


**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION**

Subject: Implementation Procedures for VWP Preliminary Jurisdictional Determinations (PJDs), Approved Jurisdictional Determinations (AJDs), and State Surface Waters Determinations (SSWDs), WAT-PER-003

To: Regional Directors

From: Scott Morris, DBA, P.E., Director, Water Division 

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Copies: Regional Water Permit Managers, Regional Water Compliance Managers

Summary:

Virginia has a very broad and comprehensive statutory definition of state waters. Since at least 1968, state waters have been defined to include “all water, on the surface and under the ground, wholly or partially within or bordering the [Commonwealth] or within its jurisdiction.” This definition was expanded in 2000 to include “all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.” Virginia law prohibits excavating, filling, draining, or other activities that cause significant alteration or degradation of existing wetland acreage or functions without a permit. Since 2001, Virginia has regulated activities in surface waters (i.e., wetlands and streams and open waters) through the Virginia Water Protection (VWP) Permit Program. These permits require avoidance and minimization of wetland impacts to the maximum extent practicable and compensation for any unavoidable loss of wetland functions.

Information related to this memo can be found on the DEQ website at:
<https://www.deq.virginia.gov/permits/water/wetlands-streams-vwp> under Surface Water Delineations.

The purpose of this memo is to provide clarity regarding recent changes VWP program requirements and to provide DEQ staff with implementation procedures for these changes.

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Sackett vs U.S. Environmental Protection Agency

What is *Sackett*?

A decision by the Supreme Court of the United States (SCOTUS) on 25 May 2023 that refined the federal definition of “waters of the United States” (WOTUS). The Court determined that the jurisdiction of the Clean Water Act (CWA) “extends only to those wetlands with “relatively permanent” water and a “continuous surface connection” to other water bodies that are WOTUS in their own right, such that they are indistinguishable from those waters.” The *Sackett* decision reduces federal jurisdiction of WOTUS in some parts of Virginia.

How does *Sackett* change federal jurisdiction in Virginia?

Wetlands that are near waterbodies, but lack a continuous surface connection to them, may not be federally protected. Wetlands that lack relatively permanent water may not be federally protected. As of fall 2023, DEQ expects EPA and the United States Army Corps of Engineers (USACE) to issue guidance to their field staff to assist with identifying which waters are “relatively permanent” with a “continuous surface connection”.

How will the USACE and EPA apply *Sackett* in Virginia?

At this time, DEQ does not know how the USACE and EPA will implement the *Sackett* decision in permitting and delineation boundary decisions. As of fall 2023, the USACE is issuing some preliminary jurisdictional determinations (PJDs), but few, if any, approved jurisdictional determinations (AJDs). DEQ expects new federal guidance, checklists, field procedures, regulations and other information made public in the future.

What does implementation of *Sackett* mean for DEQ-VWP Staff?

Neither the State Water Control Law nor the VWP regulations are affected by the *Sackett* decision. Presuming that *Sackett* reduces federal jurisdiction over some wetland areas, DEQ anticipates issuing more VWP permits and coverages, particularly for those small projects that previously received a nationwide permit from the USACE. DEQ also anticipates performing more State Surface Waters Determinations (SSWDs).

Waters of the United States Rule (2023)

Why did the Waters of the United States (WOTUS) rule change in 2023?

The 1972 amendments to the Clean Water Act established federal jurisdiction over “navigable waters,” defined as the “waters of the United States (WOTUS).” Many Clean Water Act programs apply only to WOTUS. In January 2023, EPA and the USACE issued a revised definition of WOTUS. However, parts of the January 2023 Rule became invalid under SCOTUS’ interpretation of the Clean Water Act in the *Sackett* decision in May 2023. Therefore, in August 2023, the agencies amended key aspects of the regulatory text to conform it to the *Sackett* decision. The 2023 WOTUS rule became effective on 08 September 2023. To date, there are pending court challenges and proposed federal legislation to further change the WOTUS rule.

How will the USACE apply the 2023 WOTUS rule in Virginia?

At this time, DEQ does not know how the USACE and EPA will implement the 2023 Revised Definition of Waters of the United States in permitting and delineation boundary decisions. As of fall 2023, the USACE is issuing some preliminary jurisdictional determinations (PJDs), but few, if any, approved jurisdictional determinations (AJs). DEQ expects EPA and the USACE to issue guidance to their field staff to assist with identifying which waters are “relatively permanent” with a “continuous surface connection”, and expects new federal guidance, checklists, field procedures, regulations and other information made public in the future.

What does implementation of WOTUS mean for DEQ-VWP Staff?

Nothing in federal law, federal regulation, or court cases involving federal jurisdiction changes the definition of “state waters.” DEQ continues to regulate wetlands and other surface waters as it has since 2001. DEQ anticipates issuing more VWP permits and coverages, particularly for those small projects that previously received a nationwide permit from the USACE. We expect some of this additional permitting workload to proceed via the VWP general permit 45-day coverage provisions in state law; meaning no further review is conducted and the general permit coverage is granted on Day 45. DEQ also anticipates performing more State Surface Waters Determinations (SSWDs).

CLEAN WATER ACT SECTION 401 RULE (2023)

What is Clean Water Act (CWA) Section 401 Certification?

Under the CWA, a federal agency may not issue a license or permit to conduct any activity that may result in any discharge into “waters of the United States,” unless the state or authorized tribe where the discharge would originate either issues a CWA Section 401 water quality certification or waives certification.

Why did the Clean Water Act Section 401 rule change in 2023?

The 2023 Section 401 rule limits federal agency reviews to “whether the appropriate certifying authority issued the certification decision; the certifying authority confirmed it complied with its public notice procedures established pursuant to CWA Section 401(a)(1); and the certifying authority acted on the request for certification within the reasonable period of time.” Generally, the 2023 Rule gives states and tribes more discretion on federal projects than the 2020 Rule did. The Rule provides (1) states an opportunity to receive early notification and to engage with project proponents and federal agencies before beginning 401 review; (2) states to receive a copy of the permit application or draft permit, and any “readily available water-quality related materials”; (3) sets a default “reasonable period of time” to act on a request for certification of six months from the time a state receives the request, but the federal agency and state can agree to extend that period to full year; and (4) restores a states’ ability to evaluate whether the “[project] as a whole will comply with all applicable water quality requirements,” rather than just the discharge. However, even with the 401 Rule changes, fewer projects will likely be subject to federal jurisdiction due to Sackett and the revised WOTUS rule.

How will the USACE of Engineers apply the 2023 Section 401 rule in Virginia?

The USACE cannot issue CWA Section 404 permits until receiving a Section 401 certification decision (grant, grant with conditions, waive, or deny) from DEQ. For the USACE general permits (nationwide, regional, and SPGP permits), Section 401 certification decisions are made by DEQ on a programmatic basis. For USACE individual permits, the Section 401 certification decision is made on a project-specific basis. DEQ considers a project proponent's submittal of a Joint Permit Application (JPA) to be a request for Section 401 Water Quality Certification, assuming all state waters, including those that are also WOTUS, have been identified. Applicants will continue to submit JPAs to the Virginia Marine Resource Commission (VMRC), which will continue to track JPAs, distribute them to the USACE and DEQ, and process them for that agency's own permitting purposes when applicable. Each agency will independently determine whether the project is subject to that agency's jurisdiction.

What does implementation of the Section 401 mean for DEQ-VWP Staff?

DEQ uses the VWP Permit Program as a surrogate Section 401 Water Quality Certification (WQC) process for surface water impacts in absence of a separate or stand-alone WQC process (other than for certain pipeline upland WQC), which is allowed by Virginia law. Today, there is more scrutiny on how states and tribes implement and comply with Section 401 WQC. For example, EPA is paying more attention to the neighboring state's or tribe's jurisdictional determination provision, which means that neighboring states or tribes may weigh in on another state's or tribe's CWA Section 401 WQC decision. This scenario was rarely encountered under previous Section 401 rules but is now being given more attention by EPA. DEQ will continue to complete its CWA Section 401 WQC decisions via the VWP permit process, which is initiated by submission of a complete JPA. When a VWP general permit coverage decision also serves as the Section 401 WQC decision, the decision is made within 45 days, either affirmatively (typically less than 45 days) or via the 45-day VWP general permit coverage provision (on 45th day) in State Water Control Law. When a VWP individual permit decision also serves as the Section 401 WQC decision, the decision should occur within 120 days per State Water Control Law. If not finished within one year, the Section 401 WQC decision can be deemed waived by any applicable federal licensing or permitting agency.

Example Scenarios

1. DEQ receives a JPA for a project with permanent wetland and stream impacts. A Preliminary Jurisdictional Determination (PJD) from the USACE is included in the JPA submittal. DEQ accepts the PJD because it identifies all aquatic resource areas on a project site, regardless of federal jurisdiction. DEQ staff reviews the application and if applicable, begins processing a VWP permit or coverage using current processes and procedures. Applicants are notified if no VWP permit or coverage applies.
2. DEQ receives a JPA for a project with permanent wetland and stream impacts. An Approved Jurisdictional Determination (AJD) from the USACE is included in the JPA submittal. DEQ can accept the AJD because it identifies all aquatic resource areas having federal jurisdiction, but then DEQ-VWP staff must perform a State Surface Waters Determination (SSWD) to identify whether additional state waters are present on the site. If no additional state waters are present on the site, then DEQ accepts the AJD, reviews the application, and if applicable, begins processing a VWP permit or coverage using current processes and procedures. If other state

waters are present on the project site, then DEQ uses the AJD and the SSWD to supplement review of the JPA and if applicable, begin processing a VWP permit or coverage using current processes and procedures. The SSWD findings are valid for five (5) years from the date the SSWD is issued in absence of a permit decision, or when a permit decision applies, the SSWD is valid for the life of the permit. In either case, applicants are notified if no VWP permit or coverage applies.

3. DEQ receives a JPA from an applicant for a project with permanent wetland and stream impacts, including an SSWD request, but no AJD or PJD from the USACE is included. DEQ must first perform an SSWD to identify whether state waters are present on the site. Once DEQ staff concludes the SSWD process, and, if state waters are present and proposed to be impacted, they can continue reviewing the JPA and if applicable, begin processing a VWP permit or coverage using current processes and procedures. The SSWD findings are valid for five (5) years from the date the SSWD is issued in absence of a permit decision, or when a permit decision applies, the SSWD is valid for the life of the permit. Applicants are notified if no VWP permit or coverage applies.
4. DEQ receives an SSWD request from a consultant without a JPA submittal. DEQ staff review the SSWD request using current processes and procedures and issues the SSWD findings. The findings are valid for five (5) years from the date the SSWD is issued.
5. A proposed cell tower will have 400 square feet (0.01 acre) of permanent wetland impacts. Due to other site constraints, these impacts cannot be further avoided. The wetland area is no longer regulated by the USACE because of the 2023 WOTUS rule. A VWP general permit coverage is necessary. DEQ conducts a threatened or endangered species screening, and, if no concerns are identified, issues a VWP general permit coverage. If applicable, DEQ staff would perform a cursory review of any 45-day coverage checklist provided by the applicant, then allow the project to proceed via the 45-day VWP general permit coverage provisions in State Water Control Law, meaning no further review is conducted and the permit coverage is granted on Day 45. In the past, VWP General Permit WP-1 (for any activity less than one-half acre of wetland impacts) was rarely used. However, we anticipate it will be used more frequently now for small-impact projects formerly covered under USACE nationwide permits.
6. A proposed data center will have permanent wetlands impacts in five (5) different areas of the property. The USACE regulates three of the five impact areas, but they do not regulate Impact Area #4 (0.67 acre) and Impact Area #5 (0.83 ac). The USACE issues a nationwide permit for Impact Areas #1-3, which does not require a VWP permit or coverage because these areas meet our CWA Section 401 WQC condition criteria for the nationwide permit program. A VWP permit or coverage is required for Impact Areas #4 and 5. For the VWP Permit Program purposes, Impact Areas #4 and 5 would be assessed cumulatively (proposed 1.50 acres of impact), and DEQ staff would begin processing a VWP permit or coverage using current processes and procedures. Areas 1-3 would not be included in the cumulative impact assessment.

7. A proposed shopping center will have permanent wetlands and stream impacts in four (4) different areas of the property. The JPA submittal includes an PJD from the USACE identifying all aquatic resources on the project site. The PJD states that only one of these impact areas (0.35 acres of wetland and 116 linear feet of stream) has federal jurisdiction although the determination is not an AJD. DEQ staff begins simultaneously processing a State Programmatic General Permit (22-SPGP-RCIR) verification for the one impact area with federal jurisdiction and VWP permit or coverage using current processes and procedures for all state water impacts.
8. A proposed industrial park will have permanent wetland impacts in nine (9) different areas of the property for a total of 3.72 acres of permanent impacts to state waters. DEQ regulates all proposed permanent and temporary impacts, and DEQ staff determine that the project requires a VWP individual permit. The USACE regulates two of the nine areas for proposed 0.82 acres of permanent wetland impacts. This project requires a USACE individual permit as the impacts exceed the 0.50-acre nationwide permit threshold. The project proponent re-designs the project to avoid the two proposed impacts associated with USACE jurisdiction. A USACE individual permit is no longer required, and DEQ processes a VWP individual permit using current processes and procedures.
9. A proposed residential subdivision will have permanent wetlands and stream impacts in fifteen (15) different areas of the property, for a cumulative total of 2.42 acres of wetland impact and 3,172 linear feet of stream impact. The JPA submittal includes (1) an AJD from the USACE stating that no federal waters are present on the project site, and (2) a valid SSWD from DEQ depicting the presence of 13.61 acres of forested wetlands and 20,917 linear feet of stream. A USACE permit is no longer required, and DEQ processes a VWP individual permit using current processes and procedures.
10. A proposed linear transportation project will have permanent wetland and stream impacts for widening 0.75 miles of urban/suburban arterial primary road. The JPA includes a PJD identifying small streams with narrow fringe wetlands in seven (7) locations along the project. DEQ staff begins simultaneously processing a 22-SPGP-LT verification and a VWP permit or coverage using current processes and procedures.