



November 27, 2020

Secretary Austin Caperton
WV Department of Environmental Protection
Division of Water and Waste Management
601 57th Street South East
Charleston, WV 25304

Attn: Chris Smith, WQS Program

RE: 401 Water Quality Certification Program

Submitted electronically via WQScomments@wv.gov

Secretary Caperton:

West Virginia Rivers Coalition, on behalf of our members and the organizations signed below, respectfully submit the following comments on the proposed modifications to the West Virginia Department of Environmental Protection (DEP) 401 Water Quality Certification for U.S. Army Corps of Engineers (USACE) Nationwide Permits (NWP).

Given the USACE needlessly cut short the five-year NWP revision cycle by two years, the benefits of rigorously assessing the impacts of both the existing NWPs issued in 2017 and the proposed NWPs were cut short. We are concerned about many of the numerous changes DEP made involving this certification that stand to weaken protections for water quality. Considering the wide scope and volume of these proposed modifications, we recommend a public meeting be held with DEP's 401 Water Quality Certification Program to enable dialogue around the agency's rationale for these changes. Moving forward, such a meeting would be helpful to take place prior to the public comment period.

Standard Condition 15

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. ***Standard Condition 15 should be restored.***

Standard Condition 20

The removal of standard condition 20. B. and C. weakens protections for endangered mussels. DEP eliminated standard conditions 20. b. which required applicants to seek approval from WVDNR for potential impacts to endangered mussels and 20. C. which

provided a resource for pre-planning guidance to avoid impacts to sensitive water resources such as mussel streams, trout streams, wetlands and karst.

We are opposed to the removal of these 2 standard conditions for all NWPs and encourage DEP to restore these standard conditions.

Special Conditions under NWPs

We commend WVDEP for strengthening a few of the special conditions in the NWPs. However, in most cases we see a trend toward weakening the special conditions and reducing the thresholds where individual certification is required. ***We encourage DEP to strengthen or at a minimum retain, rather than remove or weaken, impact thresholds for which an individual certification is required.***

NWP 3 Maintenance Activities

The elimination of Special Condition A removes DEP's oversight of maintenance activities. Previously, DEP was required to be notified of maintenance activities that impacted sensitive streams listed in Standard Condition 17. A. Tier 3, B. naturally reproducing trout streams, or C. streams included in the Natural Streams Preservation Act (NSPA). By removing Special Condition A., DEP has no oversight of maintenance activities covered by NWP 3 even if those activities occur in the sensitive waters listed in Standard Condition 17. A, B, C and Section 10 Rivers. ***We encourage DEP to restore Special Condition A, to have oversight over activities that have potential to impact our high quality rivers and streams and navigable waters.***

NWP 6 Survey Activities

DEP removed Special Condition A, which required test holes to be abandoned. ***What is DEP's justification for removing this special condition?***

NWP 7 Outfall Structures and Associated Intake Structures

In Special Condition C, DEP changed the bank disturbance linear feet of impact threshold for an individual permit from 100 to 500 feet. ***DEP should strengthen or at a minimum retain, rather than remove or weaken, limits to the extent of impacts which require an individual certification.***

Under Special Condition F, the word "permanent" is added to the language prohibiting impedances to fish passage. However, permanent is not defined. ***How long are temporary impedances allowed?*** Within NWP 33, temporary is defined as not to exceed one year. The definition of non-permanence should be consistent throughout the special conditions. In the case of fish passage; however, an entire year of impedances to fish passage could have detrimental effects on aquatic life. ***DEP should revise this Special Condition F, which prohibits permanent impedances to fish passages, to specify that those impedances should not occur during the spawning season and should coincide with WVDNR's time***

of year restrictions for construction activities.

NWP 12 Utility Line Activities

DEP eliminated a total of 8 special conditions from NWP 12; Special Conditions Ai, Aiii, B, C, E, I, J and M, effectively removing the most conditions on any NWP. This is particularly alarming because the NWP 12 is frequently used in West Virginia and has been the subject of several legal actions since the NWPs were recertified in 2017. DEP waived the 401 State Water Quality Certification for the Mountain Valley Pipeline citing the strong special conditions that were included in the NWP 12. The elimination of these special conditions could have significant impacts to water resources. DEP is very familiar with the negative impacts that pipeline projects have had on waters of the state, yet is proposing to weaken their oversight of them. ***DEP should restore and strengthen protections for the NWP 12, not strip or weaken them.***

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. We know from previous experience that large-scale pipeline construction, even 24-inch pipelines, has had severe sedimentation impacts on the waters of the state within their path. An individual certification must be required for projects with a high potential to impact waters of the state. ***We recommend DEP restore this special condition instead of eliminating it.***

The elimination of 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. There is no justification for why this special condition was eliminated. ***We encourage DEP to restore Special Condition A. iii.***

We support the change of Special Condition A. iv., which changed 200 linear feet of impacts to Tier 3, naturally reproducing trout streams, or NSPA streams to any permanent impact and was modified to include the additional individual permit threshold for 1/10 acre of wetland impacts. This modification offers additional protections for the streams and wetlands crossed by pipelines. We encourage DEP to make more modifications to that effect instead of weakening and removing the conditions.

DEP removed Special Condition B. which outlined that points of ingress and egress in streams must occur within the Limit of Disturbance (LOD). There is no justification for removing this special condition. It makes sense to confine the impacts of heavy equipment crossing streams to within the impact area. ***We urge DEP to restore Special Condition B.***

DEP removed Special Condition C. requiring crossings be completed within 72 hours. We have expressed our concerns previously about weakening this condition and are alarmed to see DEP is proposing to remove it altogether. The special conditions are in place to protect our waters designated uses. Just because a pipeline company has trouble complying

with a condition, does not mean that it should be removed. ***Special Condition C must be restored for the following reasons:***

1. The time restriction on pipeline crossings is critical to protect aquatic life. In its biological opinion for the Atlantic Coast Pipeline, the US Fish and Wildlife Service lists dewatering of mussel beds and increased sedimentation as two of the threats leading to the decline of Clubshell mussels. Allowing unlimited crossing durations during which the stream bed is dewatered for prolonged periods, and/or sedimentation is occurring would have detrimental effects on aquatic life. Removing the time restriction does not protect the streams designated use to support aquatic life. The impacts to aquatic life must be taken into consideration prior to removing the 72-hour requirement.
2. DEP relied on the 72-hour stream crossing condition when issuing the State General Water Pollution Control Permit for the Atlantic Coast and Mountain Valley Pipelines. On both projects in its response to comments for why an antidegradation review is not needed, DEP stated, “The Stormwater Pollution Prevention Plan (SWPPP) for this project requires that additional protective measures will be employed at crossings of and in proximity to Tier 3 and trout streams. The additional measures include...stream crossings in these areas will be completed within 72 hours once the crossing has begun...”. By exempting rivers and streams from the 72-hour stream crossing condition, DEP would also invalidate the protections afforded streams under the General Stormwater Construction Permit and undermine its own rationale of why an anti-degradation review is unnecessary.
3. Other state agencies rely on the special conditions included within the Nationwide Permits. DNR refers to the condition requiring crossings to be completed in 72 hours in its spawning waiver approvals, and assumes when issuing those waivers that the applicant will comply with the 72-hour restriction. DNR has relied on this condition to allow construction during the spawning season. Removing this condition would therefore undermine DNR’s spawning waiver approvals.

For the above reasons, DEP must restore Special Condition C that limits the durations of stream crossings.

DEP removed 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 Clean Water Act requires NWP-authorized activities to cause no more than minimal impacts, individually or cumulatively. By removing special conditions, DEP is no longer attempting to minimize impacts. ***We encourage DEP to restore the Special Condition E which minimized disturbance and impacts.***

DEP removed 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. ***We strongly urge DEP to restore Special Condition I. to protect recreationist on the rivers from the hazards of pipeline construction.***

DEP removed Special Condition J. requiring prior notification for vented low water crossings. ***What is DEP's justification for removing this special condition?***

DEP's modification of Special Condition G included "permanent" in the language prohibiting the impedances to fish passage. As we stated previously under NWP 7, "permanent" is not defined. ***How long are temporary impedances allowed?*** Within NWP 33, temporary is defined as not to exceed one year. The definition of non-permanence should be consistent throughout the special conditions. In the case of fish passage; however, an entire year of impedances to fish passage could have detrimental effects on aquatic life. ***We encourage DEP to revise this Special Condition G, which prohibits permanent impedances to fish passages, to specify that those impedances should not occur during the spawning season and should coincide with DNR's time of year restrictions for construction activities.***

DEP removed Special Condition M which detailed how stream and wetland materials would be removed and stockpiled during construction and replaced during restoration. ***What is DEP's justification for removing this special condition?*** This best management practices guidance seems crucial for protection of the stream during construction and restoration activities. ***We encourage DEP to restore Special Condition M.***

The measures taken by DEP to weaken the Special Conditions of the NWP 12 is alarming. Thousands of streams have been damaged by sedimentation from pipeline construction in previous years and continues to this day. ***DEP must strengthen or at a minimum retain, rather than remove or weaken, the special conditions of the NWP 12.***

NWP 13 Bank Stabilization

DEP removed special condition A. i. which required an individual state water quality certification for 500 linear feet of streambank impacts. The change would remove DEP's oversight for streambank stabilization projects that do not impact the states sensitive waters.

We support DEP's modifications from A. ii. To A. i. which removed 200-foot threshold for an individual state water quality certification and instead lists any permanent impact to sensitive streams listed in Standard Condition 17 A, B, and C.

We support bank stabilization measures that reduce erosion. ***We encourage DEP to add a special condition that promotes natural stream design techniques for bank stabilization and require the applicant with a structural bank stabilization design to***

demonstrate that a nature-based approach would be insufficient to stabilize the stream bank, and that the applicant's proposed method would be the least environmentally damaging practicable alternative.

NWP 14 Linear Transportation Projects

DEP modified Special Condition D, from requiring individual permit on impacts to sensitive water resources in Standard Condition 17 A, B, C to requiring additional information on the project to determine if an individual state water quality certification is necessary. This modification seems unnecessary and “muddies the waters” on what constitutes an individual certification. Permitting requirements must be clear to the permittee.

Requiring State 401 Water Quality Certifications for some projects that impact streams under 17. A, B, C, but not for others leaves a gray area for permittees. ***We encourage DEP to rescind this modification and restore the condition requiring State 401 Water Quality Certifications for any projects that impact streams in Standard Condition 17. A, B and C.***

NWP 21 Surface Coal Mining Activities

DEP modified Special Condition B. which previously required an individual permit for impacts to perennial and intermittent streams but now only requires an individual permit if there are ½ acre of impacts to perennial or intermittent streams. We are opposed to this this modification that weakens protections for streams impacting by mining activities. ***We encourage DEP to rescind this modification.***

DEP's modifications to Special Condition C. changed the threshold from requiring an individual permit for 100 linear feet of impacts of haul roads and related mining infrastructure to 300 linear feet or ½ acre of cumulative impacts. This modification weakens DEP's oversight of mining's impacts on streams. We are opposed to this this modification that weakens protections for streams impacting by mining activities. ***We encourage DEP to rescind this modification.***

We support DEP's modification to Special Condition D. which changes the threshold for an individual permit from one acre of wetland impacts to ½ acre of cumulative impacts. This modification provides more protections for wetlands and we encourage DEP to adopt this more protective approach throughout the NWP conditions. ***We urge DEP to go even further and reduce the threshold to ¼ acre as was previously listed in special conditions of NWP 49.***

NWP 45 Repair of Uplands Damaged by Discrete Events

DEP modified the special condition in NWP 45 from requiring individual permit for over 200 linear feet of impacts to streams protected under Standard Condition 17 to a 60-day notice and additional information to determine if individual permit is warranted. We refer

to our previous comment on this approach. This modification “muddies the waters” on what constitutes an individual certification. Permitting requirements must be clear and avoid gray and ambiguous areas. Therefore, ***we encourage DEP to rescind this modification and restore the condition requiring State 401 Water Quality Certifications for any projects that impact streams in Standard Condition 17. A, B and C.***

NWP 49 Coal Remining Activities

DEP modified Special Condition B. which previously required an individual permit for impacts to perennial and intermittent streams but now only requires an individual permit if there are ½ acre of impacts to perennial or intermittent streams. We are opposed to this this modification that weakens protections for streams impacting by mining activities. ***We encourage DEP to rescind this modification.***

DEP’s modifications to Special Condition C. changed the threshold from requiring an individual permit for 100 linear feet of impacts of haul roads and related mining infrastructure to 300 linear feet or ½ acre of cumulative impacts. This modification weakens DEP’s oversight of mining’s impacts on streams. We are opposed to this this modification that weakens protections for streams impacting by mining activities. ***We encourage DEP to rescind this modification.***

DEP’s modification to Special Condition D changes the threshold for an individual permit from ¼ acre of wetland impacts to ½ acre of cumulative impacts This modification weakens DEP’s oversight of mining’s impacts on wetlands. We are opposed to this this modification that weakens protections for wetlands impacted by mining activities. ***We encourage DEP to rescind this modification.***

NWP 50 Underground Coal Mining Activities

DEP modified Special Condition B. which previously required an individual permit for impacts to perennial and intermittent streams but now only requires an individual permit if there are ½ acre of impacts to perennial or intermittent streams. We are opposed to this this modification that weakens protections for streams impacting by mining activities. ***We encourage DEP to rescind this modification.***

DEP’s modifications to Special Condition C. changed the threshold from requiring an individual permit for 100 linear feet of impacts of haul roads and related mining infrastructure to 300 linear feet or ½ acre of cumulative impacts. This modification weakens DEP’s oversight of mining’s impacts on streams. We are opposed to this this modification that weakens protections for streams impacted by mining activities. ***We encourage DEP to rescind this modification.***

NWP 51 Land-Based Renewable Energy Generation Facilities

See comments in NWP 45.

Conclusion

The cumulative impact of weakening the state's special conditions and certification of projects covered under NWPs stand to create detrimental effects to the state's water resources. We urge DEP to restore the conditions as requested above to provide protections for the state's valuable water resources. The direct, indirect, and cumulative impacts of weakening the standard conditions and the special conditions in each NWP should be assessed before certifying the final NWP package. Without this information, the DEP cannot ensure that the NWPs will cause only minimal individual and cumulative impacts as required by law. Thank you for the opportunity to comment.

Signed,

Angie Rosser
West Virginia Rivers Coalition

Chad Cordell
Kanawha Forest Coalition

Tim Reese
Friends of the Cacapon River

Linda Frame
West Virginia Environmental Council

Leah Rampy
West Virginia Interfaith Power and Light

Sherry Evasic
Blue Heron Environmental Network Inc.

Chuck Marsh
Sleepy Creek Watershed Association

David Lillard
Elks Run Watershed Group

Larry Thomas
West Virginia Highlands Conservancy

Kristen Alexander
Potomac Valley Audubon Society

Vivian Stockman
Ohio Valley Environmental Coalition

Gary Zuckett
West Virginia Citizen Action Group

Allen Johnson
Christians for the Mountains

Beth Little
Eight Rivers Council

Howdy Henritz
Indian Creek Watershed Association

Eric Engle
Mid-Ohio Valley Climate Action

John J. Walkup, III
Greenbrier River Watershed Association