert installation and the requirement to pass bankfull flow is intended to protect water quality through the reduction of excess bank erosion, turbidity, and sedimentation during high flow events. Also, it is intended ensure aquatic organism passage to protect the required designated use of all waters of the state for the Propagation and Maintenance of Fish and Other Aquatic Life as identified in Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-6.1 (2016). To ensure that the condition citation includes all applicable language and statutory requirements relevant to the condition, the following citation will replace what was published in the Public Notice (PN); Antidegradation Implementation Procedures, W.Va. C.S.R §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).

9. *EQT expressed concerns regarding Standard Condition 5 and the authority of WVDEP to require temporary crossings be restored to a physical condition similar to the originally impacted channel or wetland. EQT also calls into question the appropriateness of the citation utilized in describing the material to be discharged as waste.*

The Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016) provides appropriate authority in regards to activities conducted as part of temporary stream crossings since any discharge of material that was not in place prior to the project activity is considered waste. The requirement to replace substrate and provide restoration to similar physical characteristics of the original stream channel is necessary to ensure that the designated use of an aquatic resource is not degraded and to prevent water quality issues that may occur when soil from banks is eroded to waters causing potential contamination or excess turbidity and sedimentation in downstream reaches.

10. *EQT notes that the inclusion of groundwater in Standard Condition 6 is beyond the scope of §401 WQC.*

The reference to groundwater has been removed from Standard Condition 6, but is still applicable to projects in accordance with the WV Groundwater Protection Act W.Va. Code §22-12-1 (1994) and enforceable by the WVDEP independent of the NWP.

11. *EQT notes that the inclusion of groundwater in Standard Condition 7 is beyond the scope of §401 WQC and the condition inappropriately regulates activities in uplands.*

The WVDEP appreciates the comment and has provided revisions to ensure it is within the scope of the state's §401 WQC authority.

12. *EQT inquires whether Standard Condition 8, "stabilization requirement applies to activities along stream banks, but not to areas entirely displaced by fill" and seeks clarification of disturbance.*

Standard Condition 8 is intended for all disturbances and has been clarified in the final §401 WQC of the NWP.

13. *EQT purports that Standard Condition 10 is outside of the scope of §401 WQC and asks if the "WVDEP extend its construction stormwater permitting requirements to the actual stream and wetland crossings by a linear project such as a utility line"?*

Construction Stormwater Permits issued by WVDEP do regulate the crossing techniques and BMPs are required when working in waters. For this reason, and because NPDES requirements are required by the WV Water Pollution Control Act, the WVDEP hasn't revised the condition.

14. *EQT requested revision of Standard Condition 11 for clarification regarding concrete handling requirements within a water course.*

The WVDEP has revised the condition as requested for clarification purposes.

15. *EQT identifies concerns regarding the applicability of Standard Condition 12 when utilizing the one-step excavation method and suggests that "condition should acknowledge that it is limited to "point source" discharges that are regulated by USACE nationwide permits".*

The WVDEP §401 WQC of the NWP is only for activities subject to federal permitting requirements. If methods of sediment removal are being utilized that preclude the operator from Corps permitting requirements, then the §401 WQC of the NWP would not be applicable.

16. *EQT requested the removal of Standard Condition 16 since it is regulated under state law and may not be applicable to all projects for which water withdrawals are proposed.*

WVDEP regulates Large Quantity Water use pursuant to the Water Resources Protection Act, W.Va. Code §22-26-1 (2014) under state authority. For those nationwide permits for which water withdrawals are considered in association with an applicable discharge from a point source, reporting may be required in accordance with the Water Resource Protection Act. Standard Condition 16 will be removed and included as a note since other NWP §401 WQC Special Conditions address the concerns associated with water availability when an applicable discharge from a point source occurs.

17. *Arch, LP, WVCA, and WVONGA all raise concerns regarding §401 WQC Standard Condition that requires coordination with WV Division of Natural Resources (DNR), Office of Land and Streams (OLS) for a right of entry agreement for activities requiring equipment to be placed in-stream.*

The WVDNR owns WV stream beds and banks below the ordinary high water mark and requires coordination through their OLS when equipment will be placed in-stream. This condition of §401 WQC of the NWP has been removed, but this does not change WVDNR OLS's requirement for coordination, nor for appropriate state enforcement should compliance with the right of entry requirements of WVDNR OLS not be observed.

18. *WVONGA raises concern that Standard Condition 20 usurps federal authority of the US Fish and Wildlife Service (FWS) and places that authority with WVDNR and states that "No West Virginia statute or regulation authorizes the state to restrict or otherwise regulate activities based on the potential that an activity may jeopardize the survival of an entire mussel species, or even a population of a mussel species."*

The WVDEP revised Standard Condition 20 significantly prior to public notice to address the issues raised by WVONGA and does not find that the condition as noticed weakens or undermines the federal authority of the USFWS, but rather strengthens the coordination required under the Fish and Wildlife Coordination Act, 16 U.S.C. §661 and ensures appropriate wildlife protections. The WVDNR has authority to require a collection permit and potential restitution for the take and/or possession of mussels in accordance with applicable state law, Possession of Wildlife, W.Va. Code §20-2-4 (2017) and Fishing Regulations W.Va. C.S.R. §58-60-5.11 (2020). The condition as noticed and included in the attached §401 WQC of the NWP requires coordination "should native freshwater mussels be encountered during the use of any Nationwide Permit."

19. *The WV Rivers Coalition (Rivers) requested that a public meeting be held to discuss the WVDEP's rationale behind the proposed changes included in the public noticed §401 WQC of the NWP.*

The WVDEP was provided a reasonable period of time for certification from the Corps of 60-days requiring issuance of §401 WQC on December 12, 2020, otherwise risking waiver in accordance with the Environmental Protection Agencies, Clean Water Act Section 401 Certification Rule, 40 C.F.R. Part 121. Due to this extremely diminished review timeframe allotted, the WVDEP does not have sufficient time to host a public meeting and provide changes to the certification without risk of waiver.

20. *Rivers expressed concern that, "The removal of Standard Condition 15 weakens protections for every Nationwide Permit. DEP eliminated Standard Condition 15 which required the permittee of any Nationwide Permit to comply with the state's water quality standards."*

The WVDEP acknowledges River's concern and notes that protection of the State's water quality standards is the bedrock of its §401 WQC. The requirements contained in the Standard

and permit-specific Special Conditions are each ultimately geared toward protecting water quality in the State.

21. *Rivers seeks justification of the removal of Standard Condition 20 B and C present in the 2017 NWP §401 WQC that provided protection for federally endangered species and required prior coordination with WVDNR.*

Standard Condition 20 B was a duplicative condition requiring coordination for federally endangered species. The Corps coordinates with USFWS under the existing NWP process regarding endangered species. As part of that coordination the USFWS includes the WVDNR as a coordinating party when considering impacts to endangered species in the state. Section C was directing applicants to a useful pre-planning tool and will be included in the notes section but is not being included as a requirement for compliance with the NWPs.

22. *Rivers requests that Special Condition A present in the 2017 NWP 3 §401 WQC be reinstated.*

The requirement of notification for any project affecting Tier 3 waters, trout waters, and Natural Streams Preservation Act reaches is still present in the Standard Conditions and the removal from NWP 3 was to reduce unnecessarily repeated conditions that may lead to permittee confusion.

23. *Rivers requests that Special Condition A present in the 2017 NWP 6 §401 WQC be reinstated.*

The WVDEP did not have a water quality requirement justification for the condition, so it was removed from the §401 WQC of the NWPs.

24. *Rivers requested “WVDEP strengthen or at a minimum retain, rather than remove or weaken, limits to the extent of impacts which require an individual certification” under NWP 7 Special Condition C.*

The limit of bank disturbance associated with NWP 7 activities was increased to be more consistent with other NWP §401 WQC conditions associated with bank disturbance and stabilization activities.

25. *Rivers requests clarification of the intended meaning of “permanent” in §401 WQC Special Condition F of NWP 7 and Special Condition G or NWP 12 regarding fish movement.*

Any structure that is intended to be left in place after project completion would be considered permanent.

26. *Rivers provides the following comment regarding NWP 12, “The elimination of Special Condition A. i. which detailed that a pipeline greater than 36-inches required an individual permit, weakens protections for thousands of rivers and streams in the path of pipelines.” and “Special Condition A. iii. pipelines transporting hazardous materials, unnecessarily puts our water and the public’s health at risk by removing DEP’s oversight on pipelines transporting hazardous materials.”*

If an activity triggers notification under Special Condition A of the §401 WQC for NWP 12 then the state has determined that additional review and consideration must be given to the necessity of additional conditions to ensure the activity complies with all applicable water quality requirements. It was determined that the size of the pipeline did not necessitate additional conditions, so long as the activity complies with the NWP conditions and §401 WQC Standard and Special Conditions. Sedimentation from disturbances in uplands is protected as part of the Construction Stormwater Permit for the activity and not within the scope of §401WQC review. The proposed NWP 12 only authorizes oil and natural gas pipeline activities and NWP D authorizes all other utility line activities carrying water or other substances. Due to this change in NWP coverage the WVDEP will include a hazardous substance individual certification §401 WQC requirement for NWP D.

27. *Rivers requested justification for why WVDEP, “removed Special Condition B. which outlined that points of ingress and egress in streams must occur within the Limit of Disturbance (LOD).”*

It was determined the intent of the condition is better protected by the WVDNR, OLS right of entry authority if the restriction were due to a wildlife consideration. Otherwise, Standard Conditions 8 and 13 provide appropriate protection.

28. *Rivers inquires why WVDEP, “removed Special Condition C requiring crossings be completed within 72 hours” from NWP 12.*

The WVDEP maintained the condition as incorporated into Standard Condition 5 of the §401 WQC.

29. *Rivers has concern regarding the WVDEP’s removal of the 2017 NWP 12 “Special Condition E., which required surface disturbance be contained within the right-of-way and stream crossings to be performed at a 90-degree angle. This special condition was in place to minimize disturbance.*

The WVDEP appreciates the comment and will include a condition indicating that when practicable stream crossings will be made at a 90-degree angle. It is not always possible to cross a stream in accordance with the previous condition, therefore potentially problematic for permit compliance. Individual certification would not afford additional protection if the alternatives analysis for the project left no other practicable alternative.

30. *Rivers requests WVDEP reinstate the 2017 NWP 12 “Special Condition I, requiring warning signage for recreational users. This simple action by pipeline companies warned recreational users on the rivers of upcoming hazards. There is no justification why DEP eliminated this special condition that protected the rivers recreational users.”*

After consideration and additional review of the Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-6.4 (2016) it was determined that to meet Category C requirements regarding water contact recreation considerations that are applicable to all waters, the WVDEP will reinstate the condition.

31. *Rivers requests a justification for removing the 2017 NWP 12 Special Condition J which required prior notification for vented low water crossings.*”

The WVDEP felt notification of the crossing based on crossing type was unnecessary so long as the activity complies with the §401 WQC Standard and Special Conditions.

32. *Rivers requests a justification for removing the 2017 NWP 12 “Special Condition M, which detailed how stream and wetland materials would be removed and stockpiled during construction and replaced during restoration.”*

This condition remains applicable to all NWP activities as Standard Condition 5.

33. *Rivers has concern regarding the WVDEP’s removal of the 2017 NWP 13 “Special Condition A. i. which required an individual state water quality certification for 500 linear feet of streambank impacts.”*

The WVDEP allowed for the waiver of individual certification requirement for projects up to 1,000 linear feet for landowners under the same 2017 NWP 13 Special Condition A.i. The current NWPs allow a maximum of 1,000 linear feet of bank stabilization to be considered under NWP 13 and an individual certification review would not provide additional water quality protections than those afforded in the §401 WQC Standard and Special Conditions.

34. *Rivers requests justification for the Special Condition changes made to the coal related NWPs 21, 49, and 50.*

WVDEP has revised a number of Standard and Specific Conditions to the NWP’s relevant to coal mining related activities. Most notably, changes were made to the Special Conditions for NWP 21, 49 and 50 to mirror the Special Conditions for other NWP’s and to incorporate changes to the NWP’s made by the USACE.

Specific changes to the Special Conditions for NWP 21, 49 and 50 were done for the following reasons.

Condition A required a minor change to reflect the numbering of Standard Condition 18 to 17. It retains the protection for Tier 3 streams.

Condition B was amended to be more consistent with all other NWP conditions. For many years, Individual Certification was required for any activity in intermittent or perennial streams. There was no minimum or maximum threshold. The ½ acre threshold coincides with the ½ acre imposed by the Corp.

Condition C was amended to adopt the cumulative ½ acre threshold imposed by the Corp, while adopting a less restrictive threshold for individual stream crossings from 100 feet to 300 feet. WVDEP opposes the ½ acre as the single threshold for an individual crossing in that it would grant a more significant impact to a single section of stream without scrutiny of an application and public review. As an example: a proposed crossing of 12 foot wide intermittent or perennial stream under the ½ acre condition would allow 1815 feet of stream to be impacted.

Without exceeding ½ acre condition, this proposed activity would not require a §401 application, public participation and §401 Certification. WVDEP realizes that the previous 100 foot threshold for an individual crossing was more restrictive than other non-coal NWP's and that the 300 foot threshold is comparable to other Special Conditions imposed on non-coal related NWP's.

Condition D was revised to simply clarify that the impact to ½ acre of wetlands was cumulative and not just to a single wetland. Some commentors have expressed opinion that the ½ acre needs to be reduced to ¼ acre as was previously listed in NWP 49. We cannot find the ¼ acre threshold condition for NWP 49 in the last two previous NWP reissuances. The ½ acre is consistent with other NWP conditions.

35. *WVONGA and WVDOH suggest §401 WQC Standard Condition 2 “should be modified to use a 1/10-acre threshold for both wetlands and perennial and intermittent streams.” as opposed to the 300 linear foot threshold currently noticed. The WVDOH also proposes consistency with the Corps regarding the determination of mitigation for cumulative impacts from a project.*

The WVDEP after review and consideration found the 300 linear foot threshold for permanent impacts was more appropriate than 1/10 acre threshold, which may potentially allow for greater than 1,500 linear feet of permanent impact to federally jurisdictional waters without compensation. This could lead to a potentially significant cumulative impact to waters, and the Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2.i (2016) disallows a discharge to cause significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems. The condition also appropriately protects streams and rivers as well as the headwaters of the State. In the January 13, 2002 NWPs, the Corps provided the following requirements that the “...discharge does not cause the loss of greater than 300 linear-feet of a stream bed” so “any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively”, which is a protective approach that has been implemented by WVDEP for almost two decades.

36. *The WVDOH suggests the following language for NWP 13 §401 WQC Special Condition B, “... forty-five-day advance notification prior to installation of bank protection may be waived in the event of an emergency that endangers people, buildings, infrastructure, and/or access by emergency responders” to ensure appropriate consideration for extenuating circumstances.*

The WVDEP will include the proposed changes in the final §401 WQC of the NWPs.

37. *The WVDOH expressed concern regarding NWP 14 §401 WQC Special Condition D, which requires 60-day notification prior to impact when the permit is being used for the discharge of material to Section 10 waters and streams identified in Section H Standard Condition 17 A, B, and C. It was requested that the WVDEP revise the condition to require 30-day notification.*

The WVDEP will work with applicants in situations where a determination of the necessity of individual certification is provided in a timely manner in order to initiate the appropriate review process. The 60 day prior to impact requirement is to provide sufficient time to review the

activity, provide public notice if individual certification is required and issue certification prior to when project impacts are proposed to occur.

38. *WVONGA raises concern with the WVDEP's use of "significant adverse impact" and requests clarification of the intended meaning of "aquatic resources," "aquatic ecosystem," "high quality and special aquatic resources," and "aquatic resource functions."*

The WVDEP uses the terms identified above as they are described in state and federal rules and regulations applicable to the State's water quality requirements. Primary references include Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), WV Water Pollution Control Act, W.Va. Code §22-11-1, et seq. (2014), Rules for Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-1, et seq. (2014), and Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 33 C.F.R. §332 (2008).

39. *WVONGA provides the following comment regarding §401 WQC, "Standard Condition 1 indicates that WVDEP will review and determine whether an applicant needs an individual permit upon every standard NWP submission. The language "to ensure the activity complies with the state water quality requirements" implies that the WVDEP, not the USACE, has authority over the permitting process and adds uncertainty for applicants. WVDEP is not the permitting authority and, therefore, this language should be removed."*

The WVDEP only intends to receive notification for those activities that also trigger Pre-Construction Notification to the Corps. The WVDEP does not have discretion under Standard Condition 1 to require an individual §404 permit, but rather reviews the activity in coordination with the Corps to provide agency support regarding whether the proposed activity will meet the requirements of the subject §401 WQC and applicable water quality requirements.

40. *WVONGA provides the following comment regarding §401 WQC conditions including, "The requirement to avoid removal of "well-established" riparian vegetation" indicating it "is impermissibly vague because WVDEP has not defined this term."*

To ensure water quality protection from erosion and turbidity, the WVDEP included in Standard Condition 13 the protection of well established vegetation, or that vegetation that provides bank stability and protection through mature root systems. This stability reduces near bank stress during high flow or bankfull events. The WVDEP has simplified the language and removed "well established" to avoid ambiguity and to ensure protection of waters from unnecessary degradation.

41. *WVONGA proposes that the use of inadvertent return in NWP 12 §401 WQC Special Condition A.i is "contrary to applicable law".*

The WVDEP has removed the inadvertent return language from the conditions identified in WVONGA's comments to reduce confusion of what impacts are contemplated under NWP 12 authorization from the Corps.

42. *WVONGA requests clarification and revision to the definition of hazardous material in accordance with other applicable state and federal law.*

The WVDEP reviewed the proposed revisions and agrees that it provides clarification and have include the following language, "...hazardous material, consistent with the definition found in Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601(14) and Toxic Substances Control Act, 15 U.S.C. §53(2601–2629) ..." in the final issuance of the §401 WQC for the NWP.

43. *WVONGA provides the following comment, "Proposed Special Condition F requires clarification. The stated basis for Special Condition F is "[t]o ensure water availability in perennial streams and protect the integrity of aquatic resources." The term "water availability" is impermissibly vague because WVDEP has not defined this term. WVONGA also inquiries about the definition of "more than minimal impact".*

The WVDEP intends for the condition to protect streams from being dewatered and impacting the designated uses applicable to all waters of Category B and C in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-6, et seq. (2016). Water availability is intended to reflect the availability of sufficient water in stream to protect at minimum those designated uses identified above. The WVDEP understands the concerns regarding "more than minimal" ambiguity and has removed this phrase for clarification purposes.