

Comparison of VWP Permit and Nationwide 12 Permit

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VWP Program and Corps Program

- Both Virginia Water Protection (VWP) permit and the Corps' Section 404 permits **apply to the same activities**: the dredging or filling of surface waters and wetlands.
- **For linear projects (all roads and all types of utility projects), both programs have substantially identical permitting requirements.**

9 VAC 25-210-130 (J)

“Coverage under a general, regional, or **nationwide** permit promulgated by the USACE **and certified by the board** in accordance with this section **shall be deemed coverage under a VWP general permit regulation...**”

Siting Determinations In SWCL

Regarding the requirement to develop general permits, State Water Control Law (62.1-44.15:21(D)(2)) states:

“No Board action on an individual or general permit for such facilities **shall alter the siting determination** made through Federal Energy Regulatory Commission or State Corporation Commission approval.”

VWP Permit & Corps' NWP12

Both require:

- Surface Waters Delineation
- Avoidance/minimization
- Compensation for unavoidable permanent impacts
- Each wetland/stream crossing is a “single and complete project”
- Restoration of all temporary impacts
- Coordination with DGIF regarding time of year restrictions for state trout waters
- Appropriate Erosion & Sediment Controls

DEQ VWP Program

Permitting: Permit requirements apply to activities including the construction, dredging, filling, or excavation of surface waters and wetlands. VWP also regulates certain types of excavation in wetlands and fill in isolated wetlands which may not be under federal jurisdiction. **For linear projects, DEQ and Corps have substantially identical requirements.**

VWP regulations do not provide the authority to regulate upland construction activities. The Clean Water Act **Section 401 certification process allows** DEQ to go beyond VWP's regulatory authority by providing a **mechanism to review a project under the lens of overall potential water quality impacts from upland construction activities.**

Corps Permit Program

Permit requirements apply to activities including the construction, dredging, filling, or excavation of surface waters and wetlands. **For linear projects, DEQ and Corps have substantially identical requirements.**

The Corps does not regulate activities in uplands.

DEQ VWP Program

Joint Permit Application (JPA)

The **JPA process and JPA forms are used by the USACE, the VMRC, the DEQ,** and the Local Wetlands Board for permitting purposes involving tidal and/or non-tidal water, tidal and/or non-tidal wetlands, including, but not limited to, construction, dredging, filling, or excavation. JPAs are submitted to VMRC.

Corps Permit Program

Joint Permit Application (JPA)

U.S. Army Corps of Engineers uses the **same JPA process and JPA forms** as DEQ.

DEQ VWP Program

Definition of “single and complete project”

“Single and complete project (e.g., a single and complete crossing) applies to **each crossing of a separate surface water** (e.g., a single water body) **and to multiple crossings of the same water body at separate and distinct locations.**”
(9VAC25-670-10)

Corps Permit Program

Nationwide Permit 12 – Note 2

“For utility line activities **crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations**, each crossing is considered a single and complete project for purposes of NWP authorization.”



DEQ VWP Program

Compensation

VWP requires compensation for all permanent loss **over 1/10 acre and/or 300 linear feet** of waters.

VWP requires **compensation for permanent conversion impacts** (forested wetlands to emergent wetlands) at a **1:1 ratio**.

For utility projects, regulations allow for a 20-foot wide maintenance and access corridor not subject to compensation requirement.

Corps Permit Program

Compensation

The Corps requires compensation for all permanent loss **over 1/10 acre and/or 300 linear feet** of waters.

Nationwide Permit 12, RC #14 3 – c:
“**Compensatory** mitigation **may be required for permanent conversion** of wetlands within the utility line corridor.”
(emphasis added)

**** MVP has voluntarily offered compensation at a 1:1 ratio for permanent conversion impacts as part of their NWP12 Corps permit**

**** ACP has voluntarily offered compensation at a 1:1 ratio for permanent conversion impacts as part of their NWP12 Corps permit**

DEQ VWP Program

Erosion and Sediment Control

“Erosion and sedimentation controls shall be designed in accordance with the **Virginia Erosion and Sediment Control handbook**, Third Edition, 1992.”
(9VAC25-670-100)

Corps Permit Program

Erosion and Sediment Control

Corps requires **compliance with state and local erosion and sediment control laws** for construction.

DEQ VWP Program

Delineation

State Water Control Law (62.1-44.15:21(C)) states “[t]he [State Water Control] Board shall utilize the **U.S. Army Corps of Engineers' "Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report"**

SWCL goes on to say:

“Any delineation accepted by the U.S. Army Corps of Engineers as sufficient for its exercise of jurisdiction pursuant to § 404 of the Clean Water Act shall be determinative of the geographic area of that delineated wetland. ”

Corps Permit Program

Delineation

The **U.S. Army Corps of Engineers' "Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report"** is the approved method for delineating wetlands.

VWP Permit

Standard Project Conditions

1) “The activities authorized by this permit shall be executed in a manner that any **impacts to beneficial uses are minimized...**” (9VAC25-210-110 C.2)

2) “No activity shall substantially disrupt the **movement of aquatic life...**”
(9VAC25-210-50 A)

NWP 12

Regional & General Conditions

RC #14 - 3. b. i: “...selection of an alignment which **avoids and minimizes wetland and stream impacts** to the maximum extent practicable.”

GC #2: “No activity may substantially disrupt the necessary life cycle **movements of those species of aquatic life**”

VWP Permit

Standard Project Conditions

3) “**Flows downstream** of the project area **shall be maintained** to protect all uses.”

(9VAC25-210-50 A)

4) “No activity shall cause more than **minimal adverse effect on navigation...**”

(9VAC25-210-230 A.1)

NWP 12

NWP12 & General Conditions

“Appropriate measures to **maintain normal downstream flows** and minimize flooding to maximum extent practicable”

GC #1 – a: “No activity may cause more than a **minimal adverse effect on navigation.**”

VWP Permit

Standard Project Conditions

5) “The activity **shall not impede** the passage of **normal or expected high flows...**”

(9VAC25-210-50 A)

6) “**Continuous flow of perennial springs** shall be maintained...”

(9VAC25-670-100 B.13)

NWP 12

General Conditions

#9: “The activity **must not restrict or impede** the passage of **normal or high flows**”

Covered by #9: [because **no distinction** between perennial spring and other surface water types]

VWP Permit

Standard Project Conditions

7) “All excavation, dredging, or filling in surface waters shall be accomplished in a manner that **minimizes bottom disturbance and turbidity**”
(9VAC25-210-50 A)

NWP 12

General Conditions

#3: “Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by **substantial turbidity**) of an important spawning area are **not authorized**.”

#9: “Appropriate **erosion and sediment controls must be used and maintained** in effective operating condition during construction”

#11: “...other measures must be taken to **minimize soil disturbance**.”

VWP Permit

Standard Project Conditions

8) “All **instream activities** shall be **conducted during low-flow conditions** whenever practicable.”
(9VAC25-670-100 D.4)

9) “All construction, construction access, and demolition activities associated with this project shall be accomplished in a manner that **minimizes construction materials or waste materials from entering surface waters...**”
(9VAC25-210-50 A)

NWP 12

General Conditions

#12: “Permittees are encouraged to **perform work** within waters of the United States **during periods of low-flow** or no-flow, or during low tides.”

#6: “No activity may use **unsuitable material** (e.g., trash, debris, car bodies, asphalt, etc.)”

VWP Permit

Standard Project Conditions

10) “All fill **material placed in surface waters shall be clean and free of contaminants** in toxic concentrations or amounts...”

(9VAC25-210-110 C)

11) “Measures shall be employed at all times to **prevent and contain spills of fuels, lubricants, or other pollutants** into surface waters.”

(9VAC25-210-110 E)

NWP 12

Regional & General Conditions

GC #6: “**Material used for construction** or discharged must be **free from toxic pollutants** in toxic amounts.”

RC #14 – 9: “**...a plan to address the prevention, containment, and cleanup** of sediment or other materials caused by inadvertent returns of drilling fluids to waters of the U.S..... needs to be included with the PCN.”

VWP Permit

Standard Project Conditions

12) “**Machinery or heavy equipment** in temporarily impacted wetlands **shall be placed on mats or geotextile fabric**, or other suitable means shall be implemented, to **minimize soil disturbance** to the maximum extent practical.”

(9VAC25-670-100 B.9)

13) “Stream channel **restoration activities shall be conducted in the dry or during low-flow conditions.**”

(9VAC25-670-100 D.4)

NWP 12

General Conditions

#11: “**Heavy equipment** working in wetlands or mudflats **must be placed on mats**, or other measures must be taken to **minimize soil disturbance.**”

#12: “Permittees are encouraged to **perform work** within waters of the United States **during periods of low-flow or no-flow**, or during low tides.”

VWP Permit

Standard Project Conditions

14) “**Temporary disturbances** to wetlands, stream channels, and/or stream banks during project construction activities **shall be avoided and minimized** to the maximum extent practicable.” (9VAC25-210-80 B.1f)

15) “All **temporarily disturbed wetlands** shall be **restored to preconstruction conditions within 30 calendar days** of completing work in areas, which shall include **re-establishing pre-construction contours, and planting or seeding with appropriate wetland vegetation** according to cover type (emergent, scrub/shrub, or forested), **except for invasive species identified on DCR’s Virginia Invasive Plant Species List...**” (9VAC25-670-100 B.11)

NWP 12

Regional & General Conditions

NWP12: “After construction, **temporary fills must be removed** in their entirety and the affected areas **returned to pre-construction elevations**. The areas affected by temporary fills **must be revegetated**, as appropriate.”

RC #14 – 5. b: “All excavated material must be placed back into the trench to the **original contour** and all excess excavated material must be completely removed from the wetlands **within 30 days** after the pipeline has been laid”

RC #7: “Plant species listed by the most current Virginia **DCR Invasive Alien Plant List shall not be used for re-vegetation** for activities authorized by any NWP.”

VWP Permit

Standard Project Conditions

17) “**All materials** (including fill, construction debris, excavated materials, and woody materials that are temporarily placed in wetlands, in stream channels, or on stream banks) **shall be placed on mats or geotextile fabric...**”
(9VAC25-670-100 B.12)

18) “**Temporary in-stream construction features** such as cofferdams shall be made of **non-erodible materials.**”
(9VAC25-670-100 B.7)

19) “**Virginia Water Quality Standards shall not be violated** in any surface waters as a result of the project activities.”

(9VAC25-210-110 B)

NWP 12

Regional Conditions & NWP12

RC #14 – 5. a: “**All excavated material** stockpiled in a vegetated wetland area is **placed on filter cloth, mats**, or some other semi-permeable surface

NWP12: “**Temporary fills** must consist of materials, and be placed in a manner, that **will not be eroded** by expected high flows.”

NWP12: “The State Water Control Board **issued conditional Section 401 Water Quality Certification for NWP 12** as meeting the requirements of the Virginia Water Protection Permit Regulation, which serves as the Commonwealth’s Section 401 Water Quality Certification”

VWP Permit

Standard Project Conditions

20) “All non-impacted surface waters and any required buffers with compensation areas that are within the project or right-of-way limits, and that are within fifty feet of any project activities, shall be clearly flagged or demarcated for the life of the construction activity within that area. The permittee shall notify all contractors and subcontractors that no activities are to occur in these marked areas.”
(9VAC25-670-100 B.10)

NWP 12

There is no Nationwide Permit 12 condition referring to flagging and demarcation of non-impacted surface waters within fifty feet of project activities.

***** MVP is voluntarily flagging all non-impacted surface waters and any required buffers within the project or right-of-way limits for the life of the construction activity, as part of their NWP12 Corps permit.***

***** ACP is voluntarily flagging all non-impacted surface waters and any required buffers within the project or right-of-way limits for the life of the construction activity, as part of their NWP12 Corps permit.***

VWP Permit

Special Conditions E: Installation of Utilities

“All utility line work in surface waters shall be performed in a manner that **minimizes disturbance** in each area. **Temporarily disturbed waters shall be restored** in accordance with Part I.C.15, C.16, and C.17, unless otherwise authorized by this permit.”
(9VAC25-670-100 D.1)

NWP 12

NWP12 & Regional Conditions

NWP12: “After construction, **temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations**. The areas affected by temporary fills must be revegetated, as appropriate.”

RC #14 – 5. b: “All excavated material must be placed back into the trench to the original contour and all excess excavated **material must be completely removed** from the wetlands within 30 days after the pipeline has been laid”

#7: “Plant species listed by the most current Virginia DCR Invasive Alien Plant List shall not be used for re-vegetation for activities authorized by any NWP.”

#14 – 5. a: “All **excavated material** stockpiled in a vegetated wetland area is **placed on filter cloth, mats**, or some other semi-permeable surface.””

VWP Permit

Special Conditions

2) “**Material** resulting from trench excavation may be **temporarily sidecast** into wetlands **not to exceed a total of 90 calendar days**, provided the material is not placed in a manner such that it is dispersed by currents or other forces.”
(9VAC25-670-100 D.2)

3) “The trench for a **utility line cannot** be constructed in a manner that **drains wetlands** (e.g., backfilling with extensive gravel layers creating a French drain effect).”
(9VAC25-670-100 D.3)

NWP 12

NWP12

“**Material** resulting from trench excavation may be **temporarily sidecast** into waters of the United States **for no more than three months**, provided the material is not placed in such a manner that it is dispersed by currents or other forces.”

“The **trench cannot** be constructed or backfilled in such a manner as to **drain waters of the United States** (e.g., backfilling with extensive gravel layers, creating a French drain effect).

VWP Permit

Special Conditions

9VAC25-670-70. Compensation - F:

“When conversion results in a permanent alteration of the functions of a wetland, **compensatory mitigation for conversion impacts to wetlands shall be required at a 1:1 mitigation ratio**, as calculated on an area basis. For example, the **permanent conversion of a forested wetland to an emergent wetland is considered to be a permanent impact** for the purposes of this chapter.”

For utility projects, regulations allow for a 20-foot wide maintenance and access corridor not subject to compensation requirement.

NWP 12

Regional & General Conditions

RC #14 3 – c: “**Compensatory mitigation may be required for permanent conversion** of wetlands within the utility line corridor.” (emphasis added)

**** MVP is voluntarily compensating at a 1:1 ratio for permanent conversion impacts as part of their NWP12 Corps permit**

**** ACP is voluntarily compensating at a 1:1 ratio for permanent conversion impacts as part of their NWP12 Corps permit**

VWP Permit

Special Conditions

9VAC25-670-100. VWP General Permit – Part I. Special Conditions – 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”

9VAC25-670-100. VWP General Permit – Part I. Special Conditions – B. 15: “The permittee **shall conduct his activities** in accordance **with the time-of-year restrictions recommended by the Virginia Department of Game and Inland Fisheries**, the Virginia Marine Resource Commission, or other interested and affected agencies”

NWP 12

Regional Conditions

#8 – a: “All pipes: all **pipes** and culverts **will be countersunk** at both the inlet and outlet ends”

#2: “For any proposed NWP, if the project is located in an area documented as an anadromous fish use area (confirmed or potential), a **time-of-year restriction (TOYR) prohibiting all in-water work** will be required... **specified by VDGIF** and/or Virginia Marine Resources Commission.”

#6: “**VDGIF recommends the following time-of-year restrictions (TOYRs)** for any instream work within streams identified as **wild trout waters** in its Cold Water Stream Survey database.”

Summary of VWP and NWP12 Comparison for MVP & ACP

- Of 46 regional and general conditions in the Corps' NWP12, **only 2 differ** from the VWP Permit Program:
 - *VWP requires compensation for permanent conversion impacts (forested wetland to emergent wetland) at a 1:1 ratio*
 - *VWP requires all non-impacted surface waters and any required buffers that are within fifty feet of any project activities, shall be clearly flagged or demarcated*
- Both MVP and ACP offered compensation for permanent conversion impacts at a 1:1 ratio, and agreed to flag non-impacted surface waters.
- The Corps incorporated these 2 provisions as conditions to the NWP12 permits.
- **For linear projects (all roads and all types of utility projects), both programs have substantially identical permitting requirements.**