

Clean Water Act Section 401 Certification

**West Virginia Department of Environmental Protection
Division of Water and Waste Management**

401 Water Quality Certification Program

**Wilma Reip
Program Manager**

Section 401 of the Clean Water Act:

Requires that any applicant for a federal license or permit to conduct an activity that will or may discharge into waters of the United States (as defined in the Clean Water Act) to present the federal authority with a certification from the appropriate state agency.

Federal Permits requiring 401 Certification:

US Army Corps of Engineers

Section 404 of the Clean Water Act

Section 10 of the Rivers and Harbors Act of 1899,

Federal Energy Regulatory Commission:

Federal License

The State may grant, grant with conditions, deny, or waive certification.

If the State denies certification, then the federal license or permit shall not be granted.

47CSR5A

TITLE 47

LEGISLATIVE RULE

DEPARTMENT OF ENVIRONMENTAL PROTECTION

WATER RESOURCES

SERIES 5A

RULES FOR INDIVIDUAL STATE CERTIFICATION OF

ACTIVITIES REQUIRING A FEDERAL PERMIT

The West Virginia Department of Environmental Protection-Division of Water and Waste Management (WVDEP-DWWM) revised the Legislative Rule for Individual State Certification of Activities Requiring a Federal Permit.

The Rule became effective May 14, 2014.

It can be downloaded from:

<http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=25746&Format=PDF>

This rule establishes the procedures and criteria for the application, processing and review of state water quality certifications.

Modifications to the rule (47CSR5A) that may affect Oil and Gas Industry include:

- 1) Requiring state certification on Section 10 only permits. Impacts to recreational resources associated with Section 10 Permits will require mitigation.**

- 2) Allowing for additional mitigation if an after-the-fact certification is necessary: If a permittee undertakes activities prior to or without applying for certification, the Department may issue an after-the-fact certification. Any mitigation or compensation required as an after-the-fact certification may be at a rate of up to 125% of the original calculated mitigation or compensation requirement.**

We have also revised the application for Individual Water Quality State 401 Certification and increased the certification fee.

The new fee is \$350.

Applicants for Individual 401 Water Quality Certification must use the new application and instructions, which can be downloaded from

<http://www.dep.wv.gov/WWE/Programs/Pages/401Certification.aspx>

or upon request, a copy will be mailed.

What oil and gas activities may require 401 Certification?

- Any activity that requires a 404 permit
 - Examples: Access roads, intake/outfall structures, pipelines, water impoundments, well pads

- Section 404 Permits
- Nationwide Permits
- Current NWP's effective until March 18, 2017.
- Activity may qualify for coverage under a NWP for both 404 and 401.
- Activity may qualify for coverage under a NWP for 404 but require Individual 401 WQC.
- Some NWP's require advance notification (pre-construction notification) to the Corps.
- WVDEP has issued 401water quality certification for the following NWP's pending compliance with certain conditions and/or limitations.

- **AVOID AND MINIMIZE IMPACTS TO THE GREATEST EXTENT PRACTICABLE**

NWP's generally associated with the Oil and Gas Industry:

39. Commercial and Institutional Developments (well pads, impoundments)

Pre-construction notification to the Corps is required.

West Virginia 401 Water Quality Certification Special Conditions:

- A. The permittee shall, concurrent with the NWP application, submit written notification to the WVDEP, DWWM of any use of this NWP.**
- B. Individual State Water Quality Certification is required for perennial and intermittent stream impacts greater than 300 linear feet.**
- C. Projects impacting Section 10 waters and adjacent wetlands require Individual State Water Quality Certification.**

12. Utility Line Activities (pipelines, substations, intakes)

West Virginia 401 Water Quality Certification Special Conditions: A.-M.

- L. Individual State Water Quality Certification is required for perennial and intermittent stream impacts greater than 300 linear feet.**

***Certification is required for horizontal directional drilling under stream if less than 100 feet below stream bed.**

NWP's generally associated with the Oil and Gas Industry Continued:

14. Linear Transportation Projects (access roads)

7. Outfall Structures and Associated Intake Structures

3. Maintenance, (Land Slips)

12. Utility Line Activities, (Land Slips)

33. Temporary Construction, Access, and Dewatering (Land Slips)

Activity may require both Individual 404 and Individual 401 WQC:

- **Individual 404 Permits**
- **Required for any activity that the Corps determines to have more than minimal adverse environmental effects.**
- **Public Notice is required.**
- **Certification is required.**

Section 10 of the Rivers and Harbors Act of 1899:

Requires approval prior to any work in, on over or under navigable waters of the United States, or which affects the course, location, condition or capacity of such waters.

Section 10 permits require 401 Certification when the work is in or within 100 feet under stream bed of a Section 10 stream.

A Section 10 Permit is required for all projects on, in or over a Section 10 water.

A Section 10 Permit, 404 Permit, and 401 Certification is required when a project involves fill in a Section 10 water.

401 Certification Review:

- **Grant Certification when the activity meets standards and other provisions.**
- **Grant Certification with conditions indicates the listed conditions must be met. Every 401 condition becomes a part of the 404 permit.**
- **Certification is waived when the State decides not to act on the request or a year has passed.**
- **Certification is denied when the activity is not consistent with Water Quality Standards. No conditions would be adequate to ensure protection of the Waters of the State.**

Mitigation:

- **Corps Approved Mitigation Bank**
- **WVDEP In-Lieu Fee**
- **Permittee Responsible Mitigation (requires performance bond)**

Isolated wetlands

All wetlands that the Corps determines to be non-jurisdictional.

WV Code:

- No well pad may be prepared or well dilled within one hundred feet measured horizontally from any perennial stream, natural or artificial lake, pond or reservoir, or a wetland, or within three hundred feet of a naturally reproducing trout stream.

If the Corps has issued an approved Jurisdictional determination for wetlands and identified any as non-jurisdictional, then they are Waters of the State.

Impacts greater than one tenth of an acre will require mitigation at the same ratios as jurisdictional wetlands.

An authorization to impact may be granted.

Jurisdictional Wetland



Isolated Wetland



WVDEP has an agreement with the WV Division of Natural Resources

Cliff Brown (Environmental Resources Specialist)

Site Visits for Oil & Gas Projects

Questions

Contact:

Wilma Reip

(304) 926-0499 X 1599

Wilma.Reip@wv.gov

Things to remember and consider:

Avoid and minimize impacts

Water Quality

Direct and Indirect Impacts

Proposed Mitigation