

<p style="text-align: center;">Purpose of Document</p> <p>To summarize comments provided by the public and to provide WVDNR’s responses and actions taken to each comment. Comments were kept as original to the source while maintaining the commenters anonymity. In cases where multiple comments addressed the same topic some comments were combined to maintain brevity.</p>	<p style="text-align: center;">Acronyms Used:</p> <p>WVDNR or DNR– West Virginia Division of Natural Resources WVDEP or DEP – West Virginia Department of Environmental Protection USFWS or FWS – United States Fish and Wildlife Service USGS – United States Geologic Survey ACOE – Army Corps of Engineers CWA – Clean Water Act ESA – Endangered Species Act</p>
<p>Mussel Stream Guidance Comments</p>	<p>WVDNR Response</p>
<p>The Stream Guidance still attempts to summarize the regulatory programs of other state and federal agencies and then provides numerous “recommendations” for implementing and complying with those programs. But none of those regulatory programs are within DNR’s statutory purview. As a result, any attempt to compel implementation of the recommendations as part of any DNR reviews or to pressure project proponents to follow the terms of the Stream Guidance, including by attempting to establish terms and conditions for Stream Activity Permits, would be inappropriate and contrary to law.</p>	<p>Stream guidance material was separated from the survey protocol to differentiate between survey requirements and beneficial conservation actions. The stream guidance does not summarize the regulatory programs of other agencies but seeks to provide mussel-specific recommendations for other regulatory jurisdictions.</p> <p>The WVDNR has a statutory obligation to protect wildlife resources (20-2-1). We will attempt to clarify in the final guidance document that the guidance document represents recommendations and not a regulatory guidance letter.</p> <p>Stream Activity Applications are a separate issue. The DNR is actively reviewing standard language placed on our right of entry authorizations. The new language should reflect reasonable and prudent measures suggested to reduce potential impacts to aquatic resources. Applicants seeking renewals of right of entry authorizations may wish to request re-evaluation of the authorization.</p>
<p>The DNR intends to use the Stream Guidance as a vehicle for advising project proponents about the Department’s interpretations and opinions regarding how to comply with these provisions of federal law.</p>	<p>The commenter is accurate that the document was produced in order to provide project proponents guidance on complying with various state and federal regulations and implementing what the Division believes are reasonable and prudent measures to avoid or minimize potential impacts to wildlife resources (mussels). Project</p>

<p>*Continued previous page</p>	<p>proponents are under no obligation to adhere to the guidance and may seek guidance from other state and federal authorities, trade associations, consultants, or environmental law firms. The Stream Guidance document does not represent regulatory rules or CWA/ESA permit conditions. We will clarify that the document is not a regulatory guidance letter.</p>
<p>While crustaceans/shellfish are one of the numerous biological components of the “aquatic ecosystem” in lay parlance, there is simply no requirement in CWA Section 404 to avoid all impacts to them or their habitat “to the maximum extent practicable” as the Stream Guidance incorrectly suggests.</p>	<p>As this document is guidance and not regulatory in nature, our advice remains to avoid mussel populations to the maximum extent practicable. The term “maximum extent practical” is a term utilized in the ESA (Sec 10 (B)(ii)). Many of our state mussels are listed under our state wildlife action plan as Species of Greatest Conservation Need and therefore the WVDNR will advise project proponents to minimize to the maximum extent practical impacts to these resources.</p>
<p>DNR lacks both the jurisdiction and the expertise, at least in the context of oil and gas operations, to make these types of recommendations to either project proponents or the agencies legally responsible for implementing these programs.</p>	<p>The Stream Guidance Document clearly states that the content found within does not fall under WVDNR regulatory authority. We retain the right to discuss and provide recommendations to our sister agencies and project proponents.</p>
<p>We request that the Department expressly state in the Stream Guidance that (1) the information and recommendations provided in the Stream Guidance are advisory only, (2) DNR does not and cannot implement or enforce federal or state regulatory programs over which it has no jurisdiction,</p> <p>*Continued next page</p>	<ol style="list-style-type: none"> 1. We added the additional advisory statement to stream guidance. 2. WVDNR concurs that the DNR does not enforce federal and state regulations. However, the DNR works very closely with federal and state agencies that utilize our expertise. The DNR has specific local knowledge which is beneficial to federal agencies. Modifications will be made to the guidance/protocols emphasizing that these are recommendations and not enforceable code and/or regulation. However, that does not influence DNR’s codified obligation to protect wildlife resources of the State for the use and enjoyment of all the citizens of West Virginia. The regulatory agencies (ACOE, EPA, WVDEP, USFWS) may or may not choose to adopt the recommendations expressed in the guidance, but will often support projects that implement them.

<p>(3) the summaries and descriptions of regulatory programs and requirements provided in the Stream Guidance reflect DNR's interpretations, and the agencies responsible implementing those programs have not approved or otherwise endorsed the guidance, and project proponents should not rely on the Stream Guidance to maintain compliance with those regulatory programs and should direct any questions about compliance to the federal and state agencies responsible for those programs.</p>	<p>3. We highly encourage project proponents to research and enquire about all local, state, and federal laws from the regulatory agency. Language was added to better emphasize this point.</p>
<p>ESA Section 7, which is implemented by the U.S. Fish & Wildlife Service ("USFWS"), does not require avoidance of impacts to mussels or their habitat by any private actor ESA Section 7 does not apply to private activities.</p>	<p>WVDNR does not implement Section 7 and is only involved in a biological advisory role. WVDNR requires concurrence from the USFWS prior to permitting activities that may involve take or impacts to listed species.</p>
<p>ESA Section 7 requires federal agencies to ensure that their actions do not "jeopardize the continued existence" of a listed species or result in "destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a). Neither of these requires avoidance to the maximum extent practicable by a federal agency or any private actor. Nor do they, or any part of ESA Section 7 for that matter, contemplate any role for a state agency like DNR in making jeopardy determinations.</p> <p>Also listed with Comment: ESA Section 9 prohibits unauthorized take of individual members of federally listed species. 16 U.S.C. § 1538. ESA Section 10, which sets forth completely voluntary procedures for private actors seeking incidental take authorization, including developing habitat conservation plans, to "minimize and mitigate the impacts of [the] taking" to "the maximum extent practicable."</p>	<p>DNR concurs that DNR does not have the authority to make a listed species jeopardy determination. Nor do we have any enforcement responsibilities under the ESA. The ESA references cooperation with the "state agency" in the implementation of the goals of the ESA. The commenter is concerned with the language "maximum extent practical". The ESA refers to "reasonable and prudent" measures. The ESA also references the term "maximum extent practical" in Sec 10 as the commenter later notes. This language is used for consistency. Therefore, the guidance/protocols will express what the DNR considers reasonable and prudent recommendations to protect and conserve wildlife resources of the state of which we are charged to act as trustees for the citizens of the state of WV.</p>

1. The Stream Guidance treats water withdrawals associated with oil and gas operations (again, which DNR has no authority to regulate) differently than other water withdrawals without articulating any rational basis for doing so.
2. DNR’s stated reason for doing so – “ the relatively large volume withdrawn by some Oil and Gas operations” – raises, rather than answers, questions as to why DNR is imposing additional restrictions specifically directed only to withdrawals relating to oil and gas operations.
3. The Stream Guidance also improperly provides generalized recommendations that ignore there is no “one-size fits all” approach that can account for the site-specific complexities of each individual project.

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1. Water withdrawals are regulated at the state level by WVDEP. The WVDEP requested the DNR offer guidance and recommendations pertaining to mussels for water withdrawals within the state as they relate to oil and gas activities which, in some cases, are regulated separately from other withdrawals by WVDEP. We will further clarify that these recommendations can be used anywhere in the state to help protect mussels.

The DNR has worked with the WVDEP in the development of these recommendations. WVDEP currently recommends that those wishing to withdraw water for whatever reason follow the recommendations expressed in the WVDEP Water Withdraw Tool. DEP acknowledges the tool has limitations. The DNR may recommend additional protective measures depending on location of the withdrawal point, withdrawal rate and quality of the stream.

2. This document has created no additional restrictions, as advisory guidance all provisions stated in the guidance would be voluntary.
3. These recommendations provide a liberal safety factor. They do not represent permit conditions or regulations. As more data has become available, we have met with the WVDEP to revise our recommendations. We understand that “one-size fits all” doesn’t work in all instances. However, the WVDEP’s water withdrawal tool is based on USGS stream gauge data, which in some cases gauges may be significant distances and several tributaries away from withdrawal locations.

<p>4. In addition, to the extent the Mussel Guidance attempts to impose enforceable restrictions on water withdrawals based on water temperature, those restrictions are both beyond DNR’s regulatory authority and an improper attempt at regulation through guidance.</p> <p>5. In effect, this guidance overrides State Code and the existing data-based permitting process used by DEP and attempts to replace it with the individual judgement of DNR</p>	<p>4. These are only recommendations, the WVDNR does not enforce or permit water withdrawals. We have added additional language to reiterate that these are recommendations. Dissolved oxygen in streams is closely linked to water temperature. This suggestion was added as a protection for smaller streams that might be impacted due to water withdrawals during periods of temperature extremes. We have modified language to indicate the size class of streams the recommendation was devised for.</p> <p>5. As recommendations, the stream guidance for WV mussels does not impose new regulations or conditions upon WVDEP’s permitting process.</p>
Mussel Protocol Comments	WVDNR Response
<p>(Paraphrasing) Several instances of language directed at project proponents rather than mussel surveyors. Requested change of terminology. Additional definitions requested for certain terms.</p>	<p>Text was reviewed and updated where necessary.</p>
<p>Nothing in the ESA or West Virginia law authorizes DNR to dictate to a project proponent when it must consult with USFWS or the substance of any consultation with USFWS or otherwise impose restrictions upon project proponents that USFWS might apply to a federal agency under ESA Section 7.</p>	<p>When applicable, WVDNR requires surveys and salvage prior to in-stream impacts. The WVDNR scientific collecting permit conditions require notification of listed species to the WVDNR and USFWS within 48 hours of detection. The WVDNR per its Section 6 cooperative agreement with the USFWS, cannot issue a permit which may result in “take”.</p>
<p>Comments in response to protocol’s requirement to obtain concurrence through the FWS on Group 2 & 4 streams.</p> <p>1. First, the text represents an improper attempt by DNR to require ESA Section 7 consultation on a state action. Next, it improperly allows the Department to make a determination – in this case a blanket determination – regarding what constitutes “take” of a federally-listed species. That is a decision for USFWS alone; DNR has no authority to make that determination.</p>	<p>1. We agree that the WVDNR does not determine what constitutes take as referenced in the ESA , this is the authority of the USFWS and why we require USFWS concurrence prior to actions involving listed species.</p>

<p>2. In addition, with this language the Department is acting outside of its regulatory authority by attempting to usurp USFWS’s authority for determining if ESA Section 7 requires consultation and, if so, whether formal or informal ESA Section 7 consultation must occur.</p> <p>3. Finally, the new language in Section 10.0 of the Mussel Protocol inappropriately purports to set forth consequences for the failure to comply with its terms. To the extent DNR attempts to seek enforcement of those terms, the new language in Section 10.0 is beyond the appropriate scope of a guidance document.</p>	<p>2. We respectfully disagree; the process of requiring USFWS inclusion in decisions involving listed species is an exercise to ensure WVDNR does not usurp USFWS’s authority. This process keeps the WVDNR from permitting actions beyond our authority without concurrence.</p> <p>3. The WVDNR does not have the authority to provide “Not likely to impact” statements or sole approval of monitoring plans for relocation of listed species. To this end, we coordinate with the USFWS to expedite the clearance process.</p>
<p>Comment on approved mussel surveyor requirements: The 3-year criteria should be deleted and just have the 10 Group 2 and 10 Group 4 surveys in the last 5 years, along with the 2 letters of reference. This is a more quantitative measure. Many companies do a lot of sampling and these criteria could be met in less than 3 years.</p> <ul style="list-style-type: none"> - Same comment was made for certification on group 1 & 3 streams. 	<p>Upon review we have revised conditions for group 1 & 3 approved surveyors to no longer require 3 years of experience and reduced this down to 1 field season.</p> <p>We will leave group 2 & 4 surveyor requirements unchanged due to the additional liability of handling and conducting surveys and salvage involving federally listed species.</p>
<p>Two comments regarding Group 4 Dredging have been placed together:</p> <ol style="list-style-type: none"> 1. These buffers are a bit excessive, particularly the lateral buffer. The lateral buffer of 150 m generally ends up in the main channel, which is already affected by barge traffic. This could be truncated to include the area up to the main channel if depths are <15 ft. Construction impacts are unlikely more than the ADI and salvage zone. Upstream and downstream buffers 2. 50 m up and 100 m down (plus 50 m lateral) should be sufficient effort for small maintenance dredging projects should also be reduced to 50 to 100 m up and downstream of the ADI. 	<ol style="list-style-type: none"> 1. We agree with the commenter in some situations, specifically the “standard” protocol for smaller dredging projects. We have changed the 150 m lateral buffer to now be project specific. 2. In response to the latter half of (1.) and comment 2, we will be splitting maintenance dredging from new loading facilities. The new maintenance dredging protocol will have a tiered requirement, based on total dredging area, to address smaller less impactful activities.

<p>Comments on Phase 2 protocol: In the effort table, all transects in the ADI and salvage zone (impact areas) are 5 or 10 m apart. Only transects in buffer zones are greater. Buffer zones are avoided by impacts- so by definition, Phase 2 would never be required.</p>	<p>Phase two surveys are included to meet USFWS expectations and to facilitate the USFWS's determinations of likely impact to listed species. Transect spacing was set within the ADI to meet phase 2 requirements due to this area having the highest direct impact.</p>
<p>Comment on Section 10.6 Add clarifying language that the salvage zone will not exceed the ADI + 10 meter buffer</p>	<p>The suggested language was added to the protocol.</p>
<p>Can weblinks be added the document for the WVDNR</p>	<p>URL's and in-text hyperlinks were added to the text.</p>
<p>Clarification is needed for section 4.5 regarding outfalls. Outfalls that change flow regime. Hydraulic effects should be included in ADI.</p>	<p>Language was updated to clearly state changes in flow may be assessed as an impact.</p>
<p>Williams et al. 2017 is now out of date, suggest updating to newest edition.</p>	<p>The reference was removed and replaced with instructions to use the State supplied mussel list, which is based on Freshwater Mollusk Conservation Society's actively curated list.</p>