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See DISCLAIMER in INTRODUCTION.

# CHAPTER 2: NO PERMIT REQUIRED

## 2.1 Introduction

Certain regulated activities identified in § [62.1-44.15:21](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A21/) and [-:22](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A22/), of the Code of Virginia, [9VAC25-210 *et seq*](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)*.*, [9VAC25-660 *et seq*](https://law.lis.virginia.gov/admincode/title9/agency25/chapter660/)*.*, [9VAC25-670 *et seq*](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/)*.*, [9VAC25-680 *et seq*](https://law.lis.virginia.gov/admincode/title9/agency25/chapter680/)*.*, and [9VAC25-690 *et seq*](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/)*.*do not require obtaining a permit under the Virginia Water Protection (VWP) Permit Program, and in some cases, the Code and/or regulations prohibit the issuance of a VWP permit. The activity may be excluded from permitting; may qualify for a permit waiver; or may be already covered by another state or federal permit in accordance with [9VAC25-210-130](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section130/).H through J or [9VAC25-690-30](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/section30/).E and -F. The action or decision by the Virginia Department of Environmental Quality (DEQ or department) to not require or waive a VWP individual permit or general permit coverage for a certain activity is commonly referred to as a “No Permit Required” or “NPR” decision. DEQ does not public notice NPR or waiver decisions for the purposes of VWP permits/coverages or Section 401 Water Quality Certification.

Unlike for permits and coverages, there is no expiration date identified in the NPR decision itself. However, project proponents relying on NPR decisions greater than 15 years old must submit a new application or otherwise demonstrate that conditions resulting in DEQ’s original NPR decision have not changed. An NPR decision may change when the circumstances on which the decision is based changes, such as but not limited to: 1) a change to the project activities; 2) a change to provisions in the Code of Virginia or state regulations; and/or 3) a change to federal laws, regulations, or specific permit actions, such as the Nationwide Permits.

## 2.2 Exclusions

Activities excluded from VWP permitting requirements are summarized below. Staff should carefully read [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/) and this chapter when evaluating the applicability of an exclusion. Subsection 40 of each general permit regulation also refers to 9VAC25-210-60. In accordance with 9VAC25-210-60, upon request by the department, any person claiming one of these exclusions shall demonstrate to the satisfaction of the department that he qualifies for the exclusion. Therefore, staff may request additional information as necessary to determine if an activity qualifies for an exclusion.

### 2.2.1 USACE Permits - Do Not Require 401 Water Quality Certification (9VAC25-210-60.1)

**This exclusion is most widely used with USACE general permits called Nationwide Permits (NWPs) and is often determined at the time an application is submitted for USACE *verification* that a project meets the criteria of one or more specific NWPs.**

**“**Discharges of dredged or fill material into state waters, except wetlands, which are addressed under a USACE Regional, General, or Nationwide Permit, and for which no § 401 Water Quality Certificate is required”.

**In many cases, these NWPs have already received a § 401 decision from DEQ at the time the NWPs were issued, which occurs every five years, and thus do not require a separate, individual § 401 WQC decision.**

**In the case of the NWPs issued in 2021, staff should send the NPR-Exclusion-Waiver letter in the Chapter 2 Templates subfolder when applicable. In the case of the NWPs issued in 2022, staff typically do not need to send the NPR-Exclusion-Waiver letter when no action by DEQ is necessary, unless the project does not meet the *federal NWP* criteria for verification. In these cases, the project application is reviewed by the USACE and DEQ, and possibly other agencies, for a decision, and the NPR-Exclusion-Waiver letter should be used when applicable for DEQ.**

**Other types of general USACE general permits include Programmatic General Permits (PGPs) and State Programmatic General Permits (SPGPs). A VWP permit or coverage may be required, such as in the case of the 22-SPGPs, regardless of DEQ making a Section 401 WQC decision at the time these types of general permits were issued. While the 22-SPGPs do not require DEQ to make a separate, individual Section 401 WQC decision, they do require that a state VWP individual permit or general permit coverage to be issued in order for applicants to use the 22-SPGPs.**

**Lastly, this exclusion only applies to activities in other types of surface waters – like streams or open waters - but not in wetlands.**

### 2.2.2 Projects Permitted by Other DEQ Discharge Permits (9VAC25-210-60.2 and -.7)

**The following activities are regulated under another type of DEQ permit and are likely excluded from the requirement to obtain a VWP permit or coverage to reduce duplicative regulatory processes between programs.** VWP permit staff may coordinate or refer inquiries to regional VPDES program staff when needed.

* Discharges permitted by a Virginia Pollution Discharge Elimination System (VPDES) permit (9VAC25-31) or Virginia Pollution Abatement (VPA) permit (9VAC25-32)[.](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/) This may include discharge of herbicides or pesticides authorized by 9VAC25-800, a VPDES General Permit for Discharges Resulting from the Application of Pesticides to Surface Waters (VAG87), when such VAG87 authorization is issued.
* Stormwater discharges from land-disturbing activities authorized under the Virginia Erosion and Stormwater Management Program (9VAC25-875).
* Surface water impacts from the flooding or back-flooding effects of a temporary sediment basin or trap, as the duration of effects of the facility are limited to the site’s construction period.

These exclusions clarify that discharge of **effluent or stormwater** into state waters permitted by a VPDES permit does not require a VWP Permit. However, these exclusions do not apply to discharges that are beyond the permitted discharge and that require a VWP Permit in accordance with [§ 62.1-44.15:20](http://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A20/). For example, these exclusions do **NOT** apply to:

* Discharges of sediment into surface waters that result in filling of a wetland or stream channel.
* Discharges of stormwater from land disturbance that would cause flooding or loss of acreage or function of wetlands or stream channels.
* The excavation in a wetland or stream channel or placement of fill material in all waters associated with installing a structure for a discharge permitted under a VPDES permit.

### 2.2.3 Certain Virginia Marine Resources (9VAC25-210-60.3 and VA Code § 62.1-44.15:21.G)

Activitiesgoverned *under Chapter 13* (§ [28.2-1300 *et seq*](https://law.lis.virginia.gov/vacode/title28.2/chapter13/)*.*) of Title 28.2 of the Code of Virginia by the Virginia Marine Resources Commission (VMRC) or Local Wetlands Board do not require a VWP permit pursuant to [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).3 and Va. Code [§ 62.1-44.15:21](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A21/).G, unless state certification decision is required by § 401 of the Clean Water Act. Chapter 13 is limited to the regulation of tidal wetlands. The [Wetlands Guidelines](http://mrc.virginia.gov/regulations/wetlands_guidelines.pdf) published by VMRC indicate that under Chapter 13, 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. Applicants required to obtain a Chapter 13 permit from VMRC, and a Section 10 or 404 permit from USACE, may trigger the need for a § 401 WQC decision from DEQ – in the form of a VWP individual permit – but only in rare cases. It is more common that DEQ has already provided its § 401 WQC decision on the federal permit (See Chapter 1.4.2).

### 2.2.4 Normal Residential Gardening and Landscaping (9VAC25-210-60.4)

Under VA Code § [62.1-44.15:21](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A21/).G, normal residential gardening, lawn and landscape maintenance, or other similar activities that are incidental to an occupant's ongoing residential use of property and of minimal ecological impact do not require a VWP Permit. The regulation sets forth the specific criteria governing this exemption and identifies the activities meeting these criteria. In determining whether an activity is exempt from permitting under this section, the permit writer should consider the following:

* To qualify, the activity must be incidental to the ongoing occupation of a residential dwelling. By incidental, DEQ means minor, secondary or accidental impacts that are related to living in the residence.

Example: In many areas of Virginia, rising sea levels or changes in stormwater management can result in an existing residential lawn to begin to support wetland vegetation through no efforts of the existing property owner. The ongoing mowing or landscaping of this yard would not require a permit. The same property may have avoided wetland areas that existed on the property when it was developed and purchased by the current occupant. If that occupant now wishes to expand his yard or create space for a large garden by clearing trees in a forested wetland or clearing a scrub-shrub wetland, a permit would be required because the activity will result in the conversion of a wetland to an upland or different wetland type. Similarly, removing the cut-tree stumps (i.e., grubbing) would be excavation in a wetland and would not be an excluded activity.

* The activity must be non-commercial in nature. Many residential properties are actually on property zoned for agricultural or commercial use. The permit writer should be careful to distinguish between activity related to the residential occupation of the property and activity associated with the commercial aspects of the same property.
* An overarching requirement of this exemption is that the activity must result in minimal ecological impact, regardless of whether it is accomplished by hand or by using hand tools.
* The activity should not result in a conversion of a wetland to an upland or to another wetland type, irrespective of any other criteria.
* Internal and external coordination among multiple government agencies may be necessary when tree clearing for safety reasons must occur.

### 2.2.5 Maintenance of Currently Serviceable Structures (9VAC25-210-60.5)

Maintenance of currently serviceable structures, such as purpose-built stormwater and utility structures, transportation structures, dikes, groins, levees, dams, riprap breakwaters, causeways, or bridge abutments or approaches. Maintenance includes the emergency reconstruction of recently damaged parts but does not include modifications that change the character, scope, or size of the ‘original design’.

If the original design is not available, the permittee shall submit the best available information on the design for consideration and approval. Acceptable alternative information that describes or identifies the original design or footprint of the currently serviceable structure includes but is not limited to any of the following:

* Topographic maps that show structure elevations
* Narrative description of periodic or ongoing maintenance activities – such as a mowing or vegetation control plan or document
* Aerial photograph(s) of the structure and/or maintained area
* Real estate documents describing the original design, footprint, or maintained area
* Historic or current drawings used for other nearby developments that include the structure
* Media articles, coverage, or archives
* Locality handouts, pamphlets, public notices, meeting minutes, web site information, etc.

Emergency reconstruction shall occur as soon as practicable after damage occurs. When emergency reconstruction situations apply, the emergency reconstruction portion of this exclusion shall occur as soon as practicable after the damage has occurred and such damage is discovered. While this exclusion is silent on temporary impacts ([9VAC25-210-10](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/)) to surface waters that are associated with maintenance activities, such impacts may be necessary in some cases to conduct the maintenance. When necessary, these require restoration to pre-construction conditions as would any other type of temporary impact. Invasive species identified on the most recent Department of Conservation and Recreation Virginia Invasive Plant Species List should not be used for the restoration of temporary disturbances or impacts to the maximum extent practicable.

Existing, aged structures may need to be replaced with updated versions, perhaps due to technological advances or changes in government regulatory requirements and/or standards. When such existing structure(s) are contained within a specified area, such as a corridor or easement, maintenance may entail replacement of existing structures, as replacement may be necessary to continue providing the structure’s original purpose, service, and/or function. If maintenance is required for a structure for which the original design is not available, the responsible party shall submit the best available information on the design for consideration and approval by DEQ. Staff is to evaluate the VWP exclusion as it applies to work occurring in surface waters; maintenance work in uplands is outside the scope of the program.

Entities are not required by the regulation to apply for an exclusion. When asked by a project proponent to verify that the maintenance exclusion applies, staff may request information which demonstrates exclusion applicability but should keep such requests to the minimum necessary for a determination. Generally speaking, the construction of structures in new or expanded locations that may involve surface water impacts will likely require a VWP permit or coverage. In cases where an applicant can demonstrate that the net impacts of such work will not be detrimental to the environment, staff should consider the applicability of exclusion(s) from permit coverage.

#### 2.2.5.1 Maintenance – Existing Culverts

Maintenance, repair, or replacement of *existing* culverts is excluded from the need for VWP permitting (see Chapter 3, Appendix D for installation of *new* culverts). In this case, existing culverts could include pipes that are part of a ditch or ditch system (see maintenance of farm irrigation and drainage ditches in subsection 2.2.7.5 of this chapter).

Maintenance, repair, or replacement of an existing culvert can include increasing the *culvert* capacity due to runoff changes in the watershed over time; changes in design requirements; or countersinking. Increasing the replacement pipe diameter may be considered excluded as long as the original purpose, service, and/or function of the structure is not changed, or in the case of a ditch pipe, as long as the original approximate capacity of the irrigation ditch or related structures is not increased.

Replacement of an existing culvert may include using a culvert constructed from a different material (e.g., concrete replacing metal) or using a differently shaped culvert (e.g., bottomless replacing round). Replacement culverts should be countersunk in accordance with criteria outlined in Section 100, Part I.B.2 of the applicable General Permit regulation. However, the work under this exclusion is often associated with maintenance, including repair and replacement of an existing culvert. Therefore, countersinking may not be possible in all situations.

Maintenance and repair of an existing culvert can include minor deviations from the original footprint if necessary to prevent surface water impacts occurring due to the existing culvert’s condition or function. All work must be limited to the maintenance and repair of the culvert, including adjustments to elevations for proper culvert function.

Example 1: A road is being widened 35 feet to add a turning lane requiring the replacement of the existing 100 feet of culvert with a new 135 culvert. The 100 feet of culvert would be excluded from the need for a VWP Permit, but the new 35 feet of culvert may require a VWP permit or coverage.

Example 2: A culvert replacement requires tie-in to the upstream elevation on a severely eroded and entrenched channel. Impacts related to the work necessary for the tie-in may be considered maintenance and could be considered as excluded from permitting, and therefore, would not require compensatory mitigation. The culvert could not be properly installed and would not function properly without this additional tie-in work.

The removal of a culvert structure (fill) *without replacement with another structure* and restoring the original drainage feature is not considered to be maintenance. This activity is a permanent impact and counts toward the impact threshold totals but does not require compensatory mitigation, as some benefits are being realized from ‘daylighting’ the feature. This applies if the feature is an ephemeral, intermittent, perennial, or ditched stream. Temporary impacts may also be necessary for staging and access. Temporary impacts of any surface water feature, if applicable, should be restored to original conditions like any other temporary impact. Additional consideration should be given to the Cowardian classification of the stream and stream connectivity in the area, and if warranted, request that the applicant or permittee maintain a low flow channel for aquatic organism passage. Impacts to culverted streams should be counted with the total stream impacts and a *note should be added to CEDS permit record* indicating that mitigation is not required for those impacts.

All work must comply with Erosion and Sediment Control best practices and be conducted in the dry.

#### 2.2.5.2 Maintenance - Utilities

For linear utility structures – which could include but are not limited to existing power lines and poles, sewer lines, and water line activities - within a permanent maintenance corridor or easement, and that are associated with repair and maintenance, are excluded from requiring authorization. Utility corridors and existing utility easements are part of the utility structure. Activities such as clearing an existing easement that has been previously disturbed to lay utility lines, and recorded for such utilities use, would be maintenance. Another example may be the replacement of an existing telecommunication line with a technologically advanced fiber optic line in the same utility corridor or easement. An example of non-maintenance would be an easement that is recorded but never utilized for the intended use, but at some future point is cleared for a similar use. Another example of non-maintenance would be clearing outside of the original recorded easement, such as when a new line is laid parallel to an existing line which causes expansion of the easement corridor.

In some cases, the maintenance corridor/easement has not been clearly defined, and staff will have to work with the project proponent to determine the intended permanent maintenance corridor/easement limits. Typically, the excluded activities associated with maintenance of power lines will include all activities in surface waters necessary to maintain or repair the utility structure for operational purposes and for maintaining the utility’s purpose, service, and/or function. Examples of maintenance activities for power lines may include removal of vegetation to prevent damage to the lines and facilitate line access and maintenance, to include mowing; removal of vegetation, replacement of poles; and access roads/entries. Staff review in these cases should be limited to potential / actual impacts in surface waters only and not upland activities.

A Quick Reference Table for linear utility projects is provided in Appendix A of this chapter to assist staff with review. While the table was developed for linear utility projects, VWPPP recently determined it could also be helpful with temporary matting measures used in other types of activities, such solar development or timbering, when such matting is in place less than six months. Also, Chapter 3, Section 3.7.3 regarding counting impacts in utility corridors and compensation under the VWP General Permit WP2.

#### 2.2.5.3 Maintenance - Dams

The Dam Safety Act (§ [10.1-604 *et seq*](https://law.lis.virginia.gov/vacode/title10.1/chapter6/section10.1-604/).) ensures that impounding structures in the Commonwealth are properly and safely constructed, maintained, and operated. Section [10.1-609.2](https://law.lis.virginia.gov/vacode/title10.1/chapter6/section10.1-609.2/) of the Code of Virginia, and regulations [4VAC50-20-160](https://law.lis.virginia.gov/admincode/title4/agency50/chapter20/section160/) and [4VAC50-20-260](https://law.lis.virginia.gov/admincode/title4/agency50/chapter20/section260/), prohibit the growth of trees and other woody vegetation: i) on the slopes and crest of embankments; ii) the emergency spillway area of a dam; and iii) within a distance of 25 feet from the toe of the embankment and abutments. It also requires the dam owner to remove any such vegetation in these areas.

Vegetation removal and grubbing activities in surface waters, including wetlands, fall under the regulatory authority of the VWP Permit Program, unless otherwise excluded. The VWP Permit Program regulation does not require a permit for maintenance of dikes or dams ([9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).5) but is silent regarding vegetation maintenance near dams or other impounding structures - although exclusion [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).12 may be considered applicable to vegetation maintenance. To maintain consistency between the VWP Permit Program regulation and the Virginia Soil and Water Conservation Board (SW Board) Impounding Structure Regulations ([4VAC50-20 *et seq*](https://law.lis.virginia.gov/admincode/title4/agency50/chapter20/).), the following paragraphs discuss the serviceable structure of a dam or impounding structure, as well as the compensatory mitigation requirements for surface water impacts where dam vegetative maintenance is performed. Compensatory mitigation described in this section applies to any impounding structure, or dam, regardless of height or capacity – see Chapter 3 for more information on compensatory mitigation.

In the interest of public safety and to encourage protection of communities downstream, VWP staff will not require a permit for permanent wetland conversion within the specified areas referenced above for vegetative maintenance of dams or emergency spillways. Prior DEQ approval is required for wetland impacts, including permanent wetland conversion beyond these specifically identified areas.

Permanent removal of vegetation beyond these specified areas may be subject to VWP permitting and compensatory mitigation when required. Areas of temporary disturbance beyond these specified areas for equipment access, staging or other similar activities should be reviewed on a case-by-case basis to determine if a permit is necessary. Generally, a VWP permit will not be required under the following scenarios:

* Temporary impacts ([9VAC25-210-10](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/)), not exceeding two acres, will be restored to pre-existing conditions, which may require grading to pre-existing contours and will require planting or seeding with appropriate wetland vegetation according to cover type (emergent, scrub/shrub, or forested). Invasive or undesirable plants and seeds identified on the most recent Department of Conservation and Recreation Virginia Invasive Plant Species List should not be used.
* A stormwater management facility originally constructed on dry land (uplands) (See [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).12).
* Vegetation maintenance cycles are timed such that permanent conversion of wetlands does not occur within the specified areas.

#### 2.2.5.4 Maintenance - Stormwater Management Structures

**Note: Statutory amendments in July 2018 excluded from VWP permitting all wetland or open water impacts to a stormwater management facility that was originally created on dry land (uplands) for the purpose of conveying, treating, or storing stormwater (see Section** [**2.**](#_Activities_in_open)**2.8). Therefore, the following text applies only to those SWM facilities that were *originally built within surface waters*.**

This section provides clarification regarding the maintenance of stormwater management (SWM) facilities originally built in surface waters. VPDES Municipal Separate Storm Sewer System (MS4) and construction stormwater general permits require regular SWM facility maintenance. In addition, most other SWM facilities will eventually require maintenance as well, independent of any regulatory maintenance mandate. This section should be considered a guide in addressing these situations. For example, growth of wetland vegetation is typically present in many of these SWM facilities, especially as they age, and the SWM facilities may need to be dredged/scraped of sediment build-up as part of routine maintenance to ensure proper stormwater retention.

The following items summarize the critical decision issues.

* **New Purpose Built SWM facilities.** New SWM facilities constructed in surface waters are subject to VWP permitting. Preparation of a maintenance plan and designation of maintenance areas are permit requirements. To the extent that proposed maintenance is conducted in accordance with this plan and any further the conditions contained within the VWP permit, no additional permit should be required for future maintenance. Of course, no permit would be required to construct new SWM facilities in uplands. The VWP permit does not need to be kept active for the life of the structure. The permittee should keep a copy of the approved maintenance plan for future use in case questions arise regarding the applicability of the maintenance exclusion.
* **Existing Purpose-Built SWM facilities (with maintenance plans).** Some SWM facilities may have been colonized by wetland vegetation because of inadequate or nonexistent maintenance. If maintenance is to occur in accordance with an existing maintenance plan, no VWP Permit is required. Activities to maintain the proper function of purpose-built stormwater management structures or other pollution treatment structures will generally qualify for the exclusion. Existing, aged structures may need to be replaced with updated versions, perhaps due to technological advances or changes in government regulatory requirements and/or standards. When the work is contained within the original surface water footprint or easement the maintenance exclusion may be applied. Review is to be limited in scope to activities proposed in surface waters, as activities within uplands may be outside of the program’s regulatory purview – with the exception of evaluating potential secondary impacts to surface waters. For example, an entity is proposing to replace a non-functioning 30-year-old dry pond, which was not subject to routine maintenance, with a storm water management facility meeting current Virginia Stormwater Management BMP design criteria. If the scope of work in surface waters is within the footprint of the original BMP, such activity(ies) would qualify for the maintenance exclusion because the purpose, character, and scope of the structure remains. If the scope of work extends beyond the footprint of the original BMP, and results in impacts to surface waters – for example, due to an increased pool elevation – then activity(ies) in the additional surface waters may require a VWP permit or coverage.
* **Existing Purpose-Built SWM facilities (with no maintenance plan) - Originally Built in Surface Waters**. The exclusion indicates that if the original design is not available, the permittee shall submit the best available information on the design for consideration and approval by DEQ (see Section 2.2.5). When the SWM facility was constructed in jurisdictional surface waters, a VWP permit *may* be required to establish a maintenance plan and designate a maintenance area, if maintenance work will involve dredging or excavating vegetated wetlands that were not part of the original design (i.e., in new locations) or part of the formal maintenance plan. If the BMP was created on dry land (uplands), surface water impacts resulting from maintenance work are excluded. Generally speaking, maintenance of an existing purpose-built facility should negate the need for a VWP permit action, particularly when considering surrounding land use, the disturbance already created by the original facility, and the risks, if any, to human health, nearby structures, and property. Once a maintenance plan has been established, maintenance activities within a designated maintenance area are typically not subject to VWP permitting. Staff should work with supervisors when making this determination.
* **Features redesignated as SWM facilities**. Surface waters that will be converted to a SWM facility may be subject to VWP permitting to redesignate the existing feature as a SWM facility, to establish a maintenance plan, and to designate maintenance areas, if maintenance work will involve dredging or excavating surface waters. This most often occurs when a historic farm pond is converted to a SWM facility. If the newly constructed SWM facility will result in open water impacts or if the project is converting an existing pond into a SWM facility, then the project may qualify for the open water exclusion found in [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).6, and as described in Section 2.2.6.

#### 2.2.5.5 Maintenance – Impoundment Dredging

Maintenance dredging of previously *permitted*, purpose-built nontidal open waters/impoundments involves projects undertaken purposely to facilitate continued designed use (recreational, flood attenuation, treatment, and storage capacity, etc.). Such maintenance dredging may exceed 5,000 cubic yards of material, provided the action is to maintain the original purpose, scope, and functionality of the impoundment/open water system.

The purpose-built impoundment’s construction and early life cycle may have pre-dated the VWP Permit Program. If so, staff issues a permit for the first dredging requested if exceeding 5,000 cubic yards, but thereafter, this exclusion may be applied to future maintenance dredging events regardless of volume.

Tidal or nontidal open water waterbodies/impoundments in which there is a risk that dredged material may be contaminated with substances that could negatively affect water quality, or otherwise cause a violation of an acute water quality standard ([9VAC25-260-140](https://law.lis.virginia.gov/admincode/title9/agency25/chapter260/section140/)), do not qualify for this exclusion unless the project has been pre-coordinated with VWP staff and testing data has been submitted to verify that the project will have a minimal effect on water quality. When there is potential for contaminated material, staff should coordinate with the Land Protection Group and Water Quality Monitoring. Typically, staff should require testing for Resource Conservation and Recovery Act (RCRA) metals; benzene, toluene, ethylbenzene, and xylene (BTEX); total petroleum hydrocarbons (TPH); and polychlorinated biphenyls (PCBs). Additional testing for Tributyltin (TBT), pesticides, and herbicides might be warranted, depending on site conditions.

### 2.2.6 Activities in Open Water with No Detrimental Effect (9VAC25-210-60.6)

Impacts to open waters do not require a VWP permit when there is no detrimental effect on public health, animal life, or aquatic life or to the uses of such waters for domestic or industrial consumption, recreation, or other uses. In some cases, staff will receive a request to verify that the proposed work qualifies for this exclusion. Staff also may be evaluating work after the fact to determine if a permit would have been required. Upon being aware of such detrimental effects, the RO should consider a compliance response.

In accordance with [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/), any person claiming one of these exclusions shall demonstrate to the satisfaction of the DEQ that he qualifies for the exclusion. Therefore, staff may request additional information as necessary to determine if an activity qualifies for exclusion. The Open Water Exclusion Checklist is a guide in the Chapter 2 Templates subfolder that may be helpful for this evaluation.

Dredging or excavating less than 5,000 cubic yards of material from nontidal open water is a general qualification for this exclusion. Some situations may allow for more than 5,000 cu. yds. Construction of docks in nontidal waters when the construction will not impede other beneficial uses will generally qualify for this exclusion. Converting an existing open water feature into a SWM facility or filling the feature may qualify for this exclusion on a case-by-case basis, provided that:

* the open water features are entirely owned by the property owner requesting to complete the work
* the conversion will not reduce downstream flow
* the open water feature is not in-line on a perennial stream channel
* there will be no wetland impacts associated with the work that are not otherwise excluded from permitting

The project specifics may indicate that the removal or subsequent placement of materials could have a detrimental effect on public health, animal life, or aquatic life or to the uses of such waters for domestic or industrial consumption, recreation, or other uses, and therefore warrant analysis prior to disposal.

Staff should evaluate the applicability of this exclusion on a case-by-case basis. When evaluating a project for detrimental effects staff should consider the following:

* Is there a TMDL for this waterbody for any parameters that might be affected by dredging?
* Will a turbidity curtain be used to minimize turbidity in adjacent waters?
* Does the open water have fringe wetlands, including seasonally emergent wetlands within mean high water? If so, these may qualify as isolated wetlands of minimal ecological value (IWOMEV).
* Where will dredged material be placed? Will there be a return flow? Return flows from hydraulic dredging should be appropriately handled to control turbidity and potentially monitored to ensure that there is no violation of [Water Quality Standards](https://law.lis.virginia.gov/admincode/title9/agency25/chapter260/) downstream. Dredged material removed from an open water with the intent of being placed into a wetland or stream does not qualify for this exclusion and is prohibited without a permit(s).
* Are there any documented threatened or endangered species or anadromous fish concerns with this waterbody? Note: *Project proponents* must coordinate with the Virginia Department of Wildlife Resources (VDWR) and the Virginia Department of Conservation and Recreation (VDCR) to determine if the project will have an adverse effect on fish or wildlife resources and comply with any recommended time-of-year restrictions.
* Is there overland return flow? Dredged material removed from an open water and then placed on uplands may require analysis to determine what, if any, [**toxic pollutants**](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/) may be present. Special design or construction of containment may also need to be included in disposal plans, such that liquids or solids are not released back into surface waters. DEQ’s Land Protection and Revitalization Program may be a source for coordination on the need for analytical testing of the dredged material to be placed on uplands to verify that the proposed project will have a minimal effect on water quality, in accordance with the applicable guidance and/or regulations.
* Does the project include a surface water withdrawal activity? VWP permit staff may coordinate with the Office of Water Supply Planning (OWSP) for further consideration. Exclusions may or may not apply for the withdrawal activity(ies).

### 2.2.7 Agriculture and Silviculture Activities (9VAC25-210-60.8, -.10, and -.11 / 9VAC25-310)

The regulations provide several exclusions for activities associated with agriculture and silviculture activities. When considering whether an activity qualifies for an agriculture and silviculture exclusion, staff must always review the regulations, guidance, and policies in addition to this section.

#### 2.2.7.1 Definitions

Staff should use the following definitions when reviewing agricultural and silvicultural activities.

"Acre-foot" ([4VAC50-20-30](https://law.lis.virginia.gov/admincode/title4/agency50/chapter20/section30/))

“Agricultural operation” ([§ 3.2-300](https://law.lis.virginia.gov/vacode/title3.2/chapter3/section3.2-300/))

“Agricultural purpose dams” ([4VAC50-20-30](https://law.lis.virginia.gov/admincode/title4/agency50/chapter20/section30/))

“Height” ([4VAC50-20-30](https://law.lis.virginia.gov/admincode/title4/agency50/chapter20/section30/))

“Impounding structure” (§ [10.1-604](https://law.lis.virginia.gov/vacode/title10.1/chapter6/section10.1-604/), § [62.1-104](https://law.lis.virginia.gov/vacode/title62.1/chapter8/), [4VAC50-20-30](https://law.lis.virginia.gov/admincode/title4/agency50/chapter20/section30/))

“Impoundment” means a structure, regardless of size or intended use, to gather and store surface water that captures the flow of, and is constructed in the channel of, a permanent or intermittent stream. (Incorporated from rescinded DEQ Guidance Memorandum 01-2012; [4VAC50-20-30](https://law.lis.virginia.gov/admincode/title4/agency50/chapter20/section30/))

“Intermittent stream” means a waterway that contains flowing water at times during a typical year when groundwater provides water for the stream flow, but does not contain water at all times, particularly during dry periods. These streams are likely to have an active aquatic community for at least part of the average year. (Incorporated from rescinded DEQ Guidance Memorandum 01-2012)

“Maximum impounding capacity” ([4VAC50-20-30](https://law.lis.virginia.gov/admincode/title4/agency50/chapter20/section30/))

“Normal agricultural activities” ([9VAC25-210-10](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/))

“Normal silvicultural activities ([9VAC25-210-10](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/))

"Open water" ([9VAC25-210-10](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/))

“Perennial stream” ([9VAC25-210-10](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/))

“Permanent flooding and impounding” ([9VAC25-210-10](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/))

“Pond” means a structure to gather and store surface water that may or may not be constructed to include the channel of ephemeral streams. A pond does not capture the flow of and does not include the channel of a permanent or intermittent stream. (Incorporated from rescinded DEQ Guidance Memorandum 01-2012)

“Production agriculture and silviculture” ([§ 3.2-300](https://law.lis.virginia.gov/vacode/title3.2/chapter3/section3.2-300/))

“Silvicultural activity” ([§ 10.1-1181.1](https://law.lis.virginia.gov/vacode/title10.1/chapter11/section10.1-1181.1/))

#### 2.2.7.2 Change in Land Use or Ownership

Should the purpose of the work in surface waters change, previously excluded normal agricultural or silvicultural activities, farm or forest roads, farm ponds or surface water withdrawal activities may be subject to VWP Permit Program regulations. A VWP permit application submitted for the new use should account for and propose compensatory mitigation for the impacts associated with the previously excluded activity.

Example: If forest roads were constructed to support silvicultural activities on a property, and the property is then converted to a residential subdivision or other use, the forest roads should be removed, and the surface waters restored. If the roads must be left in place to accomplish the new project’s purpose, the applicant should quantify those impacts as permanent and provide appropriate compensatory mitigation – there has been a change in land use.

Example: If a forested wetland site was timbered within the last five years, and subsequently there is a proposed change in use, then the site is considered to be a forested wetland for impact and compensatory mitigation purposes even in the absence of the trees.

#### 2.2.7.3 Normal Agriculture and Silviculture Activities (9VAC25-210-60.8)

The VWPP Permit regulations exclude normal agriculture and silviculture activities in surface waters such as:

* plowing, seeding
* cultivating
* minor drainage
* harvesting for the production of food, fiber, and forest products
* upland soil and water conservation practices

[9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).8 provides specific definitions of the activities listed above and has several criteria that must be met for these activities under this exclusion. Staff should always read the regulation carefully and discuss projects being considered under the exclusion with their supervisor.

This exclusion does NOT apply to:

1. Activities that do not meet the criteria listed in [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).8. Water quality improvement projects that include cattle exclusions from streams and require alternative watering sources for the cattle via water lines may impact streams and other surface waters during installation. These are deemed to be covered under this exclusion, provided that a non-excluded surface water withdrawal is not part of the project.
2. Activities which bring a new area into agricultural or silvicultural use that are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. However, activities on areas lying fallow as part of a conventional, rotational cycle are part of an established operation. Converting between silvicultural and agricultural is considered a change in use. A permit is required for impacts associated with conversion from silvicultural to agricultural activities, and vice versa.
3. Activities constituting a change in use.
4. The regulatory definitions of “normal agricultural activities” and “normal silvicultural activities” each include a caveat stating that activities which would require a permit under [33 USC § 1344](https://www.govinfo.gov/app/details/USCODE-2011-title33/USCODE-2011-title33-chap26-subchapIV-sec1344) are not considered “normal” agricultural or silvicultural activities that are excluded under the VWPP regulation. 33 USC § 1344 specifies that if the purpose of dredging or filling a water of the United States is to bring that area into a use to which it was not already subject, the activity does not constitute “normal” agriculture or silviculture.

Example: If an area of emergent wetlands not currently used for pasture or crops is filled or plowed for the purpose of turning it into pasture, the filling or plowing constitutes a change in use, and the activities are regulated under the VWP Permit Program. Similarly, if a wetland area historically used for silviculture is grubbed and turned into a solar power generation facility, the activities associated with the conversion are regulated due to the change in use.

1. Activities in “Manipulated Wetlands”: As part of their conservation planning and landowner assistance programs, the Natural Resource Conservation Service (NRCS) routinely cooperates with landowners who use wetlands for agricultural purposes. NRCS provides wetland determinations on agricultural lands and identifies wetland land uses by providing labels on the delineation map. NRCS uses the “manipulated wetland” label when wetlands are planned for alteration for agricultural purposes, but the practice does not involve soil tillage followed by subsequent crop production. When NRCS provides a label of “manipulated wetland” and there are impacts to surface waters, Virginia Water Protection (VWP) Permit staff should strive to provide permitting recommendations consistent with the USACE whenever possible. In some cases, the two regulatory programs already make unified permit determinations. In other cases, differing regulatory authority does not allow identical permitting requirements.

#### 2.2.7.4 Construction and Maintenance of Farm or Stock Impoundments (9VAC25-210-60.9 and -.10)

Effective July 1, 2008 the Virginia Code [§ 62.1-44.15:21](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A21/).H and subsequently the VWPP Permit Regulations [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).10 allows for the ***construction or maintenance*** (but not operation, including a withdrawal or diversion of surface waters) of farm or stock ponds and certain farm or stock impoundmentswithout a VWP permit. To be excluded from VWP permit requirements, a farm or stock pond or impoundment must:

* be constructed or maintained primarily for normal agricultural or silvicultural activities, ***and***
* be exempt from Virginia Dam Safety Regulations because it has
* a dam height less than 25 feet *or*
* a maximum impoundment capacity smaller than 100 acre-feet.

Figure 1. Physical characteristics of an agricultural or silvicultural impoundment excluded from VWP permitting.



In addition, [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).9 excludes discharges of dredged or fill material into wetlands for the construction and maintenance of farm or stock ponds and farm or stock impoundments that are operated for normal agricultural or silvicultural purposes and are less than 25 feet in height or create a maximum impoundment capacity smaller than 100 acre-feet, when they are addressed under a USACE Regional, General, or Nationwide permit.

***The Agricultural and Silvicultural exclusion does NOT apply to the withdrawal of surface water withdrawal.*** Water withdrawal from these surface waters is still subject to VWP requirements, unless otherwise excluded in [9VAC25-210-310](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section310/).

The USACE has a number of § 404 permitting mechanisms to provide federal authorization of these *VWP permit-excluded* impoundments. The USACE is required by Section 401 of the Clean Water Act to obtain a § 401 WQC decision by the relevant state for any federal permit action to be valid. Staff should send an NPR-Exclusion-Waiver letter in the Chapter 2 Templates subfolder to the USACE permit manager stating that DEQ’s § 401 WQC decision is to waive WQC[[1]](#footnote-2), provided that the activity ***does not include a water withdrawal component***. Projects with a water withdrawal component should be referred to DEQ’s Office of Water Supply Planning (OWSP).

#### 2.2.7.5 Maintenance of Farm Irrigation or Drainage Ditches (9VAC25-210-60.10.c and -.d)

Maintenance of farm irrigation or drainage ditches is excluded from regulation when conducted in ditches containing surface waters ([9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).10.d) – if not containing surface waters, these are presumed to be upland ditches. These activities include maintenance of irrigation ditches for agricultural operations, the maintenance of agricultural drainage ditches, and fill associated with appurtenant facilities that are functionally related to irrigation ditches. The maintenance dredging of existing agricultural ditches is included in this exclusion provided that the final dimensions of the maintained ditch do not exceed the designed cross-sectional dimensions of the original ditch. The construction of new agricultural drainage ditches is not excluded, nor is the filling of existing agricultural ditches in accordance with this section. Channelization of streams is expressly not included in this exclusion.

In order for a maintenance activity to be excluded from VWP regulation, a project proponent shall demonstrate at least one of the following: 1) the ditch is included in an existing drainage or irrigation easement, including roadway easements; 2) the ditch is included in an existing drainage or irrigation system; 3) the ditch is on an existing drainage or irrigation map; or 4) the ditch has historically been maintained for the purpose of drainage or irrigation. If the applicant cannot provide this demonstration, a VWP permit may be required to establish the ditch as a drainage or irrigation ditch. Once a ditch is established as a drainage or irrigation ditch, it shall be classified as such for all future maintenance activities. The project proponent must maintain documentation establishing the ditch as a drainage or irrigation ditch and must make this documentation available to DEQ upon request.

DEQ staff are often tasked with making a permitting determination on impacts to streams, ditches, and channelized streams. As a first step, DEQ staff should determine if a ditch or channelized stream is under federal jurisdiction, state jurisdiction, or both (See Chapter 1.5.2). Staff should consider proposals to maintain the channelized nature of these streams on a case-by-case basis. Factors to be considered include, but are not limited to:

* + Is this a new channelization?
* Has the channelized stream naturalized (developed stable pattern, dimension, and profile)?
* Will the activity alter the physical, chemical, or biological nature of the stream, or other waters?
* Will the functions and values of the stream be diminished?
* Are there rare, threatened, or endangered species (i.e., mussels) that will be affected?
* Will the activity degrade the stream beyond the level proposed by the activity (i.e., cause new/increased instability due to inappropriate pattern, dimension, and/or profile)?

If the answer to all of these questions is no, no permit is required for the proposed activity. If the answer is yes to one or more of these questions, staff should consider the type of permit and compensation required for the proposed activity, unless some other permitting exclusion applies.

New channelization of a stream is not considered maintenance and requires a VWP permit for this activity even if the stream channel is located within a drainage easement or part of drainage system.

#### 2.2.7.6 Construction/Maintenance - Farm, Forest, and Temporary Mining Roads (9VAC25-210-60.11)

**The VWP Permit regulations provide an exclusion for the construction or maintenance of** farm roads, forest roads, or temporary roads for moving mining equipment; however, [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/)**.11 provides several specific criteria to meet this exclusion. For example,** the activities must follow BMPs in both the construction and maintenance of such features. The exclusion also provides baseline provisions for BMPs that must be applied to minimize the impact and maintain downstream hydrology, including but not limited to minimizing use of invasive or undesirable plants and seeds for stabilization without prior approval from DEQ.

Note: “Temporary” roads for mining operations are roads that are present for the duration of the mining operations that the road services, which may be upwards of 50 years.

### 2.2.8 Impacts to Certain Stormwater Management Facilities on Dry Land (9VAC25-210-60.12)

During the 2018 Virginia General Assembly, House Bill 377 revised the Code of Virginia to exclude from VWP permitting “…*wetland and open water impacts to a stormwater management facility that was* ***created on dry land*** *for the purpose of conveying, treating, or storing stormwater, but other permits may be required pursuant to local, state, or federal law. The Department shall adopt guidance to ensure that projects claiming this exemption create no more than minimal ecological impact.”* Applicants shall demonstrate to the satisfaction of the DEQ that the project activities create no more than a minimal ecological impact.

Per [9VAC25-875](https://law.lis.virginia.gov/admincode/title9/agency25/chapter875/)-10 (Virginia Erosion and Stormwater Management Regulation), "Stormwater management facility" means a *control* (emphasis added) measure that controls stormwater runoff and changes the characteristics of that runoff including the quantity and quality, the period of release or the velocity of flow.

A VWP Permit is not required for discharges that might occur from one of these stormwater management facilities. Construction of associated features, such as a pipe outfall, does not qualify for this exclusion but may qualify for another VWP exclusion or a VWP waiver. While a VWP permitting exclusion may apply, note that State Water Control Board water quality standards do not allow mixing zones for effluent discharges to certain waters such as wetlands, swamps, marshes, lakes or ponds (9VAC25-260-20). The exclusion is predicated on the facility having been originally constructed on dry land (in uplands, not in surface waters), including those located in karst topography. The exclusion is also predicated on the purpose of conveying, treating, or storing stormwater; therefore, withdrawal of surface waters does not qualify for this exclusion, but may qualify for another VWP exclusion or a VWP waiver. Lastly, to ensure no more than minimal ecological impacts, the facility should not contain listed federal or state, threatened or endangered species.

### 2.2.9 Processing Applications for Exclusions

If a project proponent wishes to obtain a determination from DEQ as to whether an exclusion applies, the applicant should submit to DEQ a written request or application for the determination and evidence that the exclusion applies to their project. Applications for activities that are excluded from VWP permitting in accordance with [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/) may require review to confirm applicability. In such cases staff should provide a response, using the NPR-Exclusion-Waiver Letter template in the Chapter 2 Templates subfolder; create a “non-permit” (NP) compliance record in CEDS, using the ‘No Permit Required’ Activity Type; and upload the NPR documents to ECM under the file series 009551 (“VWP No Permit Required”). The NPR-Exclusion-Waiver-Letter should be signed by the Regional VWPP Program Manager. Informal NPR decisions are currently tracked at the regional office via spreadsheet.

## 2.3 Waivers (9VAC25-210-220)

Applications for activities that may qualify for a waiver typically require review to determine applicability and may warrant a written determination from DEQ to inform the applicant, USACE, and/or VMRC of DEQ’s tentative decision. DEQ does not public notice waiver decisions.

In some circumstances, DEQ may waive the requirement to obtain a VWP individual permit or general permit coverage for certain activities. The 15-day review timeframe for application completeness still applies for applications that may result in a waiver decision. If VWP staff become aware that the USACE plans to issue a *USACE individual permit* for the activities, coordinate the application with the Regional Director (in Central Office, the Manager of the Office of Wetlands & Stream Protection). An additional DEQ management review is required prior to providing a waiver decision in this case and may require additional time for a DEQ decision. Provide a brief project description, copied from the JPA or attachments, and the draft NPR-Exclusion-Waiver Letter for this review.

VWP staff should notify VMRC as soon as possible upon completing the initial 15-day application review when a VWP permit or general permit coverage is the more likely outcome, instead of a waiver. Use the Email template developed for notifying VMRC (see Chapter 3 Templates). Absent this notification, VMRC may deem DEQ has waived. Once all applicable DEQ management approvals are received, VWP staff should follow up by providing an NPR-Exclusion-Waiver Letter to the applicant. VMRC is a copy recipient using the NRP template.

### 2.3.1 Isolated Wetlands of Minimal Ecological Value (IWOMEV) (9VAC25-210-220.A)

Wetlands that qualify as an “isolated wetland of minimal ecological value” (IWOMEV, [9VAC25-210-10](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section10/)) are waived from VWP permitting requirements. These features are less than 0.10 acre in total size are not forested, and do not have any unique characteristics or support listed aquatic threatened or endangered species. Note: *Project proponents* must coordinate with the Virginia Department of Wildlife Resources (VDWR) and the Virginia Department of Conservation and Recreation (VDCR) to determine if the project will have an adverse effect on fish or wildlife resources.

This waiver is applied separately to each distinct wetland area that qualifies, even if within the same project site. Therefore, if the acreage of each feature is less than 0.10 acre but the cumulative acreage exceeds 0.10 acre, the waiver may be applied to each individual feature that is less than 0.10 acre. Additionally, the waiver may apply even if the qualifying feature is associated with other surface waters onsite that are subject to permitting. For example, a site where a wetland of less than 0.10 acre and a stream exists. In this case, wetlands qualifying as an IWOMEV are not identified as an authorized impact and thus are not assessed in the total compensation requirement or application fee. However, to avoid any confusion during future compliance reviews, the area should be clearly identified on the authorized impacts map as an IWOMEV and documented in any required VWP decision record.

### 2.3.2 Activities Regulated by VMRC and USACE (9VAC25-210-220.B)

Activities that *qualify* for a permit from the USACE; that are permitted by the VMRC or Local Wetlands Board *under Chapters 12 or 13* of the Tidal Wetlands Act; and that do not impact instream flows, *may* be waived from the requirement to obtain a VWP *individual* permit. See also Chapter 1.4.4 of this manual.

This waiver provision notes the ‘proposed activity’. However, a single project could have multiple activities that are regulated by the VWP Permit Program and thus, some impacts may qualify for the waiver, and some may not. For example, a proposed project impacting both nontidal and tidal surface waters would require careful consideration.

The regulation does not allow a waiver of VWP permitting requirements for qualifying surface water withdrawals or diversions, which typically impact instream flows. VMRC and USACE[[2]](#footnote-3) do not regulate the physical removal of surface water from a water body but may choose to regulate any associated discharge of dredged or fill material.

For activities typically regulated by VMRC under Chapter 12 *Submerged Lands* (§ [28.2-1200 *et seq*](https://law.lis.virginia.gov/vacode/title28.2/chapter12/).), refer to the DEQ-VMRC [Memorandum of Agreement (Amended August 16, 2023)](https://covgov.sharepoint.com/%3Ab%3A/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=bx57pw) that lays out responsibilities for DEQ and VMRC with regards to authorizing activities in or on state surface waters. For activities typically regulated by VMRC under Chapter 13 *Wetlands* (§ [28.2-1300 *et seq*](https://law.lis.virginia.gov/vacode/title28.2/chapter13/).), this waiver may be applied to proposed projects as has been done in the past.

Even if the waiver provision applies, consideration of other factors should be made, such as the presence of isolated wetlands that may not meet the definition of IWOMEV.

Another consideration is whether the activities will be viewed by the USACE or VMRC as needing a permit or verification. With recent changes to the Waters of the United States (WOTUS) rule, staff should not assume the applicant will qualify for a USACE permit and/or receive a VMRC permit, and thus, that a VWP individual permit can be waived under [9VAC25-210-220](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section220/).B. For example, is the proposed project: a) impacting a non-tidal stream bed? or b) passing over or under a non-tidal stream bed? A VWP permit or general permit coverage may be necessary in “a)” because activities in non-tidal stream beds are regulated by DEQ regardless of federal or other state jurisdictions. A VWP permit or general permit coverage may not be necessary in “b)” due to a regulatory exclusion or different waiver provision, or because the activity is simply not regulated by the VWP Permit Program.

### 2.3.3 Excluded Activities (9VAC25-210-220.C)

DEQ shall not require coverage under a VWP general permit or a VWP individual permit when the proposed activity meets the exclusion set forth in *subdivision 10 a of* [*9VAC25-210-60*](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/) regardless of the issuance of a permit by the USACE. See section 2.2.7.4.

## 2.4 USACE General Permit with 401 Water Quality Certification (9VAC25-210-130.H, -.I, and -.J)

The Virginia Water Protection Permit Program further streamlines the permitting of activities that have minimal impact by providing a § 401 WQC decision for selected [Nationwide Permits](https://www.nao.usace.army.mil/Missions/Regulatory/Nationwide-Permit-Conditions/), [Regional Permits](http://www.deq.virginia.gov/Portals/0/DEQ/Water/WetlandsStreams/401CertificationofCorps2013RPs.pdf), and other General permits at one time, via a separate DEQ process that typically repeats every five years. In order to further protect water quality, DEQ may apply additional conditions as part of its § 401 WQC decision[[3]](#footnote-4). If so, the USACE incorporates these conditions upon reissuing the Nationwide, Regional, or General permits.

The most recent Final § 401 WQC decision letters can be reviewed at: <https://www.deq.virginia.gov/laws-regulations/water>

## 2.5 Other Provisions Affecting VWP Permit Case Decisions

This section captures the “other” regulated activities that may not require a permit for various reasons.

### 2.5.1 Mining Activities

[9VAC25-690-30](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/section30/).F applies to mining activities that may otherwise qualify for a VWP WP4 General Permit. The WP4 governs permanent and temporary impacts related to the construction and maintenance of development activities and to activities directly associated with aggregate mining (e.g., sand, gravel, and crushed or broken stone); hard rock/mineral mining (e.g., metalliferous ores); and surface coal, natural gas, and coalbed methane gas mining, as authorized by the Virginia Department of Energy (Virginia Energy). Some mining activities are regulated by Virginia Energy, and when a permit from Virginia Energy includes a compensatory mitigation plan for the impacts, the Virginia Energy permit is considered as coverage under the VWP WP4. DEQ staff are encouraged to coordinate with Virginia Energy regarding such projects.

A VWP permit is not required for the open water features such as a borrow pit where a permit for the mine construction or excavation was issued. However, once the permit expires and the site is abandoned, any areas that meet the definitions of surface waters regulated by the VWPP program would be subject to the provisions of the VWP regulations. The following feature would not be considered jurisdictional under the VWP Permit Program as long as the permit for the construction or excavation is active, which is consistent with the federal implementation of delineation practices (as of October 2019):

*“Water filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.”*

*(Excerpted from:* <http://www.lrl.usace.army.mil/Missions/Regulatory/Water/Streams/Other-Waters-of-the-US/>*, list of five areas the USACE does not typically consider WOUS.)*

### 2.5.2 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Facilities

Actions conducted at facilities listed on the federally maintained CERCLA database do not require the issuance of a VWP permit, provided that the actions are conducted in accordance with state law. Permitting requirements for actions pursuant to CERCLA Sections 104, 106, 120, 121, or 122 are detailed in the Code of Federal Regulations ([40 CFR 300.400](https://www.ecfr.gov/current/title-40/chapter-I/subchapter-J/part-300/subpart-E)(e)(1)), as follows:

*“(e) Permit requirements. (1) No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122. The term on-site means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.”*

While VWP staff may receive a permit application for this type of project, the federal CERCLA action negates the need for a VWP permit, and thus, no VWP permit is required. However, CERCLA actions are required to meet federal and state “applicable or relevant and appropriate requirements” (ARARs). Staff may be asked by Land Protection Division staff to provide technical input on developing ARARs related to VWP permits, and such input will be included in the requirements for the CERCLA actions.

### 2.5.3 USACE Dredging and Aquatic Restoration Projects (DEQ Letter September 29, 2015)

**Maintenance dredging** undertaken by the USACE of an existing Federal Navigation Channel already has, or should have, a Federal Consistency Determination (FCD) concurrence from DEQ under the Coastal Zone Management Act (See Chapter 1.4.6). An approved FCD from DEQ means that a USACE dredging project is consistent with all of Enforceable Policies, including those of Virginia’s nontidal wetlands program. For these projects, no VWP permit or permit fee will be required, including reissuance of any expired VWP permit. For USACE capital dredging projects that do not have a FCD, any water quality or habitat concerns will be identified and addressed through the FCD process, and no further VWP permit or permit fee will be required. As the lead Federal agency, it is the USACE's responsibility to submit the necessary FCD information to DEQ's Office of Environmental Impact Review for review prior to undertaking the project. Other USACE dredging projects (i.e., those projects undertaken by the USACE, or where the USACE would otherwise be viewed as "an applicant" or "a permittee") will also follow this decision process. Overboard disposal of dredge materials associated with USACE dredging projects will not require a VWP permit or permit fee. DEQ's regulatory decision process does not eliminate the need, if appropriate, for other permits from the VMRC or other federal, state, or local regulations and ordinances.

**Aquatic Restoration** project undertaken by the USACE. DEQ agrees with and supports restoration of habitat to improve aquatic species, which will provide an overall benefit to water quality. While many of these types of projects do not impact State Waters, some projects do impact State Waters, albeit for a greater good. DEQ will review USACE restoration projects on a case-by-case basis to determine if a VWP permit will be required. In situations where a VWP permit is required, no permit fee will be assessed, in accordance with an agreement between DEQ and the USACE.

# APPENDIX A – QUICK REFERENCE TABLE

**Linear Utility Project Quick Reference Table**

The purpose of this table is to list common scenarios and types of surface water intersects for linear utility work, or possibly other similar activities or work, and how such are to be processed under existing VWPP regulations.

| **Project Type** | **VWPP Permit Action** | **Action Taken** | **Regulatory Basis** | **Manual Section** |
| --- | --- | --- | --- | --- |
| Projects Within Existing Utility Easements / Maintenance Corridors | Exclusion | *All actions*, including:* Maintenance and maintenance-oriented upgrades within the easement to meet today’s technological/service-oriented requirements.
* End-of-life replacement of infrastructure, to include decommission or out-of-kind replacement, provided no tree clearing occurs, and matting is used where applicable.
 | [9VAC25-210.60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/).5. Maintenance | Chapter 2, Section 2.2.5 |
| New Linear Utility Projects in New Utility Easements / Maintenance Corridors  | WP2; IP | New coverage or permit to permanently and/or temporarily impact surface waters.Permitting Notes:* *Matting in Surface Waters:*

0-6 months = no impact6-12 months = temporary12+ months = permanent* WP2 only: Permanent and temporary impacts within the 20-foot permanently maintained corridor (based on its centerline) count toward the total impacts allowed under the WP2. The sum of all permanent impacts is considered to determine the need for compensation.
* Each impact associated with the crossing of a surface water *may* be authorized as single and complete across the entirety of the linear corridor in question, provided activities meet definition of ‘independent utility’ and ‘single and complete’.
* Conversion impact compensatory mitigation ratios are 0.5:1 for PFO to PSS or PSS to PEM; or 1:1 for PFO to PEM.
* Conversion within the ROW may be considered PFO to PSS when integrated vegetation management practices are to be employed, to include:
1. No more than once every 3 years, a portion of the ROW at the edges approximately 10 ft wide may be mowed/mulched with a fecon head attachment at approximately 5-inches tall in maintained ROW or at 48 inches tall in unmaintained ROW, leaving the center of the ROW intact.
2. Hand clearing (no mechanized clearing) of large trees at or above ground level and leaving to lie in place with root mass intact.
3. Once every three years, woody tree or shrub species within the ROW that have the potential to grow more than 10 ft may be treated with selective backpack foliar herbicide application. Herbicide spray use will be in accordance with any required Annual Standard and Specifications approved by DEQ’s Stormwater Management Program.
4. Clearing the middle of maintained ROW may only occur for capital improvement projects, leaving root mats intact.
 | [9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/); [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/) | Chapter(s) 2; 3; 4; 5 |
| 45-Day Auto Coverage (WP2) | * Below reporting-only thresholds for permanent impact(s).
* Project meets all applicable conditions of the 45-day checklist.
 | [9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/) | Chapter 3, References |
| Exclusion | * Entirety or parts of proposed action meet the definition of one of the exclusions denoted in 9VAC25-210.60. Exclusions may be applicable on a singular impact basis, with corresponding effects on ultimate permit types and permitting actions.
 | [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/) | Chapter 2 |
| No Permit Required / Waiver | * Temporary matting impacts only, duration of matting use ≤ 6 months.
* IWOMEVs only.
* Section 10 Water(s) only (no wetlands).
 | [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/) | Chapter 2 |
| No Action Modifications to Existing Permit/Coverage | * Movement of temporary matting with no change in overall authorized impact quantification.
 | [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/) | Chapter 3, Appendix D |
| DEQ Notification Required; Modification of Permit/Coverage (DEQ Staff May Use Discretion and Not Modify – Temporary Impact Changes Are Automatically Approved After Ten (10) Days. | * Movement of temporary matting resulting in increase of temporary impacts to same type of surface waters, but below NOPC/Minor Mod Impact thresholds.
 | [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/) | Chapter 3, Appendix D |
| Modification of Permit/Coverage | * Movement of temporary matting resulting in an increase of temporary impacts to different surface water types, and/or above NOPC/Minor Mod Impact thresholds.
 | [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)[9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/) | Chapter(s) 7, 8 |
| Permit Compliance | Pre-construction Photographs | * May maintain pre-construction photos onsite via electronic access to digital records.
 | [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)[9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/) | Chapter 11 |
| Notification of Project Start | * Provide 10 days prior to start of construction.
* Electronic submittal with electronic signature is acceptable.
 | [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)[9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/) | Chapter 11 |
| Monthly Permittee Inspections | * May maintain monthly inspections onsite via electronic access to digital records.
* Monthly inspections required for all permitted impact areas where activities are being conducted until stabilization is achieved.
* Inspection of avoided/preserved areas until compliance resolution is achieved, if applicable, or the permit coverage is terminated.
 | [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)[9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/) | Chapter 11 |
| Biannual Construction Status Update (CSU) | * Submitted to DEQ twice per year for duration of coverage, even if construction has not started or is not active.
* Electronic submittal with electronic signature is acceptable.
* If written notification of completion of all activities is submitted to DEQ before the first CSU is due, submitting a CSU will not be required.
 | [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)[9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/) | Chapter 11 |
| Notification of Project Completion | * To be provided within 30 days of project completion.
* Electronic submittal with electronic signature is acceptable.
 | [9VAC25-210](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/)[9VAC25-670](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/) | Chapter 11 |

1. No VWP permit is being issued when this exclusion applies, thus no § 401 WQC is being granted or granted with conditions (for individual permits see § [62.1-44.15:20](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A20/).D; for general permit coverage, see [9VAC25-660-30](https://law.lis.virginia.gov/admincode/title9/agency25/chapter660/section30/).D, [9VAC25-670-30](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/section30/).E, [9VAC25-680-30](https://law.lis.virginia.gov/admincode/title9/agency25/chapter680/section30/).E, and [9VAC25-690-30](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/section30/).E). [↑](#footnote-ref-2)
2. [USACE Permitting of Water Supply Reservoirs FAQs](https://www.sas.usace.army.mil/Portals/61/docs/regulatory/reservoirs/factsheets/Reservoir_FAQs_Updated022814.pdf), USACE Savannah District (February 28, 2014). This refers to the USACE’s Section 404 permit program, although the USACE owns or manages several water supply projects in Virginia under other federal provisions. Also, the USACE does not issue Section 404 permits to itself for water supply projects; however, it still must comply with the Section 401 Water Quality Certification rule for discharges to Waters of the United States. [↑](#footnote-ref-3)
3. Section 401 of the CWA does not specifically require public notice of a state’s § 401 WQC *decision*. Provisions for requiring public notice of a § 401 WQC decision are found in state law (§ [62.1-44.15:20](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A20/), § [62.1-44.15:21](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A21/), § [62.1-44.15:22](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A22/), and § [62.1-44.15:82](https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15%3A82/)). [↑](#footnote-ref-4)