



Commonwealth of Virginia

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

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Director
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To: Mike Rolband, Director
Through: James Golden, Director of Operations
From: Scott Morris, Director of Water
Date: October 31, 2023
Re: Processing Virginia Water Protection (VWP) Permits in Conjunction with the 2021 USACE Nationwide Permits, and Associated Staffing Needs – Amendment No. 1

Great work
Mike cc: *Dave D*
Neghan M
Alex S.

Purpose

The purpose of this memo is to provide background regarding current VWP program activities and provide recommendations for concurrence to improve the VWP program.

Background

Various chapters of Title 62.1 of the Code of Virginia and associated regulations provide authority for requiring the avoidance and minimization of impacts to state waters; for protecting state waters and wildlife from significant impairment; and for protecting water quality and beneficial uses. DEQ's Virginia Water Protection (VWP) Permit Program strives to apply consistent requirements to proposed activity(ies) in surface waters across the entire geographic project footprint, regardless of whether a federal agency intends to claim jurisdiction or not, and regardless of what federal requirements may be applied to all or a portion of the proposed project, all surface waters are state waters in Virginia. This is not a new or modified application of state authority and has been consistent in State Law since 2001.

In the past DEQ and the Norfolk District of the USACE used several regulatory and policy tools to create efficiencies and reduce duplication of effort, but recent federal rulemakings removed most of the efficiency opportunities. The federal rulemakings changed the extent of federal

jurisdiction in surface waters (Final Navigable Waters Protection Rule, eff. June 22, 2020; Waters of the United States Rule, eff. September 8, 2023) and changed the scope for state certification under Section 401 of the Clean Water Act (Final CWA Section 401 Certification, eff. September 11, 2020; Final CWA Section 401 Certification, eff. November 27, 2023). DEQ must now receive, review and approve surface water delineations as where in the past, USACE independently reviewed and approved almost all of the delineations. Additionally, legal challenges continue regarding these federal rulemakings.

Since the USACE took early action on reissuing its Nationwide Permits (NWP), eff. in 2021 and 2022, DEQ has implemented a workload management tool using existing provisions in the Code of Virginia. Initially the tool, referred to as 45-Day General Permit Coverage process, was applied to a subset of the NWPs.

Current Status

DEQ permit decisions and permit-related tasks have increased significantly since the USACE reissuance of the NWPs, and there is a reasonable expectation for this workload to increase based on the recent federal rulemakings that reduce federal jurisdiction over Virginia's surface water resources. This change results in significant staff time spent reviewing applications and issuing decisions.

VWP staff continue to explore ideas to address the increase in workload while maintaining obligations to protect state resources. The extension of the 45-day coverage process combines an existing provision in the Code of Virginia, allowing automatic VWP general permit coverage issuance after the required 45-day processing period passes, with an existing provision in Virginia Administrative Code, allowing for the issuance of a reporting-only VWP general permit coverage. Expansion of this process will allow the VWP Permit Program to further expedite decision-making for some activities covered under all 57 Nationwide Permits, or to apply it to any situation where state-only surface waters will be subject to impacts, to address potential increases in workload.

A revised checklist is attached to this request that contains the same criteria as previously used to implement the process.

Under this process, staff records receipt of the application and sends an email to the applicant (copy to Virginia Marine Resources Commission) stating that if DEQ does not respond within 15 days¹ the application is considered complete; and, if DEQ does not respond within 45 days, coverage is authorized under the VWP general permit so indicated. The notification will include a link to the general permit in regulation, including the general permit terms and conditions. The process has the dual benefit of the project receiving general permit coverage, and DEQ having an enforcement mechanism should it be needed. Prior to the Federal regulatory changes, DEQ would not have received these applications and these projects would not have been issued a VWP permit of any kind. The most important advantage is to allow staff to focus on projects

¹ For VDOT road or highway construction the regulation shortens the times frames to 10 days for initial response and 35 days to provide coverage.

with larger surface water impacts and significant environmental considerations and public involvement.

Request:

Staff would like concurrence to proceed with implementing the following items:

1. DEQ immediately expand the implementation of the 45-day general permit coverage process to all Nationwide Permits when applicable, or any activities where state-only surface waters will be subject to impacts.
 2. DEQ notifies all VWP Program staff of the decision and the necessity to use this process until otherwise directed.
 3. DEQ continue to pursue other methods to alleviate duplication of effort with the USACE and reduce workload for small projects.
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VWP General Permit Application Checklist

Applicants for coverage under a Virginia Water Protection general permit proposing impacts to state surface waters below certain impact thresholds are to complete this checklist and submit with the Joint Permit Application or the Notice of Planned Change request, ensuring that VMRC is copied on all documents: *Beth Howell, Virginia Marine Resources Commission, Building 96, 380 Fenwick Road, Ft. Monroe, VA 23651, or jpa.permits@mrc.virginia.gov*

Project Name: [Insert Project Name]

Criterion	Criterion Description	YES	NO
1.	The applicant is requesting coverage under a Nationwide Permit, <u>or</u> the applicant proposes impacts to State Surface Waters that are not regulated by the USACE as Waters of the United States.		
1a.	The applicant is requesting coverage under NWP 12 and the inside diameter of the natural gas transmission pipeline is ≤ 36 inches.		
2.	Permanent Impacts to State Surface Waters from a single and complete project are ≤ 0.10 ac of wetlands, and/or 300 linear feet of stream channel.		
3.	Temporary Impacts to State Surface Waters from a single and complete project are ≤ 0.50 ac of wetlands, and/or 300 linear feet of stream channel.		
4.	Applicant T&E Screening with USFWS, DWR and DCR confirmed that the project will not result in impacts to federal or state listed threatened or endangered species or designated critical habitat or result in the taking of federal or state listed threatened or endangered species.		
5.	All onsite state surface waters, including wetlands, stream channel, and open waters have been delineated and mapped.		
6.	Impact map provided clearly identifies the location and quantity of all surface water impacts, including secondary impacts as follows:		
	(a) All temporary surface water impacts are identified and quantified, including impacts from long-term matting, utility connections (including offsite), and temporary construction access and crossings.		
	(b) All permanent conversion impacts in which one wetland resource type will be permanently converted to another resource type (e.g., conversion of palustrine forested wetland to a palustrine emergent wetland).		
	(c) Impacts caused by surface water fragmentation.		
7.	The onsite development and associated post-development stormwater management will be constructed in a manner to maintain down stream flows at or near pre-development levels.		

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Criterion	Criterion Description	YES	NO
8.	When countersinking culverts in streams, the applicant will comply with all other conditions of this permit, including Part I B 2. Pipes and culverts placed in streams must be installed to maintain low flow conditions and shall be countersunk at both inlet and outlet ends of the pipe or culvert, unless otherwise specifically approved by the Department of Environmental Quality on a case-by-case basis, and as follows: The requirement to countersink does not apply to extensions or maintenance of existing pipes and culverts that are not countersunk, floodplain pipes and culverts being placed above ordinary high water, pipes and culverts being placed on bedrock, or pipes and culverts required to be placed on slopes 5.0% or greater. Bedrock encountered during construction must be identified and approved in advance of a design change where the countersunk condition cannot be met. Pipes and culverts 24 inches or less in diameter shall be countersunk three inches below the natural stream bed elevations, and pipes and culverts greater than 24 inches shall be countersunk at least six inches below the natural stream bed elevations.		
9.	VWP permit application is complete for one of below General Permits. <i>Check the applicable General Permit.</i> <input type="checkbox"/> WP1 - <u>Virginia Water Protection General Permit for Impacts Less Than One-Half Acre</u> <input type="checkbox"/> WP2 - <u>Virginia Water Protection General Permit for Facilities and Activities of Utility and Public Service Companies Regulated by the Federal Energy Regulatory Commission or the State Corporation Commission and Other Utility Line Activities</u> <input type="checkbox"/> WP3- <u>Virginia Water Protection General Permit for Linear Transportation Projects</u> <input type="checkbox"/> WP4- <u>Virginia Water Protection General Permit for Impacts from Development and Certain Mining Activities</u>		
10.	For Notice of Planned Change requests only - leave blank for initial requests: Are additional impacts located within the existing project's boundary or area(s) directly related to offsite work?		

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violation."

Applicant Printed Name

Applicant Signature (Signing Party to be the Same Signing JPA)

Date