



# GUIDE TO REPORTING AND COMPLIANCE OBLIGATIONS

**FOR WEST VIRGINIA WIRELESS INTERNET NETWORKS (WIN) BROADBAND  
INVESTMENT PLAN GRANT RECIPIENTS**

WEST VIRGINIA DEPARTMENT OF ECONOMIC DEVELOPMENT  
OFFICE OF BROADBAND

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# Guide to Reporting and Compliance Obligations for West Virginia Wireless Internet Networks (WIN) Broadband Investment Plan Grant Recipients

This Guide to Reporting and Compliance Obligations for West Virginia Wireless Internet Networks (“WIN”) Recipients covers this state-funded program to increase the availability of broadband services available to West Virginians. The WIN Program is part of the West Virginia Broadband Investment Plan and will fund extensions or upgrades of last-mile wireless broadband networks that can be constructed quickly.

This document was developed in cooperation with the West Virginia Broadband Enhancement Council and Tilson Technology Management, Inc. This document is intended as a guide, not as a substitute for a thorough knowledge of state and federal laws and regulations referenced in this document. This document may be updated to more fully incorporate requirements. In the event of any discrepancy, state and federal regulations will prevail. The Grantee is responsible for compliance with the most current and stringent of any applicable local, state, or federal law or regulation(s).

The West Virginia Department of Economic Development (WVDED) does not discriminate on the basis of age, race, color, religion, sex, national origin, familial status, or disability in the admission, access to, treatment of, or employment in, its state-assisted programs or activities.

For more information, visit <https://broadband.wv.gov>, or call the WVDED at 304-558-2234.

## A Note on Sources of Funds

This funding opportunity is supported by the West Virginia Department of Economic Development utilizing state funds appropriated by the West Virginia Legislature as detailed in §31G-1A-7, which created the Broadband Development Fund.

Approximately \$10 million is targeted for this funding opportunity. Actual funds awarded may be more or less depending on the volume of applications received, the need for proposed projects for grant support, and on West Virginia legislative appropriations.

## Separate Bank Account Requirement

Recipients are required to establish a separate bank account (“Project Bank Account”) for the receipt and disbursement of Project funds that does not include other revenue or expenses of the Grantee. This account will be used for the Grantee’s match contribution and applied to approved Project expenses prior to the WVDED issuing any reimbursements from WIN grant funds.

## Eligible Entities

Applicants must be Internet Service Providers that offer a wireless broadband service and have a current statement of existence from the West Virginia Secretary of State. Applicants must have no prior default or significant violations under any federal, state, or local broadband expansion funding program, and no suspension or debarment as a vendor by the State of West Virginia or any federal agency within three years prior to filing an application with the WVDED for Program funding. Projects proposed by eligible

applicants are subject to review and possible approval, denial, or modification under the Review Guidelines.

### Responsibilities – Recipients

Recipients (ISP's) receive awards from the State to carry out a Project. Recipients/grantees must comply with statutory/regulatory requirements and the terms and conditions of the award. All recipients must provide the WVDED with any and all information requested by the WVDED, so that it may determine compliance and report to any further state and, where applicable, federal entities regarding recipient's/grantee's use of grant funds.

### Access to Subrecipient Records

Recipients must permit the Office of Broadband and auditor access to Grantee's records and financial statements as necessary.

### Recordkeeping Requirements

Grantees must comply with all applicable reporting and record retention requirements under State law, the program procedures, and/or administrative requirements, including but not limited to quarterly project and expenditure reports in the form of Exhibit H to the Grantee's Grant Distribution Agreement executed with the WVDED.

### Record Retention

Recipients shall retain all financial records, supporting documents, statistical records, and all other records pertinent to its WIN award and its Grant Agreement for a period of five (5) years from the date of submission of the final expenditure report or payment of final invoice. If a litigation, claim, or audit is started before the expiration of the five-year period, the records must be retained until all litigation, claims, or audit findings involving those records have been resolved and final action taken. Awardees must retain records for equipment acquired with WIN award funds for five years after final disposition.

### Enforcement Action for Noncompliance

Enforcement action measures may be taken against noncompliant recipients by WVDED, including requests from the Office of Broadband that grantees remediate any deficiencies.

### Reimbursable Expenditures

Projects receiving funding may be reimbursed for actual capital expenses up to a maximum project cost identified in the award. Costs must be directly related upfront investment associated with installing and/or upgrading existing broadband facilities on the proposed project on a one-time, capital improvement basis. Furthermore, costs must be reasonable and proportional to the density and difficulty of the Grantee's project.

### Eligible Costs

Eligible project activities and costs include:

1. Network and access equipment costs;
2. Tower and pole costs: Includes the construction of new towers (where required infrastructure does not exist) and costs involved with structural changes to existing towers;

3. Fiber optic cable and associated hardware;
4. Reasonable make-ready and one-time pole licensing costs, excluding recurring pole attachment payments;
5. Equipment shelter, land, site preparation, and site restoration costs;
6. Customer premises equipment: Funding only covers up to the network demarcation point (e.g., subscriber module or NID);
7. Professional services: Includes engineering and project management costs involved in designing and constructing the proposed project;
8. Testing;
9. Other upfront costs: Includes any other upfront costs not covered in other categories, such as site preparation, permits, required licenses, sales tax applicable to new equipment purchases, shipping and warehousing expenses, and miscellaneous minor material; and
10. Long-term leases, defined as leases for a duration longer than 1 year, of facilities required to provide broadband service on the proposed project.

Internal labor costs incurred as part of eligible project activities are only reimbursable up to the proportion of employees' time spent exclusively on project activities during the period for which reimbursement is sought. When seeking reimbursement, applicants must submit such costs as line-items and provide supporting documentation for the expense. Supporting documentation shall include time spent by each employee on project activities, total time spent by each employee during the period for which reimbursement is sought, and an hourly cost that may include employee salary, itemized payroll taxes and benefits. Indirect costs are not reimbursable.

#### Ineligible Costs

Costs that appear excessive and/or without justification and costs not considered eligible will not be reimbursed.

Ineligible costs include:

1. Internal administrative activities;
2. Fundraising activities;
3. Computers or office equipment;
4. Vehicles;
5. Equipment owned or leased by the customer, including routers and modems, and any other costs beyond the network interface point;
6. Operating expenses; and
7. Expenses incurred prior to the date of the grant award announcement.

Expenditures on ineligible costs cannot be used as match. Projects must primarily target unserved addresses and/or Targeted areas within state parks. Facilities that are needed to deliver last-mile broadband service to unserved addresses and incidentally cover served addresses are reimbursable, but expenditures solely to benefit served addresses are not reimbursable. Customer installations and equipment at served addresses are not eligible for reimbursement.

## Primary Program Requirements

### Targeted Addresses and Targeted Areas of State Parks

As detailed in the WIN Program Procedures published at the Office's website (<https://broadband.wv.gov>), Grantee projects may extend broadband service to Targeted addresses and locations that are within Targeted areas within state parks. The Department has published a map at <https://broadband.wv.gov> of Target areas within state parks and Target addresses eligible for funding. For the purposes of this Program, "Targeted addresses" are those with no current access to internet service with at least 25 Mbps download and 3 Mbps upload (25/3 Mbps), and which are not in an area with an existing state, federal, or locally funded project to deliver mass-market broadband service of at least 25/3 Mbps. Addresses with current or future access to service only by satellite providers or mobile wireless networks are considered Targeted if they are not also served by a terrestrial broadband provider of fixed home broadband service offering a speed of at least 25/3 Mbps. Targeted areas of state parks are listed in the "Appendix A-Park Priorities" document on the Office of Broadband Website, located at <https://broadband.wv.gov>. State parks are presented in order of priority. Additional details are provided in the "Appendix B-Park Details and Maps" document, also at the Office's website.

### Additional Service Areas

As also noted in the WIN Program Procedures, Grantees may propose to serve Additional Service Areas containing unserved addresses not identified as "Targeted addresses." An "unserved address" must lack access to wireline mass-market broadband service of at least 25/3 Mbps. Grantees must identify the Additional Service Areas at the time of application, along with the location of claimed unserved addresses within them. Additional Service Areas may not overlap with Funded Projects. The Department will separately publish a map at <https://broadband.wv.gov> of addresses which may not be included in Additional Service Areas because they are considered to have a Funded Project.

### Required Services, Performance, and Service Tiers

Proposed projects must be capable of offering services of at least 25 Mbps download and 3 Mbps upload and less than 100 ms latency and must propose to offer at least one service tier to mass-market consumers with performance meeting or exceeding this threshold. Services proposed for targeted areas of state parks must meet the additional requirements for services identified for the applicable park, identified in the "Appendix A-Park Priorities" document on the Office of Broadband Website, located at <https://broadband.wv.gov>. Grantees must be willing to enter into a contract for services for a period of not less than five years with the appropriate state agency for services provided to state park buildings or facilities.

Proposed projects must include a wireless service component, although they may also include wireline broadband infrastructure that is interconnected with proposed wireless infrastructure. Service to

Targeted addresses must include a fixed wireless broadband component, but projects may also include mobile wireless and/or WiFi components. Fixed wireless broadband services to Targeted addresses must offer service without data caps or throttling or must offer services without data caps or throttling for users consuming less than 2TB of data transfer per month. Mobile wireless services provided by the applicant may include data caps consistent with other services it offers in West Virginia.

Grantees must offer tiers on the proposed project that are no less favorable than those typically offered to the Grantee's other mass-market customers in West Virginia. Grantees are encouraged to offer higher speed service tiers.

### Construction Timeline

Construction must be able to be completed and ready to serve customers within 12 months of award; this may be extended up to an additional 6 months for delays not caused by the Grantee. Customer installations at unserved addresses requesting new service are eligible for reimbursement within 24 months of the award.

### Matching Funds

Grantees must commit to providing at least 25% of the eligible costs proposed for the project as match. Matching funds must be spent by the awardee prior to reimbursement. Match must be spent on allowed expenditures and Grantees must commit to matching funds at the time of application. While contingent funding sources are allowed, they are not to be included in the calculation of match. In-kind contributions may not be used as match.

Applicants may reduce the required match by the cost of the following categories of new facilities built with grant funds when built within state parks:

- Towers and other wireless support structures, including associated equipment shelters, and site improvements; and
- Fiber optic cables and associated hardware.

To qualify for this reduced match, applicants must provide the appropriate state agency ownership of these grant-funded state facilities after a period of not more than five years, while continuing to use and maintain them while providing service within state parks.

### Affordability

Applicants are encouraged to offer service tiers that are affordable to users, offer discounted service to households with low income, and participate in government programs that offer supported services to low-income households, such as FCC's Lifeline and Affordable Connectivity Programs.

### Waiver

The Secretary of the Department may grant waivers of certain program eligibility requirements for a proposed project if an Applicant seeks such waivers during the application process. Waivers may be granted upon a determination that to do so is in the best interest of the state and furthers the program goal of expanding broadband service in West Virginia, and that the proposed project would not be feasible or advisable without the requested waiver. The Department may prioritize funding applications

not requesting a waiver over those applications seeking a waiver. Applications seeking a waiver that is not granted may become ineligible for further consideration. Applicants may request waivers of the following eligibility requirements:

- **Construction Timeline.** Applicants seeking a waiver of the requirement that awarded projects be completed within 12 months must specifically identify an alternative proposed completion timeline for the project, which should be as short as is feasible, and in no event concluding later than December 31, 2026. The applicant must identify the circumstances not under the control of the applicant that would make the proposed project infeasible to complete within 12 months.
- **Matching Funds.** Applicants seeking a waiver of the minimum matching funds requirement or to allow funds not provided by the applicant to serve as match must specifically identify and justify the reasons why it is infeasible for the applicant to provide the match in full or in part. The applicant must document any efforts made to obtain matching fund commitments for the project from capital funding sources.

The Department may request additional information from applicants requesting waivers to assist it in advising the Secretary in a determination.

#### Grant Distribution Agreement, State Services Contract, and Standard Terms

Awardees will be required to enter into a Grant Distribution Agreement (GDA) with the West Virginia Department of Economic Development. All projects will include a retainer equal to 10% of awarded funds withheld until project completion and until all close out documents and reporting are submitted and approved. To the extent necessary, the Program reserves the right to create additional requirements that awardees must fulfill prior to disbursement of funds.

Awardees will be required to enter into a standard state contract for services requested to state park buildings or facilities, described in “Appendix A: Park Priorities” at the Office’s website (<https://broadband.wv.gov/>),<sup>1</sup> to the extent the awarded project covers Targeted areas of state parks. The contract for services will be with the appropriate state agency.

#### Grant Recipient Obligations and Post Award Monitoring

Awardees of grant funds must comply with post-award monitoring and reporting requirements to maintain continued eligibility for disbursement of grant funds. Awardees are responsible for active technical, financial, and project management of awarded projects through their own staff and/or by hiring and managing well-qualified contractors. Awardees should also expect to cooperate with technical and financial monitoring and review provided by Department contractors and staff.

#### Review of Designs, Reimbursement Requests, and Completed Networks

Projects must submit engineered designs prior to reimbursement. Designs must be prepared under the review of a P.E. or an engineer with substantial demonstrated experience designing wireless networks whose credentials are submitted along with the design.

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<sup>1</sup> <https://broadband.wv.gov/wp-content/uploads/2022/05/Appendix-A-WIN-Attachment-Park-Priorities-2022.5.20.pdf>

Disbursement of grant funds will require submission of proof of expenditures on eligible costs for review prior to reimbursement. Awardees must cooperate with field audits performed by Program contractors to verify constructed plant completeness and quality and must submit as-built network documentation prior to final close-out of the grant.

## Reporting

Awardees will be required to complete quarterly progress reports through project completion. Progress reports will require information on:

- Project expenditures;
- Number of communities served;
- Number of jobs created;
- Projected construction start date (month/year);
- Projected initiation of operations date (month/year);
- Actual construction start date (month/year);
- Actual initiation of operations date (month/year);
- Project location (for broadband geospatial location data);
- Information provided in Applicant proposals such as, speeds/pricing tiers to be offered, technology to be deployed, and cost per address covered;
- Information regarding:
  - Number of households projected to have increased access to broadband meeting the minimum speed standards in areas that previously lacked access to service of at least 25 Mbps download and 3 Mbps upload;
  - Number of households with access to minimum speed standard of reliable 100 Mbps symmetrical upload and download;
  - Number of households with access to minimum speed standard of reliable 100 Mbps download and 20 Mbps upload;
  - Number of institutions and businesses projected to have increased access to broadband meeting the minimum speed standards in areas that previously lacked access to service of at least 25 Mbps download and 3 Mbps upload, in each of the following categories: business, small business, elementary school, secondary school, higher education institution, library, healthcare facility, and public safety organization;
  - The number of each type of institution with access to the minimum speed standard of reliable 100 Mbps symmetrical upload and download; and
  - The number of each type of institution with access to the minimum speed standard of reliable 100 Mbps download and 20 Mbps upload.

This is not necessarily a comprehensive list of reporting requirements. Such terms and conditions will be contained in Exhibit H to the WIN Grant Distribution Agreement between the WVDED and Grant Awardees.

Grantees shall submit Quarterly Project and Expenditure Reports through the ZoomGrants platform, including the data listed in Exhibit H (Quarterly Project and Expenditure Report), attached to grantee's Grant Agreement through project completion. The WVDED, Office of Broadband will require that subrecipients provide Quarterly Reports no later than five (5) business days following the end of the quarter to the WVDED, Office of Broadband.

### Cooperation With State Broadband Mapping

Grantees that receive any State or Federal moneys, and which have used that money to install infrastructure used for broadband services, must provide information to the WVDED, Office of Broadband on an annual basis.<sup>2</sup> In particular, and in accordance with W.Va. Code §31G-1A-3, awardees must agree to provide information about broadband availability, pricing, and speeds. Address-level reporting will be required immediately for grant-funded projects but may be deferred for non-grant funded projects to allow coordination with the already-launched Federal Communications Commission Digital Opportunity Data Collection initiative.<sup>3</sup>

### Modification of Grant Funding Awarded

The Secretary, upon request of the awardee, may modify the amount awarded to a grant recipient up to 10% of the originally awarded amount, or modify the awarded areas, upon a determination that to do so is in the best interest of the state and that the modification is necessary for or consistent with the continued feasibility of the project, and to ensure that the greatest number of unserved locations possible receive broadband service.

Grantees may request a modification because completion of the project requires extraordinary costs that the awardee could not reasonably have foreseen at the time of application. Modification of grant funding amounts are subject to availability of funds remaining to the Program.

Awardees may request modifications to allow use of grant funds awarded but not needed to complete the awarded project due to achievement of cost savings. Awardees may request such modifications to further expand broadband service to additional unserved addresses outside the originally awarded areas. Awardees shall accompany such requests with the information required to propose Additional Service Areas.

### Procurement Requirements – All Grantees

Related to documentation required in the Grantee's Grant Agreement with the WVDED, Office of Broadband, WVDED grantees will be required to provide the Grantee's procurement policy as part of its evidentiary materials list (Exhibit C to the Grant Agreement). All grantees shall supply their procurement

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<sup>2</sup> WV Code, §31G-1A-3(d).

<sup>3</sup> <https://docs.fcc.gov/public/attachments/DA-22-182A1.pdf>

guidelines to the Office of Broadband as part of Step One to the Notice to Proceed Process, as described later in this guidance document.

In addition, the WVDED will require grantees to provide documentation of procedures used to procure any subcontractors associated with the awardees' project.

### Conflicts of Interest

As per the Grantee's Grant Agreement with the WVDED, neither the Grantees nor its officers or members, employees, or subgrantees may have an interest nor shall they acquire any interest, direct or indirect which would conflict with or compromise in any manner the performance of services.

Also as part of its Agreement with the WVDED, the Grantee shall periodically question its officers, members and employees concerning such interests and report in detail to the WVDED if it discovers any such interest. Grantees will also establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal gain.

Under the WV Grant Transparency and Accountability Act, Grantees must disclose in writing any potential conflicts of interest.<sup>4</sup>

### *Transactions with Affiliated Business Entities or Relatives:*

Also as per the Grant Agreement with the WVDED, Grantees must make a full disclosure in writing to the WVDED of any corporation, partnership, sole proprietorship, or other business entity of any kind which is a wholly or partially-owned entity of the Grantee or whose relatives supply goods or services to Grantee or work for or provide services to Grantee.

### Prohibition on Use of Grant Funds for Prohibited Political Activity

Grantees shall not knowingly use grant funds, or goods or services purchased with grant funds to engage, either directly or indirectly in any activity directed toward the success or failure of a political party, candidate for political office, or ballot issue. As part of this prohibition, Grantees and any subgrantees must not knowingly be compensated from grant funds for time spent engaging in any such prohibited political activity.<sup>5</sup> Grantees, subgrantees, or any personnel thereof who knowingly violate the above prohibition on prohibited political activity will be guilty of a felony, and upon conviction, shall be subject to penalties as outlined in the State Grant Transparency and Accountability Act.<sup>6</sup>

### Labor Practices in Construction

In general, the WVDED encourages Grantees to prioritize in their procurement employers with no recent violations of state labor and employment laws.<sup>7</sup>

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<sup>4</sup> WV Code §12-4-14(e)(12).

<sup>5</sup> WV Code §12-4-14(j).

<sup>6</sup> WV Code §12-4-14(j)(5).

<sup>7</sup> See WV Code §21-1-1 et seq. (<https://www.wvlegislature.gov/wvcode/code.cfm?chap=21&art=1>).

Grantees must evaluate whether they and/or their employees, independent contractors, and subcontractors are subject to the specific state labor and employment laws and protections set forth in the West Virginia Code, including but not limited to the following<sup>8</sup>:

- The Labor Management Relations Act for the Private Sector (W. Va. Code §21-1A-1 et seq.) (protecting, among other things, employee rights to self-organization, collective bargaining, or to refrain from engaging in such labor activities);
- Verification of Legal Employment Status of Workers (W. Va. Code §21-1B-1 et seq.) (prohibiting employers from knowingly hiring unauthorized workers and requiring employers to verify prospective employees' legal statuses or authorizations to work);
- The West Virginia Jobs Act (W. Va. Code §21-1C-1 et seq.) (requiring reporting to the Division of Labor in connection with expenditures on construction projects equaling or exceeding \$500,000 by any public authority for certain public improvements);
- The West Virginia Alcohol and Drug Free Workplace Act (W. Va. Code §21-1D-1 et seq.) (prohibiting, among other things, public authorities from awarding public improvement contracts to contractors and subcontractors that do not maintain drug-free workforce policies);
- The West Virginia Safer Workplace Act (W. Va. Code §21-3E-3 et seq.) (permitting employers to test employees or prospective employees for the presence of drugs or alcohol where certain accuracy and fairness standards are observed);
- Equal Pay for Equal Work (W. Va. Code §21-5B-1 et seq.) (prohibiting, among other things, employer discrimination between the sexes in paying for work of comparable character);
- Minimum Wage and Maximum Hours Standards (W. Va. Code §21-5C-1 et seq.) (enforcing minimum wages and maximum hours of employment);
- The West Virginia Employment Law Worker Classification Act (W. Va. Code §21-5I-1 et seq.) (setting forth legal standards for determining independent contractor and employee classifications for purposes of, among other things, applicability of separate workers' compensation laws, unemployment compensation laws, and Human Rights Act protections);
- Child Labor Act (W. Va. Code §21-6-1 et seq.) (restricting the employment of minors and criminalizing offenses);
- Industrial Homework Act (W. Va. Code §21-7-1 et seq.) (prohibiting the manufacture or delivery for manufacture of tobacco, drugs, poisons, bandages, explosives, and articles of like character in the home for an employer);

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<sup>8</sup> Summation descriptions in parentheses of the various acts listed below are presented to provide a broad overview of the general scope of each act; however the details of each act should be reviewed as appropriate.

## Oversight/Monitoring

As specified in its Grant Agreement with the WVDED, Grantees shall fully cooperate and assist the WVDED and its authorized representatives as deemed necessary and appropriate by the WVDED.

### Audits

Grantees shall cooperate with the WVDED with respect to any audit of the Department's programs or this award. Further, as agreed to in its Grant Distribution Agreement with the WVDED, grantees must review, understand, and comply with the State accountability requirements of WV Code §12-4-14.

### Audit Requirements - WV Grant Transparency and Accountability Act (WV Code §12-4-14)

All Grantees must comply with the WV State Grant Transparency and Accountability Act (WV Code §12-4-14). Under the Act,

- If a grantee receives one or more State grants in the amount of \$50,000 or more combined in a State's fiscal year, the awardee must file a report of the disbursement of state grant funds with the WVDED and the State Auditor.
- **EXCEPTIONS:** When the WVDED causes an audit, the audit is performed using generally accepted government auditing standards (GAAP), and a copy is available for public inspection, then no report is required to be filed.
- If Grantees receive a State grant in an amount less than \$50,000, or if no report is required as detailed above, then Grantees must file with the grantor (WVDED) and State Auditor a **sworn statement of expenditures** made under the grant.
- The above applies as well to any subgrantee receiving money from a grantee who was awarded a State grant.
- "Report" means an engagement, such as an agreed-upon procedures engagement or other attestation engagement, performed and prepared by a certified public accountant to test whether State grants were spent as intended. The term "report" does not mean a full-scope audit or review of the person receiving State funds.
- Reports and sworn statements of expenditures required shall be filed within two years of the end of the grantee's fiscal year in which the disbursement of State grant funds by the grantor (WVDED) was made. The report shall be made by an independent certified public accountant at the cost of the grantee. State grant funds may be used to pay for the report if the applicable grant provisions allow. The scope of the report is limited to showing that the State grant funds were spent for the purposes intended when the grant was made.

### Failure to File

If Grantee fails to file required reports under the Grant Transparency and Accountability Act, the WVDED or the State Auditor may issue stop payment orders.<sup>9</sup> Further, Grantees failing to file a required report

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<sup>9</sup> WV Code §12-4-14(d)(1).

or sworn statement of expenditures within the two-year period as provided above, will be barred from receiving any further state grants until the report or sworn state of expenditures is filed.

The WVDED is obligated under the Accountability Act to report Grantees who fail to file required reports or sworn statements of expenditures to the State Auditor for purposes of debarment from receiving state grants.<sup>10</sup>

#### *Procedures Regarding Stop Payment/Recovery of Grant Funds*

If the WVDED believes that grant funds should be subject to recoupment or recovery, it will provide the Grantee the opportunity for at least one informal conference to determine the facts and issues and to resolve any conflicts before taking formal recovery actions. The formal process for recovery of funds is outlined in WV State Grant Transparency and Accountability Act (WV Code §12-4-14(e)(7)).

#### *Recovery of Grant Funds*

Any grant funds which have been misspent or are being improperly held by Grantees/Awardees shall be subject to recovery by the WVDED.<sup>11</sup> Under state law, the WVDED may take any of the following actions or a combination thereof:

- Offsetting the amounts to be recovered against existing or future grants to be made by the WVDED;
- Requesting offsets of the amounts to be recovered from existing or future grants made by other state agencies;
- Initiating any debt collection method authorized by law against any Grantee (person, business, entity);
- Removing Grantee from WVDED's grant program and debarring the Grantee's future participation for a period of up to three years, or until the Grantee is removed from the debarred list.

#### *Compliance with Applicable Laws*

Subrecipients/grantees are responsible for complying with all applicable Federal, Tribal, and State laws.

#### *Vertical Real Estate Management and Availability Act<sup>12</sup>*

Following the selection of a state Vertical Real Estate manager by the West Virginia Department of Administration pursuant to W. Va. Code §31G-5-3, Grantees are required to confer with the state Vertical Real Estate manager to lease any state owned vertical real estate needed to implement the Project.

#### *National Defense Authorization Act*

Investments in capital projects must be carried out in ways that comply with applicable Federal laws, including the 2019 National Defense Authorization Act (NDAA).

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<sup>10</sup> WV Code §12-4-14(d)(2).

<sup>11</sup> Id. at (e)(8).

<sup>12</sup> WV Code §31G-5-1 et seq.

### Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment

In particular, Grantees are prohibited from obligating or expending loan or grant funds to procure or obtain, extend a contract to procure or obtain, or enter into a contract to procure or obtain equipment, services, or systems that use “covered telecommunications equipment” produced by:

- Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);
- Video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).
- Telecommunications or video surveillance services provided by such entities or using such equipment.
- Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the FBI, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a foreign country.

### Civil Rights Compliance

As agreed to in its Grant Distribution Agreement with the WVDED, the Grantee shall comply with all applicable Federal and State laws, rules and regulations that prohibit any unlawful discrimination or violations of civil rights. These include but are not limited to:

- The West Virginia Human Rights Act;<sup>13</sup>
- Any other nondiscrimination provisions in the specific statute(s) under which application for State assistance is being made; and
- The requirements of any other nondiscrimination statute(s) which may apply to this grant. The Grantee shall insert a similar provision in all subcontracts and subawards for activities covered under its Grant Agreement.

### Notices to Proceed

#### Step One - Notice to Proceed with Exempt Activities

The WVDED requires grantees to complete a number of requirements prior to WVDED’s issuing first, a Notice to Proceed with Exempt Activities; and second, a Notice to Proceed with Construction. Prior to making any eligible expenditures, grantees must obtain the Notice to Proceed with Exempt Activities. To do so, and as documented in the Grant Distribution Agreement with the WVDED, a Grantee must provide each of the items in Exhibit C to the Grant Agreement (Request for Approval of Evidentiary Materials) to the Office of Broadband, and if complete to the satisfaction of the WVDED, the Office of

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<sup>13</sup> W. Va. Code §5-11-1 et seq.

Broadband will issue a Notice to Proceed with Exempt Activities. The items in the Request for Approval are as follows:

1. Signed Grant Agreement with the WVDED;
2. Grantee Debarment Review form submittal
3. Proof of Establishment of a Project Bank Account
4. Grantee's completion of the State's Environmental Checklist/Questionnaire (Exhibit D to the Grant Agreement)
5. Presentation of the Grantee's Financial Management System and Record Retention Policy
6. Copy of Grantee's Procurement Policies and Procedures, Internal Controls, and compliance with federal labor standards, if applicable
7. Legally Binding Agreements between Grantee and any Private Partners and/or Subcontractors, Including Organizational Governance for public private partnerships
8. Presentation of Grantee's Audit Compliance Plan, if applicable
9. Conflict of Interest Certification, if applicable
10. Grantee's Certificate of Review of Division of Highways (WVDOH) Fiber Optic Guidelines (Exhibit E to Grant Agreement)
11. If Federal funds are funding a project in whole or in part, any Additional Federal Law Requirements (Exhibit F to Grant Agreement)
12. Consultation with the Land and Water Conservation Fund coordinator for WV.

Once all items above have been provided by the Grantee to the satisfaction of the WVDED, the Grant Agreement will be executed fully.

Once the Notice to Proceed with Exempt Activities is issued by the WVDED, Office of Broadband, the Grantee may begin pre-construction activities, and spend its pledged match on such "soft cost" items as engineering functions, permit applications/right-of-way practices, and logistical efforts may take place.

#### Step Two - Notice to Proceed with Construction

After issuance of the Notice to Proceed with Exempt Activities (Step One above), but prior to requesting a Notice to Proceed with Construction, the Grantee shall submit its engineered design to the WVDED. Designs must be prepared under the review of a P.E. or an engineer with substantial demonstrated experience designing wireless networks whose credentials are submitted along with the design. At this stage, the Grantee may request grant funds for pre-construction activities if the required match is already spent. In general, this second Notice to Proceed will not be issued until the WVDED receives from the Grantee copies of West Virginia Division of Highways (WVDOH) permitting and other applicable permits and clearances, including, Dig Once Notifications as applicable, pole attachment agreements, and WVDOH permit applications and applicable bonds.

Given that WVDOH's review only includes work in the Right-of-way, if a Grantee project involves work on private property or property outside of the right-of-way, the Grantee must also provide evidence of

any required easements or clearances as well. NOTE: Grantees may only request grant funds for construction **after** receiving the Notice to Proceed with Construction.

## Construction Compliance Requirements

### Environmental Law Compliance

WIN Projects must comply with all applicable Federal and state environmental laws. For a list of potentially applicable Federal Environmental Laws and questions relating to applicability, please complete the attached Environmental checklist.

### DEP Compliance<sup>14</sup>

The West Virginia Department of Environmental Protection (WVDEP) issues permits for various facilities and activities so as to maintain compliance with state and federal environmental laws. Most projects under the WIN program will not trigger any air quality, land restoration, or mining and reclamation issues, but awardees should consider the impact that their projects may have, and consult with the WVDEP if projects do implicate any such issues. The following is a listing of the various DEP divisions and potentially applicable permits which grantees will need to obtain, should they apply to a project.

- **Division of Air Quality**
  - Permitting link: <https://dep.wv.gov/daq/permitting/Pages/default.aspx>
    - General Permits  
<https://dep.wv.gov/daq/permitting/Pages/airgeneralpermit.aspx>
    - NSR (45CSR13) Pre-Construction Permits  
<https://dep.wv.gov/daq/permitting/Pages/nsr-forms.aspx>
    - Title IV – Acid Rain  
([https://dep.wv.gov/daq/permitting/Pages/TitleIV\(AcidRain\).aspx](https://dep.wv.gov/daq/permitting/Pages/TitleIV(AcidRain).aspx))
    - Title V – (45C SR30) Operating Permits  
(<https://dep.wv.gov/daq/permitting/Pages/TitleVGuidanceandForms.aspx>)
- **Division of Land Restoration**
- **Division of Mining and Reclamation**
- **Division of Water and Waste Management**

#### Water Permits:

- 401 Water Quality Certification  
(<https://dep.wv.gov/WWE/Programs/Pages/401Certification.aspx>)

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<sup>14</sup> (See <https://dep.wv.gov/WWE/ee/Pages/default.aspx>  
DEP Divisions)

- National Pollutant Discharge Elimination System (NPDES) Individual Permits
  - NPDES General Permits  
(<https://dep.wv.gov/WWE/PERMIT/GENERAL/Pages/default.aspx>)
  - NPDES Individual Permits  
(<https://dep.wv.gov/WWE/permit/individual/Pages/default.aspx>)
  - Stormwater General Permits  
(<https://dep.wv.gov/WWE/Programs/stormwater/csw/Pages/home.aspx>)
  - Stream Disturbances Permit Guidance  
(<https://dep.wv.gov/WWE/Programs/nonptsources/streamdisturbance/Pages/default.aspx>)
  - Underground Injection Control (UIC) Program (non-mining)  
(<https://dep.wv.gov/WWE/PERMIT/UIC/Pages/default.aspx>)

The following is a listing and description of some of these potentially applicable laws.

#### NEPA (National Environmental Policy Act)

The statutory trigger for implementing NEPA's procedural requirements is whether a proposal involves a "federal action".<sup>15</sup> Actions taken by private entities amount to federal actions subject to NEPA if "federal approval is the prerequisite to the action taken by the private actors" or if federal funding is required.<sup>16</sup> NEPA does not apply to a state or private action that is not subject to federal control, authorization, or funding. However, a state or private action may be indirectly subject to NEPA if the action requires a federal authorization, permit, or funding that itself is subject to NEPA.

As related to WIN program, projects which are funded solely by the state funds allocated to the Broadband Development Fund ("BDF") to support the extension of wireless broadband service under the WIN program are not subject to NEPA. However, the use of a source of funding which is subject to NEPA, or the involvement of government bodies that are subject to NEPA in combination with an award from the WVDED using BDF funds may make NEPA applicable to a project. Several state parks were created or funded by the federal government and consequently the approval of a federal agency may be required to construct the Project under the Land and Water Conservation Fund Act. If so, the federal agency is likely obligated to comply with NEPA. Prior to obtaining a Notice to Proceed, all Grantees must confer with the West Virginia Land and Water Conservation Fund (LWCF) Coordinator to determine if the approval of a federal agency is required in order to construct the project. In addition, Grantees under the WIN program must complete and return to the WVDED the environmental checklist provided

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<sup>15</sup> 42 U.S.C. § 4332(2)(C)

<sup>16</sup>

<https://www.faegredrinker.com/webfiles/What%20Every%20Land%20Professional%20Should%20Know%20about%20NEPA.pdf>

as Exhibit D to the Grant Agreement (see Appendix A to this Compliance Guide as well), prior to receiving a Notice to Proceed from the WVDED.

#### National Pollutant Discharge Elimination System (NPDES)

Under the Clean Water Act, discharges of pollutants through a conveyance or point source into a navigable water require a NPDES permit. In most cases, NPDES permitting under the Clean Water Act will not be applicable to broadband infrastructure projects.

In addition to the above environmental laws which may apply to projects, the following Federal environmental laws may also apply. These are including but not limited to:

- The Endangered Species Act
- Clean Water Act
- Clean Air Act
- The National Historic Preservation Act
- Resource Conservation and Recovery Act (RCRA)
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- Wild and Scenic Rivers Act
- Safe Drinking Water Act
- Farmland Protection Policy Act
- Executive Order 11988 – Floodplain Management
- Executive Order 11990 – Wetland Protection
- Executive Order 12898 – Environmental Justice

#### State ROW Permitting Requirements

Grantees are responsible for complying with all applicable permitting requirements of the West Virginia Division of Highways (DOH). In addition, to the extent that other political subdivisions (i.e. county or municipal) have jurisdiction/ownership of part of a right-of-way, grantees are required to comply with any underlying county or municipal permitting/siting requirements.<sup>17</sup>

#### Permitting Requirements for Buried Installations in Rights-of-Way<sup>18</sup>

Grantees are required to demonstrate compliance with the General Guidelines for Fiber Optic Permitting with the WVDOH right-of-way, provided as Exhibit E to the Grant Agreement before the Department will issue a notice to proceed. Further, underground installations in the WVDOH right-of-way are subject to the State's Dig Once Policy.<sup>19</sup>

The West Virginia Division of Highways utility manual contains the WVDOH's regulations, requirements, and conditions for performing work in a right-of-way.<sup>20</sup>

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<sup>17</sup> Because these requirements are location-dependent, it is the responsibility of the subrecipient to ensure that they comply with the underlying jurisdictional permitting requirements on a case-by-case basis.

<sup>18</sup> WV Code, §17-2E-3

<sup>19</sup> W.Va. Code Section 17-2E-5.

<sup>20</sup> [https://transportation.wv.gov/highways/engineering/files/ACCOMMODATION\\_OF\\_UTILITIES.pdf](https://transportation.wv.gov/highways/engineering/files/ACCOMMODATION_OF_UTILITIES.pdf)

#### MM-109 Encroachment Permit

A form MM-109 Encroachment Permit Form is required for broadband installations in the Division of Highways right-of-way.<sup>21</sup> Typically, a signed permit form must be mailed or delivered by permittees along with any plans, drawings, or specifications to the District/County Permit Office where the work will be performed as part of this permitting process for work in rights-of-way under the Division of Highway jurisdiction.<sup>22</sup>

#### SM-6 Encroachment Bond Form

In addition, an SM-6 Encroachment Bond form is also required as part of the Division of Highways permitting process.<sup>23</sup> Once printed, the applicant and the surety company must sign on page one. All signatures on the first page are to be notarized on page two. A power of attorney form should accompany the bond form.

#### Dig Once Policy<sup>24</sup>

If applying for permits to construct and install telecommunications facilities in the Division of Highways right-of-way, the applying carrier/utility must notify by email the Office of Broadband and all other telecommunications carriers on record with the council of the application. The other carriers will then have 15 calendar days to notify the applicant carrier of their interest in sharing the applicant's trench.<sup>25</sup>

**NOTE:** The above WVDOH agreement, permitting, and joint use requirements only apply to underground installations in rights-of-way and do not apply to relocation/modification of existing telecommunications facilities in a right-of-way, nor do they apply to aerial telecommunications facilities or associated equipment in a right-of-way.<sup>26</sup>

In addition to the above requirements, the West Virginia Public Service Commission has finalized new rules for resolution of trench sharing disputes and abandoned facilities, as well as the transfer of facilities on utility poles.<sup>27</sup>

#### National Historic Preservation Act– Section 106 Review<sup>28</sup>

Under the National Historic Preservation Act, Federal agencies, and any tribal, State, or local government that assumes Federal agency responsibilities, is required to consider the effects of agency action on potential cultural resources.

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<sup>21</sup> <https://transportation.wv.gov/highways/maintenance/Pages/EncroachmentPermits.aspx>

<sup>22</sup> Information on district offices can be found here:  
<https://transportation.wv.gov/HIGHWAYS/DISTRICTS/Pages/default.aspx>.

<sup>23</sup> <https://transportation.wv.gov/highways/engineering/files/SM-6%20BOND.pdf>

<sup>24</sup> WV Code §17-2E-5

<sup>25</sup> WV Code, §7-2E-5(a)

<sup>26</sup> WV Code §17-2E-3

<sup>27</sup> See Rules for the Government of Pole Attachments, 150 WVCSR Series 38.

<sup>28</sup> 16 U.S.C. 470 et seq.

The Section 106 Process includes the following steps:<sup>29</sup>

- Initiation of the Section 106 Process;
- Identification of historic properties;
- Assessment of adverse effects;
- Resolution of adverse effects;
- Failure to resolve adverse effects;
- Coordination with NEPA;
- Advisory Council on Historic Preservation review of section 106 compliance;
- Special requirements for protecting National Historic Landmarks;
- Documentation standards;
- Emergency situations;
- Post-review discoveries

#### Coordination With State Historic Preservation Office (SHPO)

In West Virginia, Grantees will consult the State Historic Preservation Office (SHPO) to comply with the Section 106 process.<sup>30</sup>

Grantees are to include the following information in their WVSHPO submittal:<sup>31</sup>

#### SHPO Requirements - General Information regarding the project:

- Is the project a new submission or supplemental information related to a previous submission?
  - a. Project Name
  - b. Federal Agency (if applicable) <sup>32</sup>
  - c. Federal Agency Contact Person (Name, street address, phone number, email)
  - d. State Agency (if applicable)
  - e. State Agency Contact Person (Name, street address, phone number, email)
  - f. Project Contact Person (individual(s) knowledgeable of project activities). (name, street address, phone number, Email)
  - g. Project street address, city, county, zip code
  - h. Project Location
  - i. Project Description
  - j. Project photographs
  - k. Date of Construction

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<sup>29</sup> 36 CFR Part 800. See also <https://www.ecfr.gov/current/title-36/chapter-VIII/part-800/subpart-B?toc=1>

<sup>30</sup> <https://wvculture.org/agencies/state-historic-preservation-office-shpo/review-and-compliance-section-106-review/>

<sup>31</sup> <https://wvculture.org/wp-content/uploads/2021/03/Section106checklist2014.pdf>

<sup>32</sup> Because the WIN Program is a state-funded program, Federal Agency will be inapplicable.

### SHPO Requirements - Identification of Cultural Resources

- Grantees must provide any information regarding the following within or adjacent to the project area:
  - a. Known archeological sites
  - b. Cemeteries
  - c. Structures
  - d. Historic Structures or Districts
- **Photographs:** If there is a standing structure within or adjacent to your project area, the State Historic Preservation Office asks that you provide photographs.
  - If there are structures 50 years or older within your project area or if within the line of sight of the project, you may be asked by SHPO to an WV Historic Property Inventory Form.<sup>33</sup>
  - For information regarding National Register Listings, see <http://www.wvculture.org/shpo/nr.html>

### Filing of Information with SHPO

The required SHPO Section 106 Review Information can be mailed to:

**Review and Compliance Staff  
State Historic Preservation Office  
WV Division of Culture and History  
1900 Kanawha Boulevard East  
Charleston, WV 25305**

### Process – Timing

The Office has 30 days to review a project and any missing information may delay review.

### Grant Recipient Obligations and Post Award Monitoring

Grant awardees must comply with post-award monitoring and reporting requirements established by the WVDED to maintain continued eligibility for disbursement of grant funds. Awardees are responsible for active technical, financial, and project management of awarded projects through their own staff and/or by hiring and managing well-qualified contractors. Awardees must also comply with technical and financial monitoring and reviews as required by WVDED contractors and staff.

### Recoupment

Failure to comply with the compliance and reporting obligations under the Program may result in recoupment of funds by the WVDED.

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<sup>33</sup> Forms and instructions located at <http://www.wvculture.org/shpo/forms.html>

## Equipment and Real Property Management

In general, Equipment and real property acquired under this program must be used for the originally authorized purpose, and any equipment and real property acquired under the WIN program will vest in the Grantee.

Title to real property or equipment acquired or improved under the Grant (Project Property) vests in the Grantee, subject to the condition that until December 31, 2034 or the useful life of the equipment, whichever is less, the Grantee and any successors or transferees:

- (1) must use the Project Property for the authorized purposes of the project in the same manner as they use comparable real property and equipment within their networks in the ordinary course of their business, subject to the rights to disposition provided below,
- (2) must continue to provide internet service to the service areas and at the standard initially agreed upon by the Department and Grantee,
- (3) must participate in federal programs that provide low-income consumers with subsidies on broadband internet access services,
- (4) must maintain adequate insurance,
- (5) must comply with the use and management requirements for equipment by applying the Grantee's commercial practices for meeting such requirements in the normal course of business (e.g., commercial inventory controls, loss prevention procedures, etc.), provided that such inventory controls indicate the applicable state interest,
- (6) must maintain records of real property that include an indication of the applicable state interest,
- (7) may dispose of Project Property in the ordinary course of business when no longer needed to operate the network, such as in order to upgrade equipment and improve facilities, provided that at least the same level of service provided by the network is maintained and there is no material interruption to service and that such upgraded property is subject to the same requirements provided in this guidance as other Project Property,
- (8) may otherwise sell or transfer Project Property only after provision of notice to the Department that identifies the successor or transferee and after securing the agreement of the successor or transferee to comply with these requirements and the acknowledgement of the successor or transferee of the state property interest, and
- (9) must notify the Department upon the filing of a petition under the Bankruptcy Code, whether voluntary or involuntary, with respect to the Grantee or its affiliates.

In recognition that this broadband program is being executed for the benefit of the public being served by the broadband infrastructure, until December 31, 2034 the Grantee must hold Project Property in trust for the beneficiaries of the WIN broadband infrastructure project.

Grantees may encumber Project Property if the State receives a shared first lien position in the Project Property such that, if the Project Property were foreclosed upon and liquidated, the Department would receive the portion of the fair market value of the property that is equal to the Department's percentage contribution to the project costs. For example, in the case in which the Department had contributed 50% of the project costs, Department would receive 50% of the fair market value of the Project Property when liquidated. The Department will not otherwise require Grantees following these requirements to record liens or other notices of record.

A Grantee who wishes to dispose of Project Property before the end of its useful life or before December 31, 2034, whichever is less, must request disposition instructions from the Department.

### Bonding Requirements

If Grantees utilize contractors to implement some or all of the Project, selected contractors must provide a performance bond on the part of the contractor for 100 percent of the contract price. This performance bond shall be executed by the successful contractor in connection with a contract to secure fulfillment of the contractor's obligations under such contract.

Grantees are responsible for obtaining appropriate levels and types of insurance to cover all aspects of the Project, specifically including Workers Compensation, and Grantee shall procure such other insurance in its judgment as appropriate, such as commercial general liability, personal injury liability, independent contractor's liability, contractual liability, product liability, completed operations liability, fire damage, medical payments, business automobile liability, excess liability, employer's liability, and builder's risk. Grantee's obligations under its Grant Agreement with WVDED will not be diminished due to Grantee incurring a loss affecting the Project which is not covered by Grantee's policies of insurance. WVDED's payments to Grantee will not be increased due to Grantee incurring a loss related to the Project which is not covered by Grantee's policies of insurance.

## Appendix A – Environmental Checklist

This is a reference document that lists environmental laws that may apply to any eligible project. The following questions will aid entities in identifying the environmental laws that may apply; however, the entity must perform the proper due diligence to ensure their project complies with all applicable laws. Additionally, recipients must retain records, permits, and documentation necessary to evidence compliance with all environmental requirements.

## FEDERAL LAWS

### 1.1 NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) provides a national policy that encourages “productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man...” The NEPA requires that all Federal agencies use a systematic, interdisciplinary approach for protection of the human environment; this approach will ensure the integrated use of the natural and social sciences in any planning and decision-making that may have an impact upon the environment. The NEPA also requires the preparation of a detailed Environmental Impact Statement (EIS) on any major Federal action that may have a significant impact on the environment.

1) Will the proposed activity be under the permitting authority of any Federal agency?

Yes No

2) Will the proposed activity receive Federal assistance

Yes No

3) Will the proposed activity be subject to any Federal regulatory decision or approval?

Yes No

4) Has a NEPA or NEPA-like review been independently prepared for this proposed eligible activity or is a NEPA review underway?

Yes No

If the answer to any of these questions is “yes,” contact the relevant Federal agency or agencies for further guidance on environmental compliance. Additional information concerning NEPA can be found at: <https://ceq.doe.gov/>.

### 1.3 ENDANGERED SPECIES ACT (ESA)

Section 7 of the Endangered Species Act (ESA) imposes a duty on Federal agencies to ensure their actions are not likely to adversely affect threatened or jeopardize the continued existence of any species listed as threatened or endangered, or that would result in the destruction or adverse modification of the critical habitat of a listed species. A Section 7 consultation may be required if a threatened or endangered species or critical is present.

1) Will the proposed activity occur in proximity to threatened or endangered species or critical habitat as defined by the ESA and under the jurisdiction of the National Marine Fisheries Service (NMFS)

(<https://www.fisheries.noaa.gov/species-directory/threatened-endangered>) or the U.S. Fish and Wildlife Service (USFWS) (<https://www.fws.gov/endangered/>)?

Yes No

2) Will the proposed activity potentially affect threatened or endangered species or critical habitat as defined by the ESA and under the jurisdiction of National Marine Fisheries Service (NMFS) or U.S. Fish and Wildlife Service (USFWS)?

Yes No

If the answer to either of these questions is “yes,” contact the regional office of USFWS (<http://www.fws.gov/offices/> ) and/or NMFS (<https://www.fisheries.noaa.gov/contact-directory/regional-offices>) to determine if consultation is required. Most consultations are conducted informally with the Federal agency or a designated non-Federal representative. Non-Federal representatives may be involved in the informal consultation process and may request and receive species lists, prepare the biological assessment, and provide information for the formal consultation. However, the USFWS requires the action agency to designate formally the non-Federal representative in writing. Moreover, the ultimate responsibility for Section 7 obligations remains with the action agency. Additional information concerning Section 7 consultations can be found in the Endangered Species Act Consultation Handbook at: <http://www.fws.gov/policy/m0002.html>.

#### 1.4 MAGNUSON – STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT (MSA)

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) is the primary law that governs marine fisheries managements in U.S. Federal waters. Consultation with the NMFS may be required if Essential Fish Habitat (EFH) is present where project activity will occur. The trigger for EFH consultation is a Federal agency’s determination that an action or proposed action, funded, authorized, or undertaken by that agency may adversely affect EFH.

1) Will the proposed activity occur in proximity to EFH as identified by the nearest Regional Fishery Management Council (<https://www.habitat.noaa.gov/apps/efhmapper/>)

Yes No

2) Will the proposed activity potentially adversely affect EFH?

Yes No

If the answer to either of these questions is “yes,” contact the nearest regional office of the NMFS (<https://www.fisheries.noaa.gov/contact-directory/regional-offices>) or Regional Fishery Management Council (<http://www.fisherycouncils.org/>) to determine if consultation is required. Additional information concerning EFH can be found at: <https://www.fisheries.noaa.gov/national/habitat-conservation/essential-fish-habitat>. Information about consultations can be found in the Essential Fish Habitat Consultation Guidance at: <https://www.fisheries.noaa.gov/national/habitat-conservation/consultations-essential-fish-habitat#the-consultation-process>.

#### 1.6 CLEAN WATER ACT (CWA)

A separate type of permit is required to dispose of dredge or fill material in the Nation's waters, including wetlands. Authorized by Section 404 of the Act, this permit program is administered by the U.S. Army Corps of Engineers (USACE), subject to and using environmental guidance from the Environmental Protection Agency (EPA). Some types of activities are exempt from permit requirements, including certain farming, ranching, and forestry practices that do not alter the use or character of the land; some construction and maintenance; and activities already regulated by States under other provisions of the Act.

A permit may be required from the USACE for the disposal of dredge or fill material in the nation's waters, including wetlands.

1) Will the proposed activity result in any disposal of dredge or fill material to the nation's waters or wetlands?

Yes No

If the answer to this question is "yes," contact the Regulatory Program of the nearest District Office of the USACE

(<http://www.usace.army.mil/Locations.aspx>) for further guidance on Section 404 permits.

A Water Quality Certification (Section 401) is required for activities that may result in a discharge into navigable waters, including wetlands, watercourses, and natural or man-made ponds. A National Pollution Discharge Elimination System (NPDES) permit may also be required for such discharges.

1) Will the proposed activity result in any discharge to navigable waters?

Yes No

If the answer to this question is "yes," contact your State water quality agency for additional guidance. Additional information concerning Section 401 or NPDES requirements can be found at:

<https://www.epa.gov/cwa-401/overview-cwa-section-401-certification> and  
<https://www.epa.gov/npdes/npdes-permit-basics>.

## 1.7 CLEAN AIR ACT (CAA)

Clean Air Act (CAA), 42 U.S.C §§ 7409, 7410, 7502-7514, 7571-7574, requires establishment of National Ambient Air Quality Standards (NAAQS) and designation of areas based on achievement of these standards. It also requires preparation of a State Implementation Plan for Air Quality (SIP). In Section 176(c) of the CAA, Federal agencies must demonstrate that their actions conform to these SIPs (or the Tribal or Federal equivalent of a SIP). The CAA also requires emission limits to be controlled and regulated through permit requirements set by States or Tribes. Special conditions may be required on projects that could affect air quality.

1) Will the proposed activity result in any direct or indirect emissions within a non-attainment area (<https://www.epa.gov/green-book>)?

Yes No

If the answer to this question is “yes,” contact the nearest State air quality agency (<http://www.4cleanair.org>) for further guidance on determining conformity with the State implementation plan.

#### 1.8 NATIONAL HISTORIC PRESERVATION ACT (NHPA)

Pursuant to 54 U.S.C. § 300101, the National Historic Preservation Act (NHPA) establishes Federal government policy with regards to historic preservation. Section 106 of NHPA (54 U.S.C § 306108) requires that “the head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or Federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, take into account the effect of the undertaking on historic properties; and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking.” Special conditions may be required on projects that could affect historic resources.

1) Will the proposed activity occur near property listed or eligible for listing in the National Register of Historic Places (<https://www.nps.gov/subjects/nationalregister/index.htm>), or near property otherwise protected by section 106 of the

National Historic Preservation Act (<http://www.nps.gov/history/local-law/nhpa1966.htm>) or a similar State Preservation Act?

Yes No

If the answer to this question is “yes,” contact the U.S. Advisory Council on Historic Preservation (<http://www.achp.gov>), or your State historic preservation office (<http://www.ncshpo.org/>) for further guidance concerning compliance requirements.

#### 1.10 RIVERS AND HARBORS ACT

Section 10 of the Rivers and Harbors Act of 1899 requires authorization from the Secretary of the Army, acting through the Corps of Engineers, for the construction of any structure in or over any navigable water of the United States. The law applies to any dredging or disposal of dredged materials, excavation, filling, rechannelization, or any other modification of a navigable water of the United States, and applies to all structures, from the smallest floating dock to the largest commercial undertaking. A permit may be required from the USACE if the proposed activity involves any work in, over, or under navigable waters of the United States.

1) Will the proposed activity involve any work (including structures) that will occur in, over or under navigable waters of the United States?

Yes No

If the answer to this question is “yes,” contact the Regulatory Program of the nearest District Office of the USACE

(<http://www.usace.army.mil/Locations.aspx>) for further guidance on Section 10 permits. The USACE can authorize activities by a standard individual permit, letter-of-permission, nationwide permit, or regional permit. The USACE will make the determination on what type of permit is needed.

### 1.11 RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

The Resource Conservation and Recovery Act (RCRA) gives EPA the authority to control hazardous waste from cradle to grave. This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. A RCRA permit may be required from the EPA or designated State agency for the long-term storage, treatment, or disposal of hazardous materials or petroleum products.

1) Will the proposed activity include the long-term storage of hazardous materials or petroleum products?

Yes No

If the answer to this question is “yes,” contact the nearest RCRA Regional Office of the EPA or State authorized agency

(<https://www.epa.gov/hwgenerators/links-hazardous-waste-programs-and-us-state-environmental-agencies>) for further guidance on RCRA compliance.

### 1.12 COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

The Comprehensive Environmental Response, Compensation, and Liability Act -- otherwise known as CERCLA or Superfund -- provides a Federal "Superfund" to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Special provisions and requirements may apply if the proposed activity involves a Superfund site (<http://www.epa.gov/superfund/sites/index.htm>).

1) Will the proposed activity involve a known Superfund site (<https://www.epa.gov/superfund/search-superfund-sites-where-you-live>)?

Yes No

If the answer to this question is “yes,” contact the nearest Regional Office of the EPA (<https://www.epa.gov/aboutepa/regional-and-geographic-offices>) for further guidance on CERCLA requirements.

### 1.13 WILD AND SCENIC RIVERS ACT

The Wild and Scenic Rivers Act prohibits Federal support for actions such as the construction of dams or other instream activities that would harm the free-flowing condition, water quality, or outstanding resource values of a designated Wild and Scenic River. Designation of a river neither does nor inherently prohibit development. “The Act purposefully strives to balance dam and other construction at appropriate sections of rivers...”

1) Is the proposed activity located on a designated Wild and Scenic River (<http://www.rivers.gov/index.php>)?

Yes No

If the answer to this question is “yes” contact the nearest Regional Office of the USFWS (<http://www.fws.gov/where>) for further guidance.

#### 1.14 SAFE DRINKING WATER ACT (SDWA)

The Safe Drinking Water Act (SDWA) authorizes the EPA to set national health-based standards for drinking water to protect against both naturally-occurring and man-made contaminants that may be found in drinking water. EPA, States, and water systems then work together to make sure that these standards are met. A permit may be required if the proposed activity will involve underground injection which may impact drinking water sources.

1) Will the proposed activity involve underground injection which may impact drinking water sources?

Yes No

If the answer to the question is “yes,” contact the nearest State drinking water or underground injection control program (<https://www.epa.gov/uic>). For more information see: <http://water.epa.gov/lawsregs/guidance/sdwa/>.

#### 1.15 FARMLAND PROTECTION POLICY ACT (FPPA)

The Farmland Protection Policy Act (FPPA) is intended to minimize the impact Federal programs have on the unnecessary and irreversible conversion of farmland to nonagricultural uses. It assures that to the extent possible Federal programs are administered to be compatible with State, local units of government, and private programs and policies to protect farmland. For the purpose of FPPA, farmland includes prime farmland, unique farmland, and land of statewide or local importance. Farmland subject to FPPA requirements does not have to be currently used for cropland. It can be forest land, pastureland, cropland, or other land, but not water or urban built-up land. For more information, visit: <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/landuse/fppa/>.

1) Is the proposed activity for new construction, acquisition of undeveloped land or change in use of land or property?

Yes No

If the answer to the question is “no,” the FPPA does not apply. If the answer to the question is “yes,” to determine any necessary next steps, contact the local National Resource Conservation Service District Conservationist ([https://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/contactus/?cid=nrcs142p2\\_053951](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/contactus/?cid=nrcs142p2_053951)).

#### EXECUTIVE ORDERS

Executive Orders (E.O.) are directives from the President of the United States to Federal agencies and officials.

##### 2.1 E.O. 11988, as amended by E.O. 13690 – Floodplain Management

E.O. 11988 requires Federal agencies to avoid, to the extent possible, the long and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct and indirect support of floodplain development wherever there is a practicable alternative. To this effect, an 8-step process must be followed for projects that may have potential impacts to or within floodplains ([https://emilms.fema.gov/is\\_0253a/groups/74.html](https://emilms.fema.gov/is_0253a/groups/74.html)). On January 30, 2015, in amending and building upon E.O. 11988, the President issued E.O. 13690, establishing Federal Flood Risk Management

Standard and a Process for Further Soliciting and Considering Stakeholder Input. Order 13690 and the associated Federal Flood Risk Management Standards (FFRMS) reinforce the important tenets and concepts articulated in Order 11988. When avoiding the floodplain is not possible, E.O. 13690 calls for agencies to make efforts to improve the resilience of communities as of Federal actions. Importantly, Order 13690 established a new standard against which Federal agencies are to evaluate the potential impacts of flooding on Federal investments, the FFRMS. This standard set a higher vertical elevation and a greater horizontal extent to the floodplain to be considered.

1) Is the proposed activity located in a designated floodplain or have the potential to affect or be affected by a floodplain on a National Flood Insurance Program map:  
(<https://msc.fema.gov/portal/home>)?

Yes No

If the answer to this question is "yes," contact the nearest Regional Office of the Federal Emergency Management Agency

(<http://www.fema.gov/regional-operations>) for further guidance.

## 2.2 E.O. 11990 – WETLAND PROTECTION

This E.O. requires agencies to minimize the destruction, loss, or degradation of wetlands, and to preserve and enhance the natural beneficial values of wetlands. Similar to E.O. 11988, the 8-step process is followed to consider how actions affect wetlands.

1) Is any portion of the proposed activity in wetlands?

Yes No

If the answer to this question is "yes," provide documentation in the grant application demonstrating that: (1) there is no practicable alternative, and (2) the proposed activity includes all practicable measures to minimize harm to wetlands.

## 2.3 E.O. 12898 – ENVIRONMENTAL JUSTICE

This E.O. requires that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Thus, as appropriate, analysis of environmental justice concerns should be integrated during the review process.

1) Will the proposed activity have disproportionately high and adverse human health or environmental effects on minority or low-income populations?

Yes No

If the answer to this question is "yes," see the Council on Environmental Quality website for further guidance on Environmental Justice: <https://ceq.doe.gov/nepa-practice/justice.html>, <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf>, and [https://www.epa.gov/sites/default/files/2016-08/documents/nepa\\_promising\\_practices\\_document\\_2016.pdf](https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf)

## 2.5 E.O. 13112 – INVASIVE SPECIES

This E.O. requires agencies to prevent the introduction of invasive species and provide for their control.

1) Will the proposed activity have the potential to introduce or cause the spread of an invasive species? For more information on invasive species, see <https://www.invasivespeciesinfo.gov/>.

Yes No

If the answer to this question is “yes,” provide documentation demonstrating that the benefits of the activity clearly outweigh the potential harm caused by invasive species, and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.

## 2.6 E.O. 13186 – RESPONSIBILITIES OF FEDERAL AGENCIES TO PROTECT MIGRATORY BIRDS

This E.O. requires the incorporation and promotion of migratory bird conservation considerations into all agency activities.

1) Is the proposed activity likely to occur during a time of the year when migrating birds are in the vicinity? For more information on migratory birds, see <http://www.fws.gov/migratorybirds>.

Yes No

If the answer to this question is “yes,” contact the nearest Regional Office of the U.S. Fish and Wildlife Service

(<http://www.fws.gov/where>) for further guidance. Additional information regarding E.O. 13186 can be found at: <https://www.fws.gov/birds/policies-and-regulations/administrative-orders/executive-orders.php>.

## Appendix B – Fiber Optic Permitting Within WVDOH RW General Guidelines for Office of Broadband

## FIBER OPTIC PERMITTING WITHIN WVDOH RW

### GENERAL GUIDELINES FOR OFFICE OF BROADBAND

OCTOBER 19, 2021

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These guidelines will apply to any project that will include installation of fiber optic lines by any Utility within any Division of Highways right-of-way. Utilities are expected to follow the provisions described within the current WVDOH Manual entitled *Accommodation of Utilities on Highway Right of Way and Adjustment and Relocation of Utility Facilities on Highway Projects*, June 2007.

#### GENERAL CONDITIONS

- Only fiber optic lines are permitted to longitudinally occupy any Controlled Access (CA) Right-of-way (RW) and those installations are subject to the following conditions:
  - Utility conforms with the provisions of the Telecommunications Act of 1996
  - such fiber optic lines are to be installed underground, and are not to be installed within the median
  - no poles or aerial installations within CA RW are permitted
- Aerial or buried perpendicular crossings of CA RW with a utility (fiber optic or other) may be permissible but entry/exit points are to be outside CA RW
- Utility is responsible for identifying location of any other utilities within project installation area and for any coordination necessary with any other utility
- Any municipal, County, State or Federal permits, approvals, or fees are responsibility of Utility
  - Municipal fees (such as B&O) may be applicable to project even if fiber optic installation (aerial or underground) is solely within WVDOH RW within municipal boundary
  - Installation (aerial or underground) of fiber optic line solely within WVDOH RW but also within boundary of Federal lands may require additional approval of Federal agency
- Utility is responsible for obtaining from each landowner any necessary approval to enter or work within any property outside WVDOH RW
- Any proposed **Microtrenching** must be approved by WVDOH - Central Office
  - this type of trench can be of concern due to lack of compaction, allowing water to infiltrate beneath the pavement, potentially causing voids and/or sinkholes—backfill/compaction procedure details must be provided
  - creates difficulty for WVDOH maintenance work due to shallowness of the line and inability to place warning tape 18" below finished grade, as required

## **MAINTENANCE BOND**

- Utility required to provide to the District a \$75,000 Maintenance Bond prior to submission of initial Utility Permit within that District
  - to be kept current by Utility
  - covers all maintenance work within any County within that District by that Utility
  - Utility required to post separate Maintenance Bond for each District in which Utility seeking permit
  - Separate Maintenance Bond necessary for each type of utility installation by same Utility
  - must be current at time WVDOT would release any construction bond to Utility
- Any entity (private company, municipality, co-operative, etc.) proposing to install fiber optic line within WVDOT RW will be required to have separate Maintenance Bond on file with each District

## **ENVIRONMENTAL CLEARANCE (NEPA DOCUMENT)**

- Utility should anticipate that at least a Categorical Exclusion (CE) document will be necessary for each project affecting CA RW or a route within the Federal-Aid Highway System
- Entire project routing (including non-WVDOT routes or other property) may be considered by FHWA to be single project with respect to environmental document
- If any part of installation is physically within boundary of a Federally owned property (even if installation solely within WVDOT RW), project may require an Environmental Assessment (EA) document
- Utility responsible for coordination with, and providing to WVDOT documentation of such coordination with Federal agencies, e.g., US Fish and Wildlife Service, US Army Corps of Engineers (if boring under or working within jurisdictional water), US Forest Service, National Park Service, US Military
- Utility coordinates with State Historic Preservation Office (SHPO) and if necessary, Tribal Nations consultations must go through FHWA
- WVDOT prepares/issues final environmental document provided by the Utility
- No construction to be undertaken until environmental clearance issued by WVDOT

## **UTILITY PERMIT SUBMISSION**

- Completed MM-109 submitted to District with appropriate plans
  - One (1) full-size, printed set of Plans
  - A PDF or other electronic/digital set of Plans
- Construction/performance Bond submitted to District
  - Bond amount is either 5 percent of estimated project cost or minimum \$100,000
  - Bond issued in name of permittee
  - Release by WVDOT of construction bond does not occur for at least one year from date of WVDOT acceptance of work performed under terms of the permit, and Utility must

have on file a current Maintenance Bond at the time WVDOT might release construction bond

- For **Aerial Installations** (new poles, attachment to existing poles, overloading), minimum information/details needed within Plans
  - Map showing route(s), termini, project limits, location
  - Aerial image (e.g., Google Earth) of project area
  - Offset distance (center of pole from centerline of roadway)
  - Pole information
    - Coordinates
    - Pole Number
    - Pole Owner
  - Profiles
  - WVDOT right-of-way along roadway
  - Traffic control plan for construction/installation, and for maintenance if applicable
  - Street name/closest physical address to project
- For **Trenching and Sawcut** Installations, minimum information/details needed within Plans
  - Map showing route(s), termini, project limits, location
  - Aerial image (e.g., Google Earth) of project area
  - Distance from centerline of roadway
  - Distance behind guardrail, if appropriate
  - Existing WVDOT drainage structures
  - Handhole information
    - Location(s)
    - Dimensions/details
    - Depth of handhole lid beneath ground surface
  - WVDOT right-of-way along roadway
  - Trenching/sawcut details
    - Depth
    - Width
    - Backfill, compaction process to be utilized to close trench after installation
  - Verification that installation is outside pavement
  - Traffic control plan for construction/installation, and for maintenance if applicable
- For **Boring** Installations, minimum information/details needed within Plans
  - Map showing route(s), termini, project limits, location
  - Aerial image (e.g., Google Earth) of project area
  - Existing WVDOT drainage structures
  - Bore information
    - Location(s)
    - Depth(s)
    - Bore pit locations/details
  - Handhole information

- Location(s)
  - Dimensions/details
  - Depth of handhole lid beneath ground surface
- WVDOT right-of-way along roadway
- Traffic control plan for construction/installation, and for maintenance if applicable
- For any proposed **Bridge attachment**, Utility provides to WVDOT:
  - Map showing route(s), termini, project limits, location
  - Aerial image (e.g., Google Earth) of project area
  - Detailed alternatives analysis comparing options reviewed, with proposed justification indicating why bridge attachment is felt to be only reasonable/feasible alternative (see Utility Manual)
- If WVDOT approves a **Bridge attachment**, then minimum information/details needed within Plans
  - Map showing route(s), termini, project limits, location
  - Aerial image (e.g., Google Earth) of project area
  - Details for method of attachment to Bridge (no welding permissible)
    - Proposed location of conduit to be installed along Bridge
    - detail to assure the installation will not adversely affect WVDOT bridge inspections or maintenance
  - Utility to provide a schedule for Utility's inspection (e.g., annually) of bridge at areas of attachment and of the conduits to ensure no issues (such as rusting) with Bridge at attachment areas
  - Conduit details (inside and outside diameters, type of material, etc.)
  - Details concerning manner in which conduit will transition from ground (approaches) to Bridge
  - Traffic control plan for construction/installation, for inspection of bridge attachment areas and conduits, and if applicable, for maintenance

## INSPECTION

- Utility installation inspection costs will be charged to Utility/Permittee
  - assume minimum cost of \$600/day for inspection cost by WVDOT
  - assume minimum cost of \$1200/day for inspection cost by WVDOT consultant

