

DEQ NWP Q & A

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Q1: Why is there a difference in how DEQ's WQC is being applied to the first group of reissued Nationwide Permits (2021) versus the second group (2022)?

A1: Largely for program jurisdiction reasons. For the first 16 NWPs reissued, agencies were operating under the 2020 definition of waters of the U.S.; the 2020 Navigable Waters Protection Rule; and the 2020 Section 401 Rule - making the state-requirement focused WQC unacceptable to the Corps. At the time the second 41 NWPs were reissued, agencies were operating under the vacatur of these federal rules, and the court direction to apply the EPA's 1971 Section 401 regulations – making the state-requirement focused WQC acceptable to the Corps, as long as the applicant self-certifies compliance with the WQC conditions 1 through 12 and all individual WQC conditions pertaining to a specific NWP (see Part B of DEQ's WQC Decision Memorandum).

Q2: Does the U.S. Supreme Court order mean that my NWP verification received before April 6, 2022 has to be reprocessed?

A2: EPA does not interpret the Court's order as affecting certifications issued while the 2020 Rule was vacated. EPA does not expect to revisit certifications the Agency issued while the 2020 Rule was vacated (Source: <https://www.epa.gov/cwa-401/overview-cwa-section-401-certification>). The federal agencies are back to applying the 2020 CWA Section 401 Rule (EPA's regulations at 40 CFR § 121), which does slightly change how most of the 41 NWPs are processed when WQC conditions cannot be met. It is DEQ's understanding that the Corps does not intend to require re-application and reprocessing of verifications in cases where both the Corps and DEQ have already made a decision or taken an action.

Q3: For Appendix A - #6.c.: does this mean that if mitigation is not required, then there is no requirement to "mark wetlands within 50-feet of disturbance"?

A3: No, avoided state surface waters within 50-feet of disturbance are to be flagged during 'active construction', regardless of compensation requirements for a project. There is no need to refresh flagging once construction activities are complete within 50 foot proximity of surface waters.

Q4: Under WQC condition 6 which deals with compensatory mitigation, flagging of all non-impacted wetlands is required. Is this condition required for all projects that require compliance with these 12 conditions or only those projects exceeding reporting or mitigation thresholds?

A4: Yes, this is a requirement for all projects.

Q5: Does the applicant need to comply with Appendix A - #11 in maintained rights-of-way or easements?

A5: For DEQ purposes, the permanent conversion of one resource type to another resource type (e.g., PSS to PEM) is not a temporary impact. This is *permanent conversion* that is dependent upon the scale and/or scope, and may require compensatory mitigation.

Utility corridors will be subject to NWP 57 and 58, both of which require a DEQ action, and thus, appropriate accounting of these impact types is made through this process.

Q6: How is DEQ interpreting Appendix A, 11.a - is monitoring required, or just restoration to pre-construction conditions?

A6: As a self-monitoring exercise to ensure compliance with the restoration by the second year, post-disturbance. Take corrective actions as necessary. No reporting requirement to DEQ applies.

Q7: For the requirement to seed and plant streambanks with the same vegetation cover type originally present, including any necessary supplemental erosion control grasses, are the banks jurisdictional above the ordinary high water mark? Must the banks be replanted?

A7: For DEQ purposes, the banks need to be returned to pre-disturbance contours and seeded/planted to reduce chance of erosion and sediment release – cannot leave banks denuded. Not replanting and using hard surface materials instead could be viewed as an additional impact. Also, applicants should always be aware of RPA requirements, if any. Note that the Appendix A1-12 WQC conditions apply to most but not all of the NWPs effective in 2022, but not to any of the NWPs effective in 2021. Upland areas away from streams or wetlands – and DEQ does not have a specific or standard distance established – would not require the replanting of woody shrubs and trees.

Q8: For the NWP 3-specific Regional Conditions, will an individual 401 WQC be required in a situation where an existing culvert outfall is being repaired and additional riprap is being expanded slightly outside the original footprint in order to comply with current stormwater requirements?

A8: A DEQ action would be needed, but for the specific example provided, may be considered as maintenance. The result would be a No Permit Required decision due to a VWP permitting exclusion being applicable; therefore no DEQ action is necessary. Exclusions are found in the VWPPP regulations at 9VAC25-210-60 and 9VAC25-210-310.

Q9: What does “cumulatively” mean in DEQ’s specific WQC conditions that are being applied to NWPs 14, 29, 39, 40, 42, 43 and 51?

A9: “Cumulatively” refers to the total permanent impacts to the water type noted, per each single and complete project. It does not include temporary impacts.

Q10: Which projects qualifying for Nationwide Permit 12 require coordination with DEQ?

A10: All applications involving natural gas pipeline activities require a DEQ action, whichever action may be applicable to the project. Projects greater than 36” ID and regulated by FERC under § 7c of the federal Natural Gas Act [15 U.S.C. § 717f(c)] have specific Virginia statutory permit and certification processing requirements. Projects equal to or less than 36” ID, whether regulated by FERC under § 7c of the federal Natural Gas Act [15 U.S.C. § 717f(c)] or not, could be considered under NWP 12’s general certification, which requires a DEQ action. Projects greater than 36” ID that are not subject to regulation by FERC under § 7c of the federal Natural Gas Act [15 U.S.C. § 717f(c)] could be considered under NWP 12’s general certification, which requires a DEQ action.

Q11: If a previously-verified NWP project from 2017 is grandfathered according to the Corps' public notice provisions, does the past DEQ certification continue as well?

A11: Yes, provided that no new federal action – such as a new NWP verification or other Corps permit action - triggers state Section 401 certification. If there is such a federal action, then all of the December 2020 DEQ WQC conditions applicable to the specific NWP would apply, since all of the NWPs are now reissued and effective.

Q12: Does the USACE requirement for a “VWP permit, or individual 401 Cert or waiver” refer to a waiver of the 401 certification or a DEQ waiver issued for projects covered by USACE and VMRC?

A12: Typically, the Corps is referring to the waiver of 401 WQC, as applied by the 2020 Section 401 Water Quality Certification regulations. DEQ is referring to the Action of Waiver of a VWP permit, as allowed by the Code of Virginia and/or VWP Permit Program regulations [§ 62.1-44.15:21.D, G; 9VAC25-210-220; 9VAC25-210-60.3]. DEQ considers the issuance of a VWP permit to be 401 WQC, as grant or grant with conditions. DEQ considers a No Permit Required decision to serve as an exclusion from VWP permitting; a waiver of VWP permitting; a determination that an activity is not regulated by the VWP Permit Program; and/or a waiver of § 401 WQC.

Q13: Is DEQ going to try to change its 2020 WQC of the Nationwide Permits?

A13: Not at this time.

Q14: Will the Joint Permit Applications be revised for the reissued NWPs?

A14: Yes. The Standard and Tidewater JPA forms are currently under review by the participating agencies, and suggested revisions are being taken c/o Traycie West at the Corps and/or Brenda Winn at DEQ.

Q15: Will the 45-day automatic issuance of coverage apply to the NWPs reissued in 2022?

A15: DEQ is considering this option, but no decision has been made at this time. This is primarily an internal workload prioritization method.

Q16: Will the USACE wait for DEQ to issue prior to the authorizing NWP, or will they be able to authorize before the VWP is obtained?

A16: For NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, 58 (2021): the Corps must receive proof of DEQ action taken before making a verification decision, unless the applicant requests a provisional verification from the Corps.

For NWPs 1, 2, 9, 10, 24, 32 (2022): the Corps can make a verification decision according to its procedures.

For NWP 17 (2022): the Corps must receive proof of DEQ action taken before making a verification decision.

For NWPs 4, 5, 6, 7, 8, 11, 15, 19, 20, 23, 25, 28, 30, 31, 34, 35, 37, 38, 41, 45, 46, 49, 53, 54 (2022): the Corps proceeds with verification decision upon receipt of EITHER the applicant's 401 Compliance worksheet or attestation statement that they are complying/will comply with the general WQC conditions 1-12 in Appendix A, OR upon obtaining the DEQ action. Use of the 401 Compliance worksheet is encouraged.

For NPWs 3, 13, 14, 16, 18, 22, 27, 33, 36, 59 (2022): the Corps proceeds with verification decision upon receipt of EITHER the applicant's 401 Compliance worksheet or attestation statement that they are complying/will

comply with the general WQC conditions 1-12 in Appendix A and all NWP-specific WQC conditions, OR upon obtaining the DEQ action. Use of the 401 Compliance worksheet is encouraged.

Q17: Will applicants and/or the Corps receive DEQ No Permit Required (NPR) letters?

A17: Yes, if applicable for any of the 16 NWPs reissued in 2021; or if applicable for NWP 17 reissued in 2022.

No, for NWPs 1, 2, 9, 10, 24, 32 reissued in 2022 – these received a waiver of § 401 WQC in December 2020. No, for any of the remaining 34 NWPs reissued in 2022 when all WQC conditions and/or limits are met.

Typically an NPR letter or email will not be provided unless DEQ is requested to do so by the applicant or agent. The DEQ NPR letter or email is copied to the Corps Project Manager.

Q18: What happens if an applicant forgets to completely fill in the 401 Compliance worksheets, or misses initialing one of the “attest” statement choices? Will the Corps ask for clarification as part of their review?

A18: Typically, yes, to determine if they can move forward with providing verification, if applicable, or whether they need to wait for the DEQ action. Note that use of the 2021 NWP worksheet is optional, and would only apply if a PCN is required. Use of the 2022 NWP worksheet would be used if a PCN is required, or in lieu, applicants can provide the written attestation statement for compliance purposes when a PCN is required.

If DEQ reviews a worksheet ahead of the Corps in a particular case, then DEQ staff will respond to guide the applicant if necessary on completing a worksheet.

Q19: a. Are threatened or endangered species database searches/screenings sufficient to document “no adverse impact” for the self-certification of Appendix A conditions?

b. If a species occurrence is recorded within 2 miles of the project limits and the determination is made (*by the applicant*) that no suitable habitat exists on-site, is this sufficient for documentation purposes? Background information concerning the determination would be included in the JPA package.

c. If there is an ETS hit but there is no effect (i.e., no habitat) and we can document the lack of suitable habitat, are we able to self-certify that we meet the 401 WQC Conditions? We would coordinate if there was a potential for adverse effect. We have an ETS hit but the Applicant will adhere to a TOYR – can we self-certify in this situation?

d. We have an ETS hit but the Applicant will adhere to a TOYR – can we self-certify in this situation?

e. When does a database confirmation for an Endangered or Threatened Species preclude the project from qualifying for the 12 WQCs in Appendix A, and would instead require the project to request an Individual Section 401 Water Quality Certification from DEQ?

f. When do I submit screening results for the applicable 41 NWPs (2022)? How would we comply with this in a non-reporting situation (i.e., is it sufficient to retain screening results in our records)?

A19 a-f:

DEQ, DWR, DCR, and the Corps are currently collaborating on ways to improve efficiency regarding species coordination matters. The regulated community will be notified as this effort progresses.

- Q20:
- a. What forms do I need to submit to DEQ? Please address WQC condition 7 to clarify what information is required under projects that require a PCN as well as non-reporting projects.
 - b. If a PCN is not required for a NWP, such as when the project qualifies for a non-reporting NWP, does DEQ need *anything* from the applicant/agent?
 - c. Do applicants have to submit a JPA to VMRC for the reissued NWPs?
 - d. Should a PCN be submitted to VMRC?
 - e. Where should I send a copy of the Corps verification when I receive it?
 - f. Do I have to use the new Corps' *Clean Water Act (CWA) Section 401 Certification Compliance* worksheets?
 - g. Do applicants still need to request a pre-filing meeting?
 - h. Do applicants still have to make an individual 401 Water Quality Certification request?

A20 a-h:

DEQ's December 2020 Section 401 WQC is applicable to all Nationwide Permits regardless of whether a project is considered by the Corps to be non-reporting under any specific Nationwide Permit. For the NWPs effective in 2021, Regional Condition 13 (requires DEQ action, does not include Appendix A1-12) and several NWP-specific WQC conditions apply. For the NWPs effective in 2022, Regional Condition 13 incorporates Appendix A1-12 (may require a DEQ action), and several NWP-specific WQC conditions also apply. Non-reporting for federal purposes may, in some cases, still warrant a state approval under state laws or regulations. Also, if a non-reporting project cannot meet all of the DEQ WQC conditions – general WQC conditions and/or any NWP-specific WQC conditions - an individual Section 401 WQC decision from DEQ will be necessary.

DEQ requires submittal of the JPA (or DEQ-approved application form) when a VWP individual permit or general permit coverage is required. In cases where applicants are certain that a VWP permit exclusion applies, the JPA is not necessary. In some cases the need for a permit or coverage cannot be determined until a review of the project is made. If an applicant is uncertain, please contact the DEQ regional office having jurisdiction over the project location, or simply submit a JPA to VMRC with a request for distribution to DEQ.

If the applicant receives a written NWP verification from the Corps, submit a copy to DEQ if DEQ is not already cc'd. [Appendix A WQC condition#7.c; 9VAC25-210-130.J]

Use of the 2021 NWP 401 Compliance worksheet is optional for applicants/agents who are seeking a written NWP verification from the Corps for a 2021 NWP or when a PCN is required, which generates a written verification from the Corps. Applicants must provide the 2022 NWP 401 Compliance worksheet *OR* a written attestation statement for WQC purposes IF a PCN is required and a NWP verification is sought from the Corps for a 2022 NWP, either because one is issued in the normal course of Corps processing or because one is requested by the applicant/agent. *If providing the attestation statement, it must state that the project complies with DEQ's WQC conditions 1-12 in Appendix A of the Corps' NWP Regional Conditions and all NWP-specific WQC*

conditions, if any. The new worksheets were developed for convenience and as a means of clearly communicating with the Corps and DEQ, but they are not required forms by either agency.

For NWP 48, 55, 56, 57, 58, and

For NWP 12 (<=36" ID, whether or not FERC licensing applies):

- Submit through VMRC:
 1. PCN and delineation, when required
 2. (optional but preferred) 401 compliance worksheet for **2021 NWPs that require a PCN**
 3. JPA if DEQ needs to issue a VWP individual permit or general permit coverage
 4. (optional if applicable) DEQ 45-day Coverage Checklist attached to the submitted JPA

For NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, 52 [*All NWP-specific WQC conditions are/will be met*]:

- Submit through VMRC:
 1. PCN and delineation, when required
 2. (optional but preferred) 401 compliance worksheet for **2021 NWPs that require a PCN**
 3. JPA if DEQ needs to issue a VWP individual permit or general permit coverage
 4. (optional) DEQ 45-day Coverage Checklist attached to the submitted JPA

For NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, 52 [*Any NWP-Specific WQC condition is not/will not be met*]:

- Submit to applicable DEQ regional office:
 1. Individual § 401 WQC Pre-filing Meeting Request (Copy Corps) [40 CFR § 121.4]
 2. (No sooner than 30 days from requesting the pre-filing meeting) Individual § 401 WQC Request (Copy Corps) [40 CFR § 121.5]
- Submit through VMRC:
 1. PCN and delineation, when required. If not sure about need for a VWP individual permit or general permit coverage, submit a JPA which can also serve as the PCN when required.
 2. (optional but preferred) 401 compliance worksheet for **2021 NWPs that require a PCN**

For NWP 12 (>36" ID and FERC licensing under § 7c of the federal Natural Gas Act [15 U.S.C. § 717f(c)]:

- Submit to applicable DEQ regional office:
 1. Individual § 401 WQC Pre-filing Meeting Request (Copy Corps) [40 CFR § 121.4]
 2. (No sooner than 30 days from requesting the pre-filing meeting) Individual § 401 WQC Request (Copy Corps) [40 CFR § 121.5]
- Submit through VMRC:
 1. PCN and delineation, when required (preferred by Corps, for Corps use)
 2. JPA, including all informational requirements for a complete application [§ 62.1-44.15:81; 9VAC25-210-80; 9VAC25-210-50.C]
 3. (optional but preferred) 401 compliance worksheet for **2021 NWPs that require a PCN**

For NWP 1, 2, 9, 10, 24, 32:

- Submit through VMRC (preferred) or to the Corps directly for Corps use only:
 1. PCN and delineation, when required ~~If not sure about need for a VWP individual permit or general permit coverage, submit a JPA which can also serve as the PCN when required.~~
 2. (optional but preferred) 401 compliance worksheet for **2021 NWP**s that require a PCN

For NWPs 4, 5, 6, 7, 8, 11, 15, 19, 20, 23, 25, 28, 30, 31, 34, 35, 37, 38, 41, 45, 46, 49, 53, 54 [*All Appendix A WQC conditions are/will be met*]:

- Submit through VMRC (preferred), or to the Corps AND applicable DEQ regional office (optional):
 1. PCN and delineation, when required. If PCN is not required, maintain record of certification-related documentation.
 2. 401 compliance worksheet or written attestation statement for **2022 NWP**s that require a PCN
- Submit to applicable DEQ regional office:
 1. Copy of Corps' NWP verification in any instance where one is issued to the applicant by the Corps
 2. Delineation *if one was generated* for the project, regardless of PCN requirements

For NWPs 4, 5, 6, 7, 8, 11, 15, 19, 20, 23, 25, 28, 30, 31, 34, 35, 37, 38, 41, 45, 46, 49, 53, 54 [*Any Appendix A WQC condition is not/will not be met*]:

- Submit to applicable DEQ regional office:
 1. Individual § 401 WQC Pre-filing Meeting Request (Copy Corps) [40 CFR § 121.4]
 2. (No sooner than 30 days from requesting the pre-filing meeting) Individual § 401 WQC Request (Copy Corps) [40 CFR § 121.5]
 3. Copy of Corps' NWP verification in any instance where one is issued to the applicant
- Submit through VMRC:
 1. PCN and delineation, when required. If not sure about need for a VWP individual permit or general permit coverage, submit a JPA which can also serve as the PCN when required.
 2. 401 compliance worksheet or written attestation statement for **2022 NWP**s that require a PCN

For NWPs 3, 13, 14, 16, 18, 22, 27, 33, 36, 59 [*ALL WQC conditions including NWP-specific conditions are/will be met*]:

- Submit through VMRC (preferred), or to the Corps AND applicable DEQ regional office (optional):
 1. PCN and delineation, when required. If PCN is not required, maintain record of certification-related documentation.
 2. 401 compliance worksheet or written attestation statement for **2022 NWP**s that require a PCN
- Submit to applicable DEQ regional office:
 1. Copy of Corps' NWP verification in any instance where one is issued to the applicant by the Corps
 2. Delineation *if one was generated* for the project, regardless of PCN requirements

For NWPs 3, 13, 14, 16, 18, 22, 27, 33, 36, 59 [*ANY WQC condition including ANY NWP-specific condition is not/will not be met*]:

- Submit to applicable DEQ regional office:
 1. Individual § 401 WQC Pre-filing Meeting Request (Copy Corps) [40 CFR § 121.4]
 2. (No sooner than 30 days from requesting the pre-filing meeting) Individual § 401 WQC Request (Copy Corps) [40 CFR § 121.5]
 3. Copy of Corps' NWP verification in any instance where one is issued to the applicant
- Submit through VMRC:
 1. PCN and delineation, when required. If not sure about need for a VWP individual permit or general permit coverage, submit a JPA which can also serve as the PCN when required.
 2. 401 compliance worksheet or written attestation statement for **2022 NWPs that require a PCN**

For NWP 17:

- Submit to applicable DEQ regional office:
 1. Individual § 401 WQC Pre-filing Meeting Request (Copy Corps) [40 CFR § 121.4]
 2. (No sooner than 30 days from requesting the pre-filing meeting) Individual § 401 WQC Request (Copy Corps) [40 CFR § 121.5]
- Submit through VMRC:
 1. PCN and delineation, when required (preferred by Corps, for Corps use)
 2. JPA, including all informational requirements for a complete application, unless certain the project does not require a VWP individual permit ~~or general permit coverage~~ [9VAC25-210-60; 9VAC25-210-80; 9VAC25-210-310; 9VAC25-210-320; 9VAC25-210-330; 9VAC25-210-340; 9VAC25-210-360]
 3. 401 compliance worksheet or written attestation statement for **2022 NWPs that require a PCN**