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See DISCLAIMER in INTRODUCTION.

# CHAPTER 1: VIRGINIA WATER PROTECTION (VWP) PERMIT PROGRAM OVERVIEW

## Very Brief ‘Government 101’

The basic ‘authority structure’ relevant to the Virginia Water Protection (VWP) Permit Program can be summarized in these broad and simplified terms:

[The Virginia General Assembly](https://virginiageneralassembly.gov/) (GA) is two-house body (the Virginia House of Delegates – lower house and the Senate of Virginia – upper house) consisting of elected representatives from an equal number of constituent districts across the commonwealth.[[1]](#footnote-2) The Virginia GA typically generates legislation that can result, and often does result, in the development and implementation of regulations, under a separate and multi-faceted process not included here. Laws are recorded in the Virginia Legislative Information System ([LIS](https://lis.virginia.gov/)). Titles most relevant to the VWP Permit Program are the State Water Control Law in Chapter 3.1 (§ [62.1-44.2](https://law.lis.virginia.gov/vacode/title62.1/) *et seq*.) and § [28.2](https://law.lis.virginia.gov/vacode/title28.2/) *et seq*. of the Code of Virginia, but these are by no means the only titles or chapters that do or could apply to a project being considered for a VWP Permit Program decision.

Regulatory actions are often carried out by appointed bodies, or Boards, but can also be initiated by a state agency or commission when such authority(ies) are provided to it. The [State Water Control Board](https://www.deq.virginia.gov/laws-regulations/citizen-boards/state-water-control-board) (Board) oversees regulatory actions that affect the VWP Permit Program at DEQ. Regulations are documented in the Virginia Administrative Code, or [VAC](https://law.lis.virginia.gov/admincode/). The regulations commonly associated with the VWP Permit Program are [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/) *et seq*., [9VAC25-660](https://law.lis.virginia.gov/admincode/title9/agency25/chapter660/) *et seq*., [9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/) *et seq*., [9VAC25-680](https://law.lis.virginia.gov/admincode/title9/agency25/chapter680/) *et seq*., [9VAC25-690](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/) *et seq*., [9VAC25-20](https://law.lis.virginia.gov/admincode/title9/agency25/chapter20/) *et seq*., [9VAC25-380](https://law.lis.virginia.gov/admincode/title9/agency25/chapter380/) *et seq*., and [9VAC15-11](https://law.lis.virginia.gov/admincode/title9/agency15/chapter11/) *et seq*., but others may apply to a project being considered for a VWP Permit Program decision.

Lastly, agencies and commissions often develop official or unofficial guidance, manuals, how-to guides, memoranda, electronic software or platforms, and other materials to serve as tools in implementing the state’s authorities. As mentioned in the Introduction, this manual serves to aid staff with implementing the VWP Permit Program’s decisions and informing the public.

## VWP Permit Program Structure and Roles

Virginia Water Protection (VWP) Permit Program (VWP Permit Program) staff are located in the DEQ Central Office and in six regional offices: Northern, Piedmont, Southwest, Tidewater, Blue Ridge, and Valley. A map of regional office locations and jurisdictions is available at: <https://www.deq.virginia.gov/get-involved/about-deq/contact-us>. These offices process and manage the processing of applications, VWP general permit coverage, and VWP individual permits and provide technical support to DEQ Enforcement staff. Central Office staff also assists with developing and implementing the VWP Permit Program regulations; coordinates with the U.S. Army Corps of Engineers (USACE or Corps) and the U.S. Environmental Protection Agency (USEPA or EPA) on regulatory, procedural, technical, and administrative aspects of the wetlands program; and provides program guidance. In addition, Virginia Department of Transportation (VDOT)-sponsored project applications are processed and managed out of the Central Office by VWP staff assigned mostly to construction-based activities – through the Inter-Agency Review Team process - while staff in the Central Office’s Water Withdrawal Permitting process VWP applications and permit decisions for surface water withdrawal/diversion projects. The Regional VWP Permit Program Manager coordinates with the Central Office Manager of the Office of Wetlands and Stream Protection as needed. At times, the OWSP Manager will coordinate issues with other pertinent DEQ management as appropriate.

## 1.3 VWP Permit Program History

Numerous federal and state acts, legal challenges, and court decisions paved the way for the development of the Virginia Water Protection (VWP) Permit Program. A graphic summary of these is shown below, and key actions are further described in the following subsections.

Figure 1: Notable Time Periods in Environmental Law

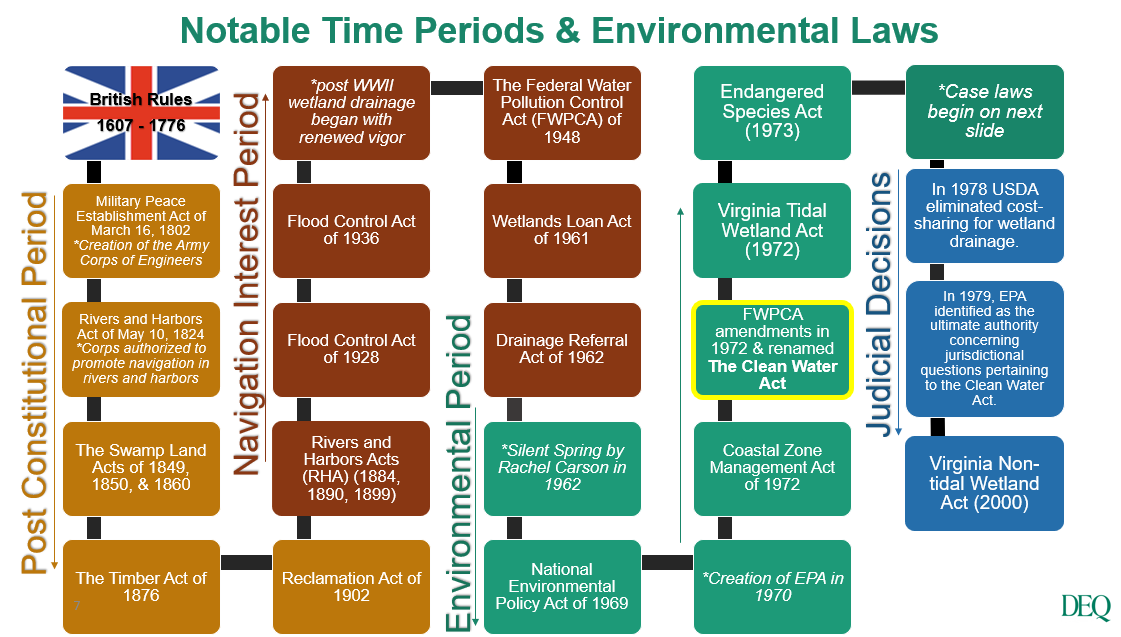
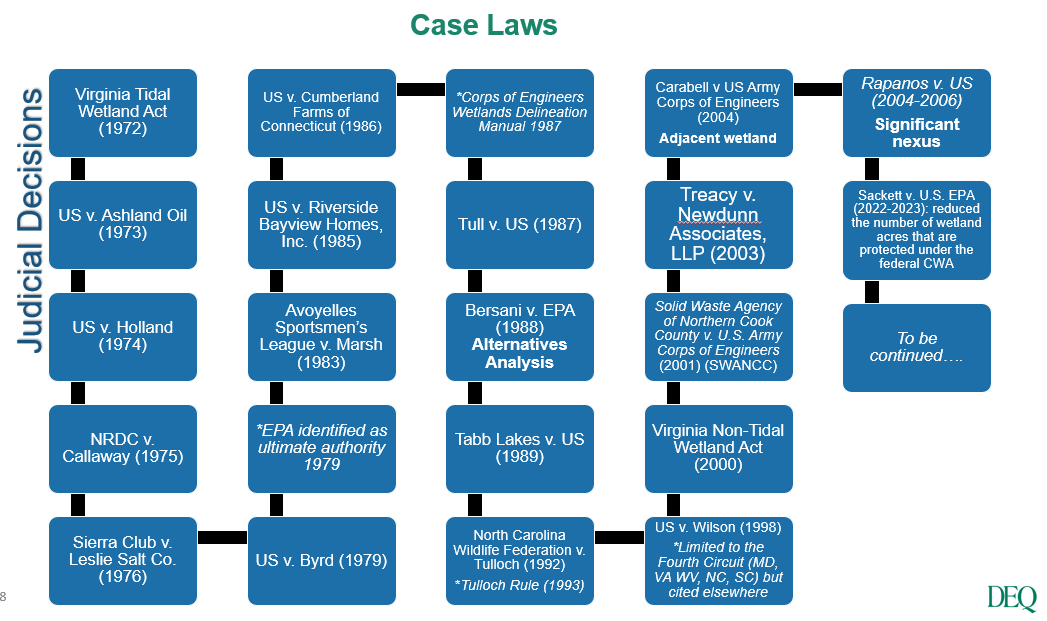


Figure 2: Historic Actions



### 1.3.1 1946 to 2001 – Clean Water Act Sections 404 and 401

The Clean Water Act (CWA) is the basis for federal regulation of discharges of pollutants into Waters of the United States (WOTUS) and water quality standards. The Federal Water Pollution Control Act (FWPC Act), enacted in 1948, formed the basis of the CWA. Even before that, the Virginia State Water Control Board was established in 1946 to regulate wastewater discharges into Virginia’s rivers[[2]](#footnote-3).

After the passage of the Federal Water Pollution Control Act (FWPCA) in 1972, the State Water Control Board became the delegated Commonwealth of Virginia agency to administer the Clean Water Act. The FWPC Act was significantly reorganized and expanded in 1972. Following the 1972 amendments, "Clean Water Act" became the FWPC Act's common name. In Virginia, 1972 also marked the adoption of the *Wetlands Act*, which established a state/local program for protecting *tidal* wetlands. Federal regulations promulgating the CWA provisions, and federal guidance explaining these regulations, have been in a regular state of flux in recent years. This directly impacts some states, while others continue to operate under their own statutory and regulatory authorities or operate under a combination of federal and state authorities.

Section 404 of the CWA establishes a program to regulate the discharge of dredged and fill material into WOTUS, the definition of which has been fluctuating since at least 2015. Section 401 of the CWA requires that an applicant for a federal § 404 permit obtain a certification from the state that the authorized discharge will not violate water quality standards.

Congress first enacted the water quality certification provisions in 1970. As incorporated into the 1972 CWA, § 401 water quality certification was intended to ensure that no federal license or permits would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate CWA provisions.[[3]](#footnote-4)

With Senate Bill 277 in 1990, the Virginia Council on the Environment set forth the groundwork necessary to establish more oversight of nontidal wetlands by the SWCB. In 1991, the SWCB proposed modified regulations for the implementation of the VWP Permit Program through the federal authority provided in § 401 of the Clean Water Act. The first VWP Permit Program Regulation (VR 680-15-02) was adopted by the SWCB in May 1992 and required a VWP permit to be issued for activities that result in a discharge to surface waters, and that require a federal permit or license, and are not permitted under the Virginia Pollutant Discharge Elimination System (VPDES). Moreover, this legislation established that issuance of a VWP permit constitutes the certification required under § 401 of the CWA. By their actions in July 2000, the Virginia General Assembly removed the dependence of the VWP Permit Program on the issuance of a USACE § 404 permit, thus enabling VDEQ to regulate activities, such as excavation in wetlands and fill in isolated wetlands, which are not currently under federal jurisdiction.

### 1.3.2 Tulloch and Wilson Decisions

In 1993, the USACE issued a rule known as the “Tulloch Rule,” which considered incidental releases or fallback of dredged material into waters as “fill” which were therefore regulated under § 404. The new rule resulted from the settlement of a lawsuit filed by North Carolina Wildlife Federation against the USACE, EPA and Tulloch, a developer. The lawsuit challenged the practice of excavating drainage ditches and/or ponds in wetlands and carefully removing the excavated soil and placing it outside of WOTUS (Tulloch Ditching), in order to avoid triggering the requirement for a § 404 permit. The purpose of the ditching and other excavation was to effectively drain the surrounding wetland, making it non-jurisdictional, and available for other uses without a § 404 permit.

Following the issuance of the Tulloch Rule, the American Mining Congress sued the EPA, claiming that regulation of such fallback exceeded the scope of authority granted by the Clean Water Act. In 1997, the District Court agreed[[4]](#footnote-5), and in 1998, the U.S. Court of Appeals for the District of Columbia upheld the District Court’s decision[[5]](#footnote-6). As a result, the USACE could no longer regulate excavation and resultant drainage of wetlands anywhere in the United States. Between the date of the ruling and May 1999, as many as 10,000 acres were reportedly drained in coastal areas of North Carolina, and in Virginia over 2,000 acres were impacted.[[6]](#footnote-7)

In *US v. Wilson* (1998), the US Court of Appeals for the Fourth Circuit overturned a criminal conviction involving a § 404 violation. The Court found that the USACE exceeded its statutory authority in regulating isolated wetlands, which do not have a direct surface water connection to waters that are navigable-in-fact, interstate, or closely related to navigable or interstate waters. The Court also stated that “sidecasting” does not constitute “pollution” if is comprised of the native soil and does not involve adding any soil from off site. This implementation of this decision was limited to the Fourth Circuit (MD, VA WV, NC, and SC).

### 1.3.3 Virginia Nontidal Wetlands Act

In response to growing concern regarding the lack of federal regulation of excavation in wetlands and any activities in isolated wetlands, the 2000 General Assembly amended [Chapter 3.1 of Title 62.1](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/) of the Code of Virginia (relating to wetlands) to establish and implement policies and programs to further protect and enhance Virginia's wetland resources. With passage of the Virginia Nontidal Wetlands Act, the General Assembly removed the dependence of the VWP Permit Program on the issuance of a § 404 permit by the USACE, thus enabling DEQ regulate all state waters, regardless of the jurisdiction established in the Clean Water Act or the Rivers and Harbors Act (RHA) and creating a nontidal wetlands program independent of § 401 Certification. The independence of the state VWP Permit Program was further upheld by the 4th Circuit Court of Appeals in 2003 in *Treacy v. Newdunn.*

Under the same legislation noted above, DEQ was directed to seek a State Programmatic General Permit to allow the best use of resources between the USACE and DEQ. In addition, the General Assembly directed DEQ to develop general permits for similar classes of activities with minimal impacts to expedite the permitting process in Virginia while maintaining the same high environmental standards as the individual permitting process. The act also amended State Water Control Law to include a goal of no net loss of existing wetland acreage and function for the Commonwealth and required the development of voluntary and incentive-based programs to achieve a net resource gain in wetlands.

In October 2001, new VWP Permit Program regulations became fully effective, broadly defining the type of activities that were regulated, expanding the program to all surface waters within the Commonwealth, and creating four general permits for varying activities impacting such surface waters. However, in recent years, several federal actions have affected Virginia’s implementation of Section 401, particularly where federal and state agencies have strived to reduce duplication of effort in project review and authorization.

### 1.3.4 Post-2001

On November 1, 2002, the first State Programmatic General Permit (SPGP) was granted to the Commonwealth of Virginia by the Norfolk District of the USACE for the discharge of dredged and/or fill material in nontidal wetlands and WOTUS associated with residential, commercial, and institutional developments and linear transportation projects within the Commonwealth. At that time, the Norfolk District suspended USACE Nationwide Permits 14 and 39 in Virginia, where they applied to nontidal waters and overlapped the coverage provided by the SPGP. The SPGP was modified and reissued in 2007, 2012, and 2017. In August 2022, the USACE issued two SPGPs, one for Residential, Commercial, Institutional and Recreational Development (22-SPGP-RCIR) and one for Linear Transportation (22-SPGP-LT). The 22-SPGP-RCIR authorizes the loss of WOTUS no greater than 1 acre per single and complete project, and the 22-SPGP-LT authorizes the loss of WOTUS no greater than 1/2 acre per single and complete project. In 2021 and 2022, the USACE-Norfolk District limited the use of Nationwide Permits 14, 29, and 39; denied use of Nationwide Permit 17; split up Nationwide Permit 12 activities into several NWPs; and added several new NWPs, as applicable in Virginia.

From 2001 to 2016, the main program regulation and general permit regulations were modified several times: in 2003, 2005, 2006, and 2008. Most of the modifications were minor, and, aside from the surface water withdrawal requirements, the essential elements of the VWP Permit Program regulation did not change significantly until they were again revised in August 2016.

Since 2016, VWP Permit Program regulations have been revised to capture statutory amendments regarding certain natural gas pipelines and stormwater management facilities (2018); administrative actions by DEQ on applications (2020); compensatory mitigation options (2019 and 2021); and agency versus State Water Control Board authorities (2022). The 2022 Virginia General Assembly (Senate Bill 657) limited the authority of the Air Pollution Control Board and the State Water Control Board to issuance of regulations and transfers the Boards' existing authority to issue permits and orders to Department of Environmental Quality (department or DEQ). For the VWP Permit Program, the term "Board" means the State Water Control Board when used in the context of promulgating regulations. However, when used outside the context of the promulgation of regulations, including regulations to establish general permits, "Board" means the department, or DEQ. This manual attempts to capture the use of board and department in the proper context, but no guarantees are expressed or implied.

## 1.4 Regulatory Environment

Several federal, state, and local agencies have regulatory interests and/or authorities in waters and wetlands, and jurisdictional extent often overlaps. Also, within Virginia, several regulatory programs may use similar terminology that refers to differing provisions and requirements, depending upon the context in which they are used. One example is the term “mitigation”, which may convey different meanings across programs. Be sure to understand the context of the regulatory provisions and authorities when communicating information about such concepts and terminology.

### 1.4.1 Federal: Rivers and Harbors Act / The Clean Water Act

Section 10 of the Rivers and Harbors Act of 1899 (RHA), requires authorization from the Secretary of the Army, acting through the USACE, 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, re-channelization, structure in, or any other modification of a WOTUS that is actually, or could feasibly be, navigable. Not all activities subject to Section 10 are regulated by the VWP Permit Program. Each USACE district maintains a list of waters subject to the RHA:

<http://www.nao.usace.army.mil/Portals/31/docs/regulatory/guidance/section_10_determinations.pdf>.

Section 404 of the Clean Water Act (CWA) regulates the discharge of dredged and fill material into WOTUS, including wetlands. EPA has delegated administration of the § 404 permit program to the Regulatory Branch of the USACE. EPA has retained oversight and enforcement authority over all activities by § 404 within WOTUS. To be valid, all § 404 permits must be accompanied by state § 401 Water Quality Certification, which in Virginia comes in the form of a VWP permit but may also be a stand-alone document. Note: The VWP Permit Program does not have a stand-alone, updated process for issuing 401 water quality certifications for a large majority of the activities it regulates, outside of its VWP permit process; however, the program is following the most recent version of the Section 401 Water Quality Certification rule/regulation promulgated by the federal government, as well as current state law, regulations, and guidance. The federal Section 401 rule/regulation has been in flux over the past several years with the changing federal administrations.

The geographical extent of WOTUS has expanded and contracted over time, in relation to various court decisions such as Riverside Bayview (1985)[[7]](#footnote-8), SWANCC (2003)[[8]](#footnote-9) and Rapanos (2008)[[9]](#footnote-10).

The USACE [Baltimore](http://www.nab.usace.army.mil/Missions/Regulatory.aspx) and the [Norfolk](http://www.nao.usace.army.mil/Missions/Regulatory.aspx) Districts administer the Section 404 and 10 programs within Virginia, and [EPA Region III](https://www.epa.gov/aboutepa/epa-region-3-mid-atlantic) staff oversee the USACE’ administration of the § 404 program.

Figure 3: USACE Regulatory Jurisdiction. From “Regulatory Permitting Program Pamphlet” <https://www.nao.usace.army.mil/Portals/31/docs/regulatory/Regulatory_Pamphlet.pdf>

Figure 3: Corps of Engineers Regulatory Jurisdiction. From “Regulatory Permitting Program Pamphlet” http://www.nao.usace.army.mil

Graphic showing Corps Jurisdiction in Waters

### 1.4.2 Nationwide and Regional Permits

Because of the large number and wide range of activities that occur within WOTUS, the CWA allows the USACE to develop general permits, most notably Nationwide Permits (NWP), district-specific Regional Permits (RP), and State Programmatic General Permits (SPGP) that at times allow a more streamlined federal permitting process for activities that are considered to have minimal impacts. Typically, these permits are used for activities regulated under Sections 402 and 404 of the CWA, Sections 9 and 10 of the RHA, and even some projects issued licenses by the Federal Energy Regulatory Commission (FERC). These general permits are developed by the USACE every five years and contain both general conditions as well as district-specific regional conditions. As a certifying authority under § 401 of the CWA, DEQ typically makes a Water Quality Certification (WQC) *decision* for these permits developed by the USACE at the time that they are issued by the USACE. In some cases, DEQ must make this decision, and/or the decision about the need for a permit, at the time an application is submitted for a specific proposed project.

The need or one or both authorizations from state and/or federal agencies is often affected by the changes made in federal rules promulgating the CWA and § 401 WQC provisions.

More information regarding the USACE permits can be found at <https://www.nao.usace.army.mil/Missions/Regulatory/>.

### 1.4.3 Natural Resources Conservation Service

The Natural Resource Conservation Service (NRCS) implements the [Food, Conservation, and Energy Act of 2008 (FSA)](https://www.congress.gov/bill/110th-congress/house-bill/2419), also known as the 2008 Farm Bill, by cooperating with landowners to facilitate conservation practices, including those applicable to certain wetlands.

More information about NRCS programs can be found here: <https://www.nrcs.usda.gov/programs-initiatives/acep-agricultural-conservation-easement-program>

### 1.4.4 VWP Permit Program

The VWP Permit Program receives authority over all state waters from the State Water Control Law ([Chapter 3.1 of Title 62.1](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/) of the Code of Virginia). The VWP Permit Program specifically regulates alterations to surface waters, which include “all state waters that are not groundwater” ([9VAC25-210-10](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/)), including wetlands, streams and open water. Unlike the activities regulated under Section 404 of the CWA, the VWP Permit Program does not need to demonstrate a connection or nexus to interstate commerce in order to exert jurisdiction over surface waters. Currently, the VWP Permit Program does not regulate activities in uplands through a VWP permit or water quality certification except for certain natural gas pipeline activities.

VWP permits function as independent state permits and typically, but not always, as § 401 Water Quality Certification decisions. The VWP Permit Program Regulation ([9VAC25-210 *et seq*](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)*.*) provides detailed conditions and requirements for implementation of the VWP Permit Program. Although DEQ has jurisdiction over tidal and nontidal waters and wetlands, VMRC is typically the lead state agency for reviewing projects occurring in tidal areas.

As stated above, the definition of state waters includes waters “partially within” or “bordering the Commonwealth”. Accordingly, activities originating in Virginia that impact the Potomac River and that are regulated by the VWP Permit Program may require a VWP permit.

### 1.4.5 Virginia Marine Resources Commission and Local Wetlands Boards

The Tidal Wetlands Act of 1972 ([Title 28.2](https://law.lis.virginia.gov/vacode/title28.2/) of the Code of Virginia) gives the VMRC the responsibility for issuing permits for the use or development of state-owned tidal and nontidal submerged and subaqueous bottom lands under Chapter 12 of Title 28.2, and tidal wetlands under Chapter 13 of Title 28.2. Chapter 14 of Title 28.2 requires permits for disturbance on coastal primary sand dunes and beaches.

Historically under Chapter 12, the Commission typically required permits for impacts within perennial streams (tidal and nontidal) with a drainage area of at least 5 square miles or with a mean annual instream flow of 5 cubic feet per second. Legislation passed in the 2023 Acts of the Virginia General Assembly changed some of VMRC’s project review and decision authorities. DEQ and VMRC currently work together under a [Memorandum of Agreement (Amended August 16, 2023)](https://covgov.sharepoint.com/:b:/r/sites/deqnet/Shared%20Documents/Water%20Division/Water%20Permitting/Wetlands%20%26%20Stream%20Protection%20-%20VWP/1DRAFT-VWP%20Permit%20%26%20Compliance%20Manual/MOA-DEQVMRCPermittingInNontidalWatersAmd8-16-2023.pdf?csf=1&web=1&e=0rhVTt) that lays out responsibilities for each agency with regards to authorizing activities in, on, or over state surface waters. Generally speaking, this MOA provides that VMRC may continue to issue subaqueous land permits in tidal waters, while DEQ or VMRC may issue permits in non-tidal waters depending upon the project activities.

Under Chapter 13 and pursuant to the Wetlands Guidelines[[10]](#footnote-11) published by VMRC, the Commission holds jurisdiction over tidal wetlands to the mean high tide line where no wetland vegetation exists, and to 1.5 times the mean tide range above mean low water when vegetation is present.

Localities have the option to adopt a model ordinance to administer the provisions of either or both Chapter 13 and 14 (tidal wetlands, primary sand dunes and beaches) with VMRC oversight. In localities that have not adopted such ordinances, VMRC administers the permit program.

### 1.4.6 Coastal Zone Management Program

The Virginia CZM Program is a networked program established in 1986 through an [Executive Order](http://www.deq.virginia.gov/Programs/CoastalZoneManagement/DescriptionBoundary/ExecutiveOrder.aspx), which consists of several agencies administering the enforceable policies protecting land or water use or natural resources within [Virginia’s Coastal Zone](http://www.deq.virginia.gov/Programs/CoastalZoneManagement/DescriptionBoundary.aspx). Pursuant to the [Coastal Zone Management Act (CZMA) of 1972](http://coastalmanagement.noaa.gov/czm/czm_act.html), actions taken by federal agencies (including the issuance of permits) that consist of or authorize activities reasonably likely to affect natural resources within the Coastal Zone must be consistent with the enforceable policies of the Virginia CZM Program.

Federal permits issued in Virginia must obtain a CZMA federal consistency concurrence from the DEQ Office of Environmental Impact Review, unless otherwise provided in CZMA implementing law, regulations, or guidance. In the case of a USACE individual permit for activities within [Virginia’s Coastal Zone](http://www.deq.virginia.gov/Programs/CoastalZoneManagement/DescriptionBoundary.aspx), an applicant must obtain the CZMA federal consistency concurrence. A USACE individual permit may not be granted until the required certification has been obtained by the applicant and provided to the USACE. (The USACE obtains CZMA concurrence for Nationwide Permits, Regional Permits, and SPGPs when they are issued every five years; no additional action is required by an applicant for these types of permits.)

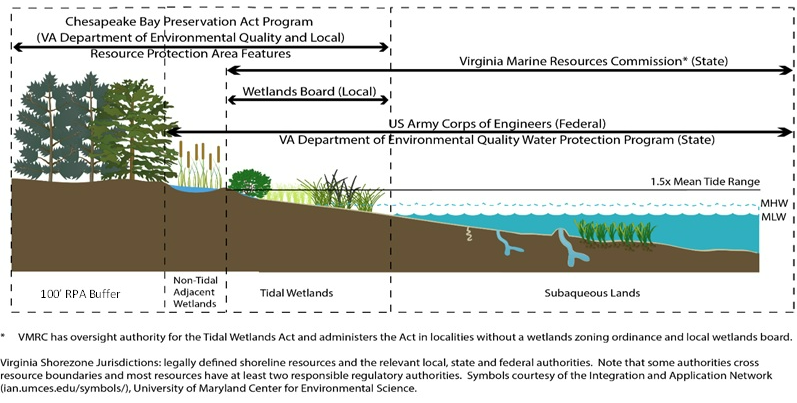
### 1.4.7 Chesapeake Bay Preservation Act Program

The [Chesapeake Bay Preservation Act](http://law.lis.virginia.gov/vacodefull/title62.1/chapter3.1/article2.5/) (Bay Act) was enacted by the Virginia General Assembly in 1988 as a critical element of Virginia's non-point source management program. Each of the 84 localities, defined as Tidewater Virginia and in Virginia’s Coastal Zone must adopt a program based on the Bay Act and the Chesapeake Bay Preservation Area Designation & Management [Regulations](http://law.lis.virginia.gov/admincode/title9/agency25/chapter830/).  The Bay Act Regulations recognize local government responsibility for land use decisions and are designed to establish a framework for compliance without dictating precisely what local programs must look like.

Under the Bay Act, there are three types of Chesapeake Bay Preservation Areas: Resource Protection Areas (RPAs), Resource Management Areas (RMAs), and locality-designated Intensely Developed Areas (optional).  The Bay Act Regulations provided for limited, specific development in these areas where little of the natural environment remain and an accompanying Water Quality Impact Assessment. Local governments administer these areas through local mapping and ordinances.

If any of these wetland features are encountered on a site visit conducted by VWP Permit Program staff and that are within a Tidewater locality, then Bay Act staff should be consulted concerning the potential for program overlap.

Figure 4: General jurisdictional boundaries of each agency. From Virginia Institute of Marine Science (VIMS) <https://www.vims.edu/ccrm/advisory/ccrmp/handbook/laws/index.php>



### 1.4.8 Other Laws

While not tied directly to the regulation of wetlands and waters, additional laws often impact the day-to-day activities of VWP Permit Program staff.

#### 1.4.8.1 Administrative Process Act

The Administrative Process Act (APA) (§ [2.2-4000 *et seq*](https://law.lis.virginia.gov/vacode/title2.2/)*.* of the Code of Virginia) sets forth the procedures that all regulatory agencies must follow during the promulgation of regulations and when making case decisions, as defined by the APA. The APA also sets qualifications for hearing officers and procedures for judicial review of regulations and case decisions.

#### 1.4.8.2 Freedom of Information Act

The Freedom of Information Act is also integral to the daily business of DEQ. The FOIA sets procedures and timelines for DEQ to respond to information or records requests. Any verbal or written request for records in DEQ’s possession should be treated as a FOIA request and handled pursuant to DEQ’s FOIA guidance. For more information, see <https://www.deq.virginia.gov/get-involved/about-deq/freedom-of-information-act>.

## 1.5 Regulated Areas

### 1.5.1 Surface Water Boundaries

To determine the geographic surface water boundaries on a given site, a delineation must first be performed. The regulation requires that *wetland* boundaries will be determined using a wetland delineation conducted *in accordance with* the USACE’ 1987 Wetland Delineation Manual and any regional supplements approved for use by the USACE. Two [regional supplements](http://www.nao.usace.army.mil/Missions/Regulatory/WetlandDelineationRegionalSupplementsInfo.aspx) are currently in use in Virginia: the *Atlantic and Gulf Coastal Plain Supplement*, generally used east of Interstate 95, and the *Eastern Mountains and Piedmont Supplement*, generally used west of Interstate 95.

The 1987 wetland delineation manual and supplements are methods to determine wetland boundaries and are not used to identify stream channels or other surface waters. Delineations of wetlands are typically conducted by private-sector wetland professionals like consultants or environmental engineers but may also be conducted by trained VWP Permit Program staff. Delineations may be confirmed by the USACE or DEQ-VWP Permit Program staff.

Delineations for other surface waters (streams, open water, etc.) are typically conducted in accordance with jointly approved DEQ and USACE guidance or policy, or in accordance with each agency’s required procedures.

DEQ and USACE have historically required that delineations done for the purposes of obtaining agency permits and approvals are formatted using Global Positioning System (GPS) tools with the capability of producing sub-meter accuracy measurements. Documentation must allow for a reasonably accurate replication of the delineation or determination at a future date[[11]](#footnote-12). With accurate and complete information, DEQ and USACE may approve delineations faster, which will also increase the efficiency of Virginia Water Protection (VWP) permit and coverage issuances.

### 1.5.2 Jurisdictional Boundaries

The *jurisdictional* extent of waters will depend on each agency’s independent statutory and regulatory authority, policies, and guidance. Under the VWP Permit Program, DEQ specifically regulates alterations to surface waters, which include “all state waters that are not groundwater”, including wetlands, streams and open water ([9VAC25-210 *et seq*](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)*.*).

#### 1.5.2.1 King’s Grant

A King's Grant (a.k.a. Commonwealth's Grant) is a property grant of stream and riverbeds and bottomlands made by the English Crown and (after independence) by the Virginia General Assembly. The practice ended in the days of the Early Republic and was completely discontinued by the time of the Civil War. Since DEQ’s jurisdictional authority to enact the VWP Program is founded on the Commonwealth's property interest to all waters and bottom lands as the successor in interest to the Crown after America’s Independence, the existence of a King's Grant can obviate the need for certain kinds of environmental permits for certain kinds of currently regulated activities. The instances in which a King’s Grant prevents the need for a VWP Permit is very fact- and case-specific. You may wish to reach out to your management team for clarification should an applicant or responsible party assert a King’s Grant.

VWP staff may be presented with claims that a King’s Grant applies to a particular area or activity, and therefore, no DEQ permit(s) is/are necessary. The burden of proof in establishing a King's Grant is on the party claiming to have one. Review of such a claim is handled through the Virginia Office of the Attorney General (OAG), and any final decision on property rights is made by a Court. There is required documentation that must be presented to the OAG for review. VWP staff should inform the party that the provisions of State Water Control Law and the VWP Permit Program regulations apply, and DEQ will decide on the need for a VWP permit or coverage via its normal procedures.

The Virginia Marine Resources Commission (VMRC) may also receive such King’s Grant or Commonwealth’s Grant claims and will make its own decisions regarding the need for a VMRC permit in these instances.

#### 1.5.2.2 Boundary Determinations

*Jurisdictional Determination* (JD) is the term used for a written determination of the surface water boundaries of jurisdiction under the USACE’ regulatory program. The USACE can provide Preliminary JDs and Approved JDs.

A Preliminary JD (“PJD”) only identifies water boundaries, and it is not appealable by the recipient receiving the PJD. It may include both federal and state jurisdictional waters. While a PJD does not have an expiration date per USACE Regulatory Guidance Letters 05-02 and 16-01, DEQ recommends at least a desktop review of any PJD older than 5 years from the USACE concurrence date.

An Approved JD (“AJD”) identifies water boundaries that are federally jurisdictional under the USACE permitting programs (Sections 402 and 404 of the Clean Water Act and Sections 9 and 10 of the River and Harbors Act) – thus, it should not include *state jurisdictional-only* waters. The AJD is appealable by the recipient and generally expires 5 years after the USACE concurrence date (USACE Regulatory Guidance Letters 05-02 and 16-01). DEQ-VWP Permit Program may accept either format with a JPA for purposes of VWP permitting. However, permit staff may need to verify that no state jurisdictional-only waters exist on the entire proposed *project site*, not just at the water crossings points considered for federal jurisdiction approvals.

Stream channels and other water features are often, but not always, identified on the wetland delineation maps and may be included in the USACE JD. When possible DEQ uses the USACE JD as representative of the extent of surface waters that are jurisdictional for VWP permitting purposes. However, permit staff may need to verify that no state jurisdictional-only waters exist on a proposed the entire project site.

**Nothing in the law, regulation or guidance precludes DEQ from independently performing its own delineations or confirmations of surface water boundaries.** Appendix A of this Chapter contains instructions for reviews. Staff should coordinate with their regional program manager and use the materials in Appendix A and the Templates subfolder of this Chapter. Also refer to 1) the DEQ Memorandum *Recent Supreme Court Decision Sackett v. Environmental Protection Agency (EPA) - Effect in Virginia and How to Move Forward Without Economic Dislocation* (June 29, 2023; Chapter 1 References), for more information about obtaining boundary and feature verifications in VA; and 2) the DEQ *WAT-PER-003 Implementation Procedures for VWP Preliminary Jurisdictional Determinations (PJDs), Approved Jurisdictional Determinations (AJDs), and State Surface Waters Determinations (SSWDs)* (December 21, 2023; Chapter 1 References) for questions and answers related to determinations and recent WOTUS events.

Reviewing requests for approval of SSWDs submitted by project proponents and/or their agents is another role that the VWPPP serves. For more information on the ***Virginia State Waters Delineation Certification Program, Program Overview & Requirements*** used by the public to expedite staff review of submitted SSWD requests, see https://www.deq.virginia.gov/permits/water/wetlands-streams-vwp.

#### 1.5.2.3 Ditches

Based on the regulation, the following guidelines apply when determining whether a ditch containing wetlands and/or open water is jurisdictional under the VWP Permit Program. Staff should also compare the nature of the activity proposed to the exclusions found in the regulation (See Chapter 2; [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/)).

1. Ditches excavated through wetlands are jurisdictional. Activities in the ditch, unless specifically excluded in VWP regulations, are regulated. Therefore, activities in the drainage or irrigation ditches for the purposes of converting the area to another use are regulated (such as filling the ditch to create uplands). DEQ staff will determine, based on the information provided by the applicant and/or through field visits, whether the ditch is vegetated (wetland) or nonvegetated (open water) to determine compensation requirements.
2. Activities proposed in ditches that are associated with ‘prior converted (PC) cropland’ are not regulated in accordance with VWP Permit Program Regulation [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).8 and [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).10.d. Since the VWP Permit Program does not regulate PC cropland, the ditches that are a part of the PC cropland designation are not regulated. This exclusion does not extend to stream impacts unless specifically excluded in VWP Permit Program regulation(s).
3. Ditches excavated through wetlands and associated with abandoned PC cropland are regulated under the VWP Permit Program.
4. If a ditch was constructed in an upland AND contains wetlands and/or open water, determine if the ditch is connected upstream or downstream to another surface water. If a ditch is not connected to a surface water (i.e., it is isolated), it is not regulated regardless of whether it contains wetlands and/or open water. If a ditch is connected to a surface water, determine if the activity will affect upstream, downstream, or other surface waters OR if the activity will affect a threatened or endangered species. The USACE may identify these ditches as ‘federally jurisdictional ditches’ or ‘other waters of the US’ in their delineation confirmation. An example of an activity that is not regulated in ditches that contain wetlands or open water and are connected to surface waters is the placement of a properly sized culvert for a driveway or roadway crossing that does not cause flooding upstream or affect downstream hydrology and where proper erosion and sediment controls are in place. An example of an activity that is regulated in ditches that contain wetlands or open water and are connected to surface waters is the relocation of a ditch that would remove hydrology from a downstream surface water or a portion thereof.
5. Activities in ditches constructed in an upland and that receive water solely from ‘artificial’ sources are not regulated, even if they contain wetlands or open water. Examples of these ditches include ditches that drain water applied in greenhouses; ditches that drain a car-wash facility; roadside ditches that convey water solely off of road and surrounding upland areas; and agricultural ditches that convey excess irrigation water from upland fields.
6. Activities in a ditch that is created during a mining operation permitted by the [Mined Land Repurposing](https://www.energy.virginia.gov/coal/mined-land-repurposing/Mined-Land-Repurposing.shtml) program of the Virginia Department of Energy (Virginia Energy), are not regulated by DEQ as state jurisdictional waters during the life of the mining permit. However, the ditch does become state jurisdictional waters when the site is no longer under an active Virginia Energy permit.

The VWP Permit Program regulations make a distinction between ditches and channelized streams. In many parts of the state, streams have been channelized and used as stormwater conveyances (i.e., streams located along roads that serve as roadside ditches and streams that serve as drainages in certain low-lying localities). These streams may be referred to as ‘ditches’ even though they are actually part of the stream network. Streams that have been channelized, relocated, or incorporated into a ditch, wholly or in part, are regulated as a stream.

#### 1.5.2.4 Identifying Impacts

Within the context of the VWP Permit Program, “impacts" include alteration of the physical, chemical, or biological properties of any surface waters in a way that make them detrimental to the public health, animal or aquatic life, or to the uses of waters for domestic or industrial consumption, recreation, or other designated uses. In addition, in wetlands, the following activities are considered impacts under the VWP Permit Program:

1. Activities that cause draining that significantly alters or degrades existing wetland acreage or functions;
2. Excavation, including ditching, dredging, or mechanized removal of earth, soil, or rock;
3. Significant alteration or degradation of existing wetland acreage or functions; and
4. Filling or dumping, which include replacing portions of surface water with upland, or raising the bottom elevation of the surface water for any purpose, by placement of any pollutant or material, including, but not limited to, dams, rock, sand, earth, and man-made materials or debris.

Impacts may be considered permanent or temporary. Permanent impacts cause a permanent alteration of the physical, chemical, or biological properties of surface waters or of the acreage or functions of a wetland. Conversion impacts are a type of permanent impact, in which activities permanently change an existing wetland or aquatic resource type to a different wetland or aquatic resource type (i.e., forested wetlands to emergent wetlands, or scrub shrub wetlands to emergent wetlands). Temporary impacts are not permanent and include activities in which the impact area is restored to its preconstruction elevations and contours with topsoil from the impact area where practicable. Temporary impacts must be pre-authorized by a permit to be considered temporary. Unauthorized impacts of any kind are just that, unauthorized, even if restored to pre-existing conditions voluntarily or as a result compliance or enforcement actions.

It is important to keep in mind that due to differences in legal authority, certain activities may not be considered regulated impacts by the USACE but may be regulated impacts under state law. For example, the USACE only regulates excavation (that does not result in concurrent fill) in waters that are subject to Section 10 of the RHA. Excavation in a headwater wetland that does not involve any related discharge of fill material may not require a permit from the USACE (as discussed earlier) but will require a VWP Permit.

Oftentimes, whether or not an activity qualifies as an impact may not be immediately obvious (for example, cutting of trees, but not grubbing, and maintaining the area in a deforested state, mowing, work in a channelized stream, or breaching a dam without entering surface waters). In such cases, permit writers are best served by asking the following questions and discussing with their regional manager:

1. Will mechanized equipment enter surface waters? (Will a dam be breached by working only in uplands?)
2. Will the area continue to meet the three wetland parameters? Will the overall Cowardin class change?
3. Will the hydrology regime of the wetland change significantly over the long-term?
4. Will the stream flow and stream substrate remain the same?
5. Will the activity alter the physical, chemical, or biological nature of the surface water?
6. Will the activity be detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other designated uses?
7. If the area has been historically physically altered (such as a channelized stream), has the area naturalized (developed stable pattern, dimension, and profile)?
8. Will the activity alter the physical, chemical, or biological nature of the stream?
9. Are there rare, threatened, or endangered species that will be affected?

If the answer to any of these questions is yes, the activity may be considered a regulated impact under the VWP Permit Program. Permit staff should also review [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/) and Chapter 2 of this manual to determine if an activity may be excluded by its nature, or if permitting prohibition exists ([9VAC25-210-50](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/); [9VAC25-660-40](https://law.lis.virginia.gov/admincode/title9/agency25/chapter660/section40/); [9VAC25-670-40](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/section40/); [9VAC25-680-40](https://law.lis.virginia.gov/admincode/title9/agency25/chapter680/section40/); [9VAC25-690-40](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/section40/). For awareness purposes, the Office of Stormwater Management developed Guidance Memorandum [GM24-2003](https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\440\GDoc_DEQ_7827_v1.pdf) regarding aspects of regulating certain silvicultural and agricultural land clearing activities.

## 1.6 Impact Authorization

The VWP Permit Program regulation sets forth a number of options for handling impacts to surface waters. These options and associated procedures are discussed in depth later in this manual.

### 1.6.1 No Permit Required

Certain activities or impacts to surface waters are regulated but excluded from the requirement for a VWP permit. There are currently 12 exclusions listed in the VWP Permit Program regulation ([9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/)). These apply to VWP individual permits and to VWP general permit coverages (Subsection 40 of each general permit regulation). Further details and guidance may be found in Chapter 2.

In addition, the regulation states that upon request by DEQ, a person claiming an exclusion must demonstrate to the satisfaction of the department that he qualifies for the exclusion.

### 1.6.2 Waivers

Under certain circumstances, [9VAC25-210-220](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section220/) allows DEQ the option of waiving the requirement for a VWP permit. Utilizing the waiver option typically results in the applicant receiving a NPR-Exclusion-Waiver Letter (No Permit Required) from DEQ.

Note that waiving the requirement for a VWP individual permit or general permit coverage under 9VAC25-210-220.A, or a VWP individual permit under 9VAC25-210-220.B, is optional, but DEQ is not prohibited from requiring a permit. The decision of whether to waive the permit requirement is in the sole discretion of the agency and is be based on factors such as water quality concerns, impacts to surface waters of significance, staffing resources, etc. DEQ is prohibited from requiring a VWP individual permit or general permit coverage under 9VAC25-210-220.C.

Chapter 2 of this manual discusses waivers in more detail.

### 1.6.3 General Permits

The VWP Permit Program regulation provides four general permits for use by applicants for minor impacts to nontidal surface waters:

1. WP1: For Impacts Less Than One-Half Acre ([9VAC25-660](https://law.lis.virginia.gov/admincode/title9/agency25/chapter660/)).
2. WP2: For Facilities and Activities of Utility and Public Service Companies Regulated by the Federal Energy Commission or the State Corporation Commission and Other Utility Line Activities ([9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/)).
3. WP3: For Linear Transportation Projects ([9VAC25-680](https://law.lis.virginia.gov/admincode/title9/agency25/chapter680/)).
4. WP4: For Impacts from Development and Certain Mining Activities ([9VAC25-690](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/)).

VWP general permits are regulatory actions decided upon by the State Water Control Board (Board). Each VWP general permit applies to specific activities within surface waters and contains acreage and linear footage limits for total impacts to streams and wetlands. These general permits contain conditions within the regulation and cannot be changed without a regulatory action by the Board. However, the DEQ Director may issue coverage to an applicant under a general permit, and that coverage may contain project-specific conditions.

DEQ reviews each application to determine if a project qualifies for coverage under the general permit regulation. If so, DEQ issues a coverage letter, informing the applicant that they may proceed with their project in accordance with the conditions set by the regulation. The coverage letter may also contain limited project-specific conditions, such as time of year restrictions (TOYR), which further restrict the authorized activities and are enforceable. Such conditions, however, are limited to the scope of conditions already within the general permit. Added conditions may not conflict with conditions contained in the general permit regulation. Refer to Chapter 4 of this manual for more information regarding general permits.

When a project will *permanently* impact less than or equal to 0.10 acre of wetland or open water, or less than or equal to 300 linear feet of stream channel, neither compensatory mitigation nor a permit application fee is required. While a general permit coverage may still be issued, Section 100 Part II of the general permit regulation – compensatory mitigation - will not apply to the project. Sometimes staff refer to these coverages as “Reporting Only” because after issuance, there tends to be mostly compliance reporting from the applicant.

### 1.6.4 Individual Permits

VWP individual permits are typically required when a proposed, regulated activity cannot be authorized under a VWP general permit regulation (see Chapter 5 and [9VAC25-210-130](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section130/).B). Projects requiring a VWP individual permit may include:

1. proposed *nontidal* impacts that are greater than VWP general permit use thresholds;
2. activities within surface waters that cannot be authorized by one or more of the VWP general permits;
3. complex threatened or endangered species issues that cannot be overcome using project-specific conditions added to the coverage letter;
4. projects for which there are significant water quality, aquatic environment, or in-stream flow concerns that require the addition of special, project-specific conditions to ensure that the project will not have more than minimal impacts; and/or
5. impacts to tidal waters.

The VWP individual permit conditions are customized within each permit to address the specific impacts of the project. Refer to the VWP Permit Program Regulation [9VAC25-210 *et seq*](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)*.* and Chapter 5 of this manual for detailed information concerning VWP individual permits.

# APPENDIX A – STATE SURFACE WATERS DETERMINATIONS

DEQ must receive a Surface Waters Determination (SSWD) [Request Form](https://www.deq.virginia.gov/our-programs/water/wetlands-streams) in order for staff to provide a confirmation of the state waters delineation. The SSWD Form can be found in Chapter 1 Templates subfolder; under the ‘Surface Water Delineations’ section of the DEQ [Wetlands and Streams web page](https://www.deq.virginia.gov/permits/water/wetlands-streams-vwp); and in the *Virginia State Waters Delineation Certification Program, Program Overview & Requirements* (SSWD Overview).

The steps for processing a SSWD Request Form are described below – these generally apply regardless of whether the request is submitted by a certified Virginia Surface Water Delineator (VSWD) or not. See also Part V of the SSWD Overview.

### A.1 Log the SSWD Request

1. Follow the instructions for entering SSWDs into CEDS using the SSWD workflow – instructions are in the VWP PEEP Guide document. For surface waters, include all confirmed state surface waters (in square feet, acres, and/or linear feet) *on the entire project site*, regardless of federal jurisdiction. The entire project site size should be used for the ‘Site Acreage’ field in the SSWD record. This may differ from how USACE and/or other agencies view the project and/or delineation area. The applicant may also need to seek approval of delineation boundaries from USACE and/or other agencies for their respective approval processes.
2. Create a subfolder in the appropriate server folder to save all relevant documents while processing the SSWD.

### A.2 Review the SSWD Request

1. VSWD Certified: For VSWD certified packages, the steps are provided in the Program Summary of the VSWD Overview document and copied verbatim below. See additional information in Section VI of the VSWD Overview regarding the streamlined review approach.

“…When a SSWD request is submitted, using the SSWD Request Form, DEQ will review the Final Delineation Report, including field delineation maps, for completeness within 15 days of receipt. If the information submittal is not complete, DEQ will require additional information from the VSWD and may suspend its verification review until complete information is submitted. Once the submittal is considered complete, DEQ will conduct its verification review within 30 days and provide a written determination, unless a field verification is needed. The need for a field verification will be sent to the VSWD.

In most cases, DEQ staff will verify SSWDs by reviewing reports, maps, and other documentation submitted by VSWDs, verifying the submitted information with available online and print resources at the desktop level, then issuing a written determination for the SSWD findings. To maintain reliability and integrity of the certification program, DEQ staff will randomly field verify each VSWD’s work on a periodic basis. A pattern of deficient work may result in a greater frequency of field verifications, followed by the suspension or revocation of the VSWD certification (see Section IX). …”

Ideally, a certified VSWD will be providing more robust information, including:

1. A Final Delineation Report Checklist (Appendix IV of the SSWD Overview). Note: This checklist can also be used by non-VSWD requestors.
2. A Delineation Report, including all information items in Part IV.A and -IV.C of the SSWD Overview
3. A Delineation Map checklist (Appendix V of the SSWD Overview). Note: This checklist can also be used by non-VSWD requestors.
4. A Delineation Map, including all information items in Part IV.C of the SSWD Overview.

The *map and resource table* should clearly differentiate between federally jurisdictional waters and federally excluded/state surface waters only. If staff are uncertain that the map and/or table reflect the expected resources, confirm with the applicant that no other delineations, SSWDs, PJDs, or AJDs have been processes for the same project.

Ensure that all *applicable* information is included. There are some items that are necessary to review for all delineations, such as soil maps, NWI, etc., while other items listed in the SSWD Overview (Parts II, IV, and V) make it easier to identify potential wetlands from a desktop review, and thus can speed staff review. If some piece of information is not relevant to the delineation work or to a particular site, then it is not required for submittal regardless of the requestor’s VSWD status.

In addition, state surface waters delineations – conducted in the 84 Tidewater localities – are subject to the Chesapeake Bay Preservation Act (Bay Act). A determination of whether the state water is also considered a Resource Protection Area (RPA) is a requirement of the Bay Act. Therefore, VSWD’s working in a Bay Act locality will also need to determine the flow regime(s) (i.e., perennial, intermittent, or ephemeral) as part of the comprehensive SSWD. Additional Bay Act information, acceptable stream methods to identify flow regime, and DEQ Perennial Flow guidance, is provided in Section III. Chesapeake Bay Preservation Act Stream Forms are in Appendix III.

If the delineation conclusion is not straight forward, the requestor should be reviewing and submitting as much documentation as possible to support the delineation conclusions. If VWP staff disagree with the conclusions at the desktop level, then scheduling a field review may be necessary.

Any SSWD Request submitted should include a signed Property Access Agreement. *This access agreement is different from the typical access agreement form used primarily for inspections* in the VWP Permit and Compliance Manual, Chapter 3 Templates*.* See also Chapter 7 in the [DEQ Enforcement Manual](https://www.deq.virginia.gov/home/showpublisheddocument/22405/638422031938000000) on accessing private property. VWP permit staff should seek assistance from the Enforcement Program for unique circumstances, which may include:

1. A requester desires to use an access agreement that is unique to a specific locality. Inform the requester that the preferred access agreement format must be reviewed by DEQ Enforcement staff prior to acceptance for use with SSWD actions.
2. Where multiple property owners are involved on a proposed project, effort should be made to receive a signed access form from each owner; however, this may vary depending upon the need to actually visit the site. Where one of several owners refuses to complete or sign the form, a desk top review may suffice, particularly as DEQ is not required to visit a site. Remember that DEQ does not have trespass rights, so ultimately the SSWD may not be able to be finalized without one or more property access permissions.
3. When the project involves an applicant that is a lease holder or holds easements, VWP permit staff may accept the signed SSWD access form from these parties but also may request to view the lease or easement documents for information on access rights. Receiving the signed access form regardless of these rights may be prudent in some circumstances.
4. Non-VSWD Certified: For non-VSWD prepared SSWD Request Forms submitted:

VWP staff processing the request prioritize review of non-VSWD packages as schedules allow.

Ensure that all *applicable* information is included. Non-VSWD users are not required to use the materials provided in the VSWD Overview. There are some items that are necessary to review for all delineations, such as soil maps, NWI, etc., while other items make it easier to identify potential wetlands from a desktop review. If some piece of information is not relevant to the delineation work or to a particular site, then it is not required for submittal regardless of the requestor’s VSWD status.

In addition, state surface waters delineations – conducted in the 84 Tidewater localities – are subject to the Chesapeake Bay Preservation Act (Bay Act). A determination of whether the state water is also considered a Resource Protection Area (RPA) is a requirement of the Bay Act. Therefore, delineators working in a Bay Act locality will also need to determine the flow regime(s) (i.e., perennial, intermittent, or ephemeral) as part of the comprehensive SSWD. The Chesapeake Bay Preservation Act Stream Forms in Appendix III of the VSWD Overview may be used for this purpose. See other acceptable methodologies in Section III.B of the VSWD Overview.

If the delineation conclusion is not straight forward, the requestor should be reviewing and submitting as much documentation as possible to support the delineation conclusions. If VWP staff disagree with the conclusions at the desktop level, then scheduling a field review may be necessary.

Any SSWD Request submitted should include a signed Property Access Agreement. *This access agreement is different from the typical access agreement form used primarily for inspections in* the VWP Permit and Compliance Manual, Chapter 3 Templates*.* See also Chapter 7 in the [DEQ Enforcement Manual](https://www.deq.virginia.gov/home/showpublisheddocument/22405/638422031938000000) on accessing private property. Note: If a requester desires to use an access agreement that is unique to a specific locality, inform the requester that the preferred access agreement format must be reviewed by DEQ Enforcement staff prior to acceptance for use with SSWD actions.

### A.3 Determine SSWD Type

Use supplemental information provided with the request to determine whether a field determination or a desktop determination is appropriate. Pre-screening the study area (see below) will help determine if a field review is warranted, or a desktop verification is appropriate. Generally, a desktop verification is appropriate when a request meets all of the following conditions:

1. A small study area.
2. Pre-screening utilizing topographic maps (2-ft contours ideal), USFWS NWI, and locality surface water predicative modeling does not identify additional areas on site warranting further review.
3. Any requested exclusions or waived resources are easily determined as applicable as based on the documentation provided with the SSWD request. Should photo documentation and supporting narrative preclude such a determination, such as when a sought exclusion or waiver is borderline or when staff disagree with the applicability of such, then a site visit is necessary.

Should any of the above parameters not be met, staff should conduct a SSWD field review.

### A.4 SSWD Field Review

* **Pre-Screening/Inspection Preparation** – generally recommended to schedule to meet the delineator onsite to go over delineation report and findings in the field, as well as discuss any possible inconsistencies noted or borderline resources. Inspectors should pre-screen the study area utilizing topographic maps (2-ft contours ideal), the USFWS NWI, and locality wetland/surface water predictor model(s). Potential resource areas that deviate from the delineation map should be identified for further field verification.
* **Field Gear** – camera, shovel/auger, ruler, Munsell soil book, flagging.
* **Methodology** – Cowardin classification may be reviewed and approved during the SSWD site inspection. SSWDs utilize the USACE delineation manual and applicable regional supplements. Specific state waters not under USACE jurisdiction could be isolated surface waters, or with the recent federal rulemakings, could just be surface waters no longer under federal jurisdiction.
  + ***Isolated state surface waters*** - as long as all three wetland criteria met or the resource has a defined bed and bank, it is a state surface water.
  + ***Ephemeral streams vs. upland drainage features*** - a case-specific determination regarding the existence of a defined bed and bank and ordinary high-water mark. A feature having all of such is state jurisdictional regardless of flow regime.
* **Documentation**– general field notes and USACE data forms, as necessary. *No separate inspection report is required* unless necessary to document significant departure of observations from what was reported in the delineation report/map.

### A.5 Draft SSWD Letter

Use the most recent SSWD decision letter template to provide the SSWD decision (see Chapter 1 Templates). Address the letter to the applicant and copy the authorized agent and USACE project manager, as applicable. The letter contains a ‘disclaimer’ that the applicant and/or agent may also need to seek approval of delineation boundaries from USACE and/or other agencies. The letter is signed by the VWP Permit Program staff member processing the SSWD.

### A.6 SSWD GIS

The VWP Permit Program is currently working with DEQ-OIS/PIDA to develop requirements for new SSWD layer(s) in the agency GIS tools. Instructions to staff will be updated when the layer(s) are finalized. In the interim:

* Do not enter SSWD polygons into the GIS *Project* Boundary layer. Upon receipt of any *SSWD shapefiles* from applicants, please copy Michelle Henicheck in VWP-Central Office for inclusion in WetCAT.
* At this time, continue to enter *Project* polygons into GIS per the tools and information provided by Maddie Moore on February 16, 2024. The link to access the GIS portal has recently changed to: <https://gishost.deq.virginia.gov/portal/home/>

Tip: The new polygon editing portal is <https://gishost.deq.virginia.gov/portal/home/>. Select the 'Edit' icon/tool about two-thirds of the way down on the right-hand-side navigation. A menu appears that looks and works like the previous polygon editor. An updated training guide is not available at this time for the new editing portals but is available for the new staff map. However, once the new editing toolbar is opened, the instructions from the existing [VWP GIS Boundary Editing Web Application User Manual](https://gis.deq.virginia.gov/mapper_int/Portalimages/VWP_GIS_Boundary_Editing_Web_App_Manual_Rev_06162023.pdf) can be applied.

### A.7 Life of SSWD Decisions

SSWD decisions are valid for 5 years from the date the SSWD is issued in absence of a permit decision. When a permit decision applies, the SSWD is valid for the life of the VWP individual permit or general permit coverage.

The SSWD is not proprietary – it can be revised to transfer the decision from the original recipient(s) to another. Revise the existing SSWD letter to address it to the new recipient(s). The new entity can rely on the decision until the decision expires as noted above.

### A.8 ECM Entry

***Upload documents to ECM under the SSWD number.*** See the VWP PEEP Guide for instructions on ECM entry.

1. <https://www.virginia.gov/agencies/general-assembly/#:~:text=The%20General%20Assembly%20is%20a,constituent%20districts%20across%20the%20commonwealth.> [↑](#footnote-ref-2)
2. *Understanding Wastewater Regulation in Virginia - Guide for Local Government Leaders,* Virginia Municipal League, 2017. [↑](#footnote-ref-3)
3. *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes*, USEPA, April 2010. [↑](#footnote-ref-4)
4. American Mining Congress v. U.S. Army Corps of Engineers, 951 F.Supp. 267 (D.D.C. 1997) [↑](#footnote-ref-5)
5. National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399 (D.C.Cir.1998) [↑](#footnote-ref-6)
6. [Hershner, Carl M. Tulloch Ditching. Wetlands Program Technical Report, No 99-4. May 1999.](http://ccrm.vims.edu/publications/wetlands_technical_reports/99-4-tullock-ditching.pdf) [↑](#footnote-ref-7)
7. [United States v. Riverside Bayview Homes, 474 U.S. 121 (1985)](http://caselaw.findlaw.com/us-supreme-court/474/121.html) [↑](#footnote-ref-8)
8. [Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001)](https://caselaw.findlaw.com/court/us-supreme-court/531/159.html) [↑](#footnote-ref-9)
9. [Rapanos v. United States, 547 U.S. 715 (2006)](https://caselaw.findlaw.com/court/us-supreme-court/547/715.html) [↑](#footnote-ref-10)
10. <https://www.mrc.virginia.gov/Notices/2021/Final-Draft-Wetlands-Guidelines-Update_03-01-2021.pdf>. [↑](#footnote-ref-11)
11. USACE Regulatory Guidance Letter No. 05-02 (June 14, 2005) [↑](#footnote-ref-12)