


COMMONWEALTH OF VIRGINIA

Department of Environmental Quality

Subject: Guidance Memo No. 24-2003 – **Application of the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Stormwater Management Program and Virginia Erosion and Stormwater Management Act to Agricultural Activities in Virginia**

To: Regional Directors, Central Office, Office of Stormwater Management

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Date: July 31, 2024

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Summary:

The Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Stormwater Management Program (§§ 62.1-44.15:51 through 62.1-44.15:66 of the Code of Virginia) and the Virginia Erosion and Stormwater Management Act (§§ 62.1-44.15:24 through 62.1-44.15:50 of the Code of Virginia) provide exemptions for certain land-disturbing activities specifically associated with agricultural activities. The purpose of this guidance document is to provide clarification on the application of these exemptions for owners and operators engaging in productive, bona fide agricultural activities.

Electronic Copy:

Once effective, an electronic copy of this guidance will be available on:

- The Virginia Regulatory Town Hall under the Department of Environmental Quality (<http://www.townhall.virginia.gov/L/gdocs.cfm?agencynumber=440>).
- The Department's website at www.deq.virginia.gov.

Contact Information:

Please contact DEQ's Office of Stormwater Management, at SWMguidance@deq.virginia.gov or 804-698-4000, with any questions regarding the application of this guidance.

Certification:

As required by Subsection B of [§ 2.2-4002.1](#) of the Administrative Process Act, the agency certifies that this guidance document conforms to the definition of a guidance document in [§ 2.2-4101](#) of the Code of Virginia.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate or prohibit any particular action not otherwise required or prohibited by law or regulation. If alternative proposals are made, such proposals will be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

**GUIDANCE MEMO NO. 24-2003 - APPLICATION OF THE EROSION AND
SEDIMENT CONTROL LAW FOR LOCALITIES NOT ADMINISTERING A
VIRGINIA EROSION AND STORMWATER MANAGEMENT PROGRAM AND
VIRGINIA EROSION AND STORMWATER MANAGEMENT ACT TO
AGRICULTURAL ACTIVITIES IN VIRGINIA**

A. APPLICABILITY

Guidance Memo No. 24-2003 is only applicable when the Virginia Department of Environmental Quality (DEQ) is the Virginia Stormwater Management Program (VSMP) or Virginia Erosion and Stormwater Management Program (VESMP) authority where the agricultural activity is occurring. Localities and other entities that serve as VESMP or Virginia Erosion and Sediment Control Program (VESCP) authorities may, but are not required to, adopt comparable policies or requirements in their ordinances that are based on this guidance.

B. EXEMPTIONS FOR AGRICULTURAL ACTIVITIES

The Virginia Erosion and Stormwater Management Act, at § 62.1-44.15:34 F 6 of the Code of Virginia, and the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Stormwater Management Program, at § 62.1-44.15:55 F 7 of the Code of Virginia, exempt certain agriculture activities from the requirements of each law, unless otherwise required by federal law. The exemptions for agricultural activities are identical in both laws:

§ 62.1-44.15:34 Regulated activities; submission and approval of a permit application; security for performance; exemptions.

...

F. Notwithstanding any other provisions of this article, *the following activities are not required to comply with the requirements of this article, unless otherwise required by federal law:*

...

6. Clearing of lands specifically for bona fide agricultural purposes; the management, tilling, planting, or harvesting of agricultural, horticultural, or forest crops; livestock feedlot operations; agricultural engineering operations, including construction of terraces, terrace outlets, check dams, desilting basins, dikes, ponds, ditches, strip cropping, lister furrowing, contour cultivating, contour furrowing, land drainage, and land irrigation; or as additionally set forth by the Board in regulations. However, this exception shall not apply to harvesting of forest crops unless the area on which harvesting occurs is reforested artificially or naturally in accordance with the provisions of Chapter 11 (§ 10.1-1100 et seq.) or is converted to bona fide agricultural or improved pasture use as described in subsection B of § 10.1-1163.

(Emphasis added).

C. DEFINITIONS

Relevant definitions from the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Sediment Control Program, Virginia Erosion and Stormwater Management Act, and implementing regulations are also included below with citations.

Definitions that do not have citations to the Code of Virginia or applicable regulations have been included below to provide clarification of DEQ's interpretation and application of these exemptions. They do not change the meaning of any definitions in the Code of Virginia or regulations.

“Board” means the State Water Control Board. However, when used outside the context of the promulgation of regulations, including regulations to establish general permits, pursuant to [Chapter 3.1 of Title 62.1 of the Code of Virginia], “Board” means the Department of Environmental Quality. (§ 62.1-44.3 of the Code of Virginia.)

“Construction General Permit” or “CGP” means a General VDPES Permit for Discharges of Stormwater from Construction Activities, 9VAC25-880.

“Department” [or “DEQ”] means the Department of Environmental Quality. (§ 62.1-44.3 of the Code of Virginia.)

“Erosion and sediment control plan” means a document containing material for the conservation of soil and water resources of a unit or group of units of land. It may include appropriate maps, an appropriate soil and water plan inventory and management information with needed interpretations, and a record of decisions contributing to conservation treatment. The plan shall contain all major conservation decisions to ensure that the entire unit or units of land will be so treated to achieve the conservation objectives. (9VAC25-875-20.)

“Site” means the land or water area where any facility or land-disturbing activity is physically located or conducted, including adjacent land used or preserved in connection with the facility or land-disturbing activity. Areas channelward of mean low water in tidal Virginia shall not be considered part of a site. (9VAC25-875-20.)

“Stormwater management plan” means a document containing material describing methods for complying with the requirements of a VESMP [(Virginia Erosion and Stormwater Management Plan)] or VSMP [(Virginia Stormwater Management Program)]. (9VAC25-875-20.)

“Terrace” means a combination ridge and channel constructed across the field slope to convey runoff and reduce sheet and rill erosion. Typically, the cuts and fills of soil are balanced, meaning there is no import or export of soil material necessary to construct the terrace system.

“Virginia Erosion and Sediment Control Program authority” or “VESCO authority” means a locality approved by the Board to operate a Virginia Erosion and Sediment Control Program. A locality that has chosen not to establish a Virginia Erosion and Stormwater Management Program pursuant to subdivision B 3 of § 62.1-44.15:27 is required to become a VESCO authority in accordance with this article. (§ 62.1-44.15:51 of the Code of Virginia.)

“Virginia Erosion and Stormwater Management Program authority” or “VESMP Authority” means the Board or a locality approved by the Board to operate a Virginia Erosion and Stormwater Management Program. For state agency or federal entity land-disturbing activities and land-disturbing activities subject to approved standards and specifications, the Board shall serve as the VESMP authority. (§ 62.1-44.15:24 of the Code of Virginia.)

“Virginia Stormwater Management Program authority” or “VSMP Authority” means the Board when administering a VSMP on behalf of a locality that, pursuant to subdivision B 3 of § 62.1-44.15:27, has chosen not to adopt and administer a VESMP. (§ 62.1-44.15:24 of the Code of Virginia.)

D. AGRICULTURAL ACTIVITIES

1. CLEARING OF LANDS FOR AGRICULTURAL PURPOSES AND THE MANAGEMENT, TILLING, PLANTING, OR HARVESTING OF AGRICULTURAL OR HORTICULTURAL CROPS

The Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Stormwater Management Program and Virginia Erosion and Stormwater Management Act include exemptions for “[c]learing of lands specifically for bona fide agricultural purposes; the management, tilling, planting, or harvesting of agricultural [or] horticultural ... crops” (§ 62.1-44.15:34 F 6 of the Code of Virginia and § 62.1-44.15:55 F 7).

These agriculture activities are usually temporary, as with tilling, planting, and harvesting, and vegetation is usually reestablished, minimizing runoff and sediment loss. Owners and operators who engage in agricultural activities that are not subject to regulation under the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Sediment Control Program or Virginia Erosion and Stormwater Management Act are not required to submit an erosion and sediment control and/or stormwater management plans or obtain coverage under the CGP. However, erosion and sediment control plans (or an agreement in lieu of a plan pursuant to § 62.1-44.15:51 of the Code of Virginia), stormwater management plans (or an agreement in lieu of a plan pursuant to § 62.1-44.15:24 of the Code of Virginia), and CGP coverage may be required for land-disturbing activities on farms when the activity is not otherwise specifically exempt. Land-disturbing activities that are not exempt may include, but are not limited to, some construction activities occurring on a farm or in concert with agricultural activities. Additional information on these non-exempt construction activities is provided in the subsequent sections of this document.

Local zoning ordinances are used to provide the standards and regulations of how properties can be used and developed within the jurisdiction. Zoning designations can be changed through a formal request to the local government. **The determination of allowing an exemption for agricultural activities is based on the proposed or current activity, not the underlying zoning of the land.**

2. ENGINEERING OPERATIONS

Engineering operations required to support the management, tilling, planting, or harvesting of agricultural and horticultural crops, such as the construction of terraces, terrace outlets, check dams, desilting basins, dikes, ponds, ditches, strip cropping, lister furrowing, contour cultivating, contour furrowing, land drainage, and land irrigation, are exempt from the Erosion and Sediment

Control Law for Localities Not Administering a Virginia Erosion and Sediment Control Program and Virginia Erosion and Stormwater Management Act.

a. Terraces, Terrace Outlets

Terraces generally involve the construction of a ridge and channel across a slope which is experiencing water erosion problems, with the intent of reducing erosion, trapping sediment, and managing sheet and rill erosion in fields. Runoff is intercepted and diverted to a stable outlet (terrace outlet). The use of terraces is applicable where the soils and topography are such that they can be constructed and reasonably farmed, a suitable outlet can be provided, and where one or more of the following conditions exist: soil erosion caused by water and excessive slope length is a problem; excess runoff is a problem; and/or there is a need to conserve water.¹ The terrace cross section should be proportioned to fit the land slope, the crop grown, and the farm machinery used, avoiding cross sections that will result in the disturbance of the soil in the spacing between terraces.² In general, terraces and terrace outlets should be designed per the National Resources Conservation Services (NRCS) National Engineering Handbook (Title 210), Part 650, Chapter 8 “Terraces.” Typically, the cuts and fills of soil are balanced, meaning there is no import or export of soil material necessary to construct the terrace system.

The regrading, reshaping, and leveling of a land surface to remove surface irregularities is classified by the NRCS as precision land forming and smoothing, not terracing. Land forming and smoothing is not included within the exemption and may be subject to the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Sediment Control Program and Virginia Erosion and Stormwater Management Act.

b. Ponds

The reference to ponds applies to ponds used for agricultural activities such as irrigating crops, watering livestock, and aquaculture. Construction or modification of ponds not used for specific agricultural activities and land-disturbing activities that are not part of the pond, such as construction or modification of a building, are not within the exemption, and may require an erosion and sediment control plan, stormwater management plan, and/or CGP coverage.

Although land-disturbing activities associated with the construction and maintenance of ponds used for agricultural activities may be exempt from stormwater and erosion and sediment control requirements, ponds that are constructed and used for an “aquaculture project” or a “concentrated aquatic animal production facility,” as those terms are defined in the Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation,

¹ National Resources Conservation Services, Virginia. Conservation Practice Standard. Terrace (600-CPS-1). December 2020.

² National Resources Conservation Services. Part 650 Engineering Field Handbook, National Engineering Handbook (Title 210), 2nd Edition. Chapter 8 Terraces. Issued February 2021.

9VAC25-31-10, may be subject to VPDES permit requirements.³ Coverage under a Virginia Water Protection Permit may also be required.⁴

Additionally, any unpermitted filling of wetlands and streams from sediment released from land-disturbing activities associated with agricultural activities that are not otherwise regulated under the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Sediment Control Program or Virginia Erosion and Stormwater Management Act, and attendant regulations, may be subject to enforcement actions and penalties under the Virginia Water Protection Permit Program (§§ 62.1-44.15:20 et seq. of the Code of Virginia).

3. OTHER LAND-DISTURBING AND CONSTRUCTION ACTIVITIES OCCURRING ON A FARM

a. Filling and Grading

The exemptions for agricultural and horticultural activity in the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Stormwater Management Program and Virginia Erosion and Stormwater Management Act do not include the addition of fill; **thus, fill activities are generally not exempt.** In a very limited scope of applicability, grading and the placement of fill to construct an agricultural engineering practice as listed in § 62.1-44.15:55 F 7 and § 62.1-44-15:34 F 6 of the Code of Virginia (i.e., construction of terraces, terrace outlets, check dams, desilting basins, dikes, ponds, ditches, strip cropping, lister furrowing, contour cultivating, contour furrowing, land drainage, and land irrigation) may be within the scope of the exemption, but both need to be evaluated on a case-by-case basis. Where filling and/or grading are exempt, the fact that fill comes from a permitted land-disturbing activity, including activity covered by a General VPDES Permit for Discharges of Stormwater from Construction Activities (CGP, 9VAC25-880), does not mean that the site where the fill is being used to construct the agricultural engineering practice is also required to obtain CGP coverage.

Filling and grading activities that are not exempt and exceed the local government's land disturbance threshold for erosion and sediment control (10,000 square feet or 2,500 square feet in a Chesapeake Bay Preservation Area (CBPA)) are generally regulated and require an erosion and sediment control plan. Additionally, filling and grading activities that are not exempt under the Virginia Erosion and Stormwater Management Act (see § 62.1-44.15:34 F 6 of the Code of Virginia which specifies "[c]learing of lands specifically for bona fide agricultural purposes...") and are equal to or greater than one (1) acre, or greater than 2,500 square feet in a CBPA, generally require a stormwater management plan and CGP coverage.

³ See 9VAC25-31-100, Application for a permit; 9VAC25-31-140, Concentrated aquatic animal production facilities; and 9VAC25-31-150, Aquaculture projects.

⁴ See § 62.1-44.15:20 et seq. of the Code of Virginia and 9VAC25-210-50, Prohibitions and requirements for VWP permits.

The filling of any surface waters (including wetlands and streams) may also be subject to enforcement actions and penalties under the Virginia Water Protection Permit Program (§§ 62.1-44.15:20 et seq. of the Code of Virginia).

b. Topsoil and Subsoil

Topsoil and subsoil that is stripped from a permitted land-disturbing activity (e.g., a construction site) and will be transported to a local farm for use is not an exempt agricultural or horticultural activity. The topsoil and/or subsoil is originating from a regulated land-disturbing activity; therefore, the stockpile would be considered an offsite support activity, and will require an erosion and sediment control plan, stormwater management plan, and/or CGP coverage (9VAC25-880-30 C). The operator would be responsible for this stockpile until it was permanently stabilized or is sent to another permitted activity.

4. CLEARING OF LANDS FOR IMPROVED PASTURE USE

The clearing of land to establish pasture use as described in subsection B of § 10.1-1163 of the Code of Virginia is considered an exempt activity under § 62.1-44.15:55 and § 62.1-44.15:34 of the Code of Virginia. However, § 10.1-1163 of Chapter 11 of the Code of Virginia, Forest Resources and the Virginia Department of Forestry (VDOF), requires evidence of intent of bona fide agricultural or improved pasture within twelve months from the date of completion of commercial cutting. This may be demonstrated by the following:

- a. The land intended for such use be cleared of all trees, snags, brush, tree tops, and debris by piling and burning, or otherwise disposing of same; or
- b. The area shall be enclosed with a well-constructed fence and planting grass seed thereon so as to make a bona fide improved pasture.

The improved pastures exemption in § 10.1-1163 of the Code of Virginia does not specify the type of livestock or pasture; and does not identify improved pasture as a subcategory of agriculture, but rather addresses it as a separate activity. To verify the intent of the land-disturbing activity, DEQ, when serving as the VESMP or VSMP authority, may require additional documentation demonstrating that the required improvements can be installed within the twelve-month timeframe. If the land-disturbing activities do not meet the requirements outlined above, DEQ will not classify the land-disturbing activity as exempt.

Land-disturbing activities associated with the construction of fences to define a property line or parcel line, or to confine livestock to a pasture, paddock, or lot, are within the exemption.

5. RECREATIONAL FIELDS

Land-disturbing activities related to the construction of recreational fields are not exempt from the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Stormwater Management Program and the Virginia Erosion and Stormwater Management Act pursuant to the exemptions for agricultural, horticultural, and forest crop activities. While the intent of grading, planting, and maintaining baseball, soccer, rugby, lacrosse, polo, and other playing fields is to produce a durable turf cover crop, the end use of the facility does not lead to the production of a food, fiber, or other agricultural product. The end use of these fields is recreational, not agricultural in nature, so land-disturbing activities associated with their

construction are subject to regulation under the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Stormwater Management program and Virginia Erosion and Stormwater Management Act.

6. ROADS

Any road constructed with the specific purpose of facilitating exempt agricultural activities is included within the exemption. These may include farm facility access roads for farm equipment; parking and/or storage areas for farm equipment; roads necessary to access farm fields for the tilling, planting, and harvesting of crops; and those roads necessary for moving, feeding, and/or hauling livestock within the farm property. Any roadway constructed to serve other purposes, such as a house or building, is not included within the exemption, except for any roadway constructed that may also serve the housing needed for the farm owner, manager, and workers in addition to being necessary to access farm fields or facilities as referenced above.

For any existing roadway 1) that was initially constructed to facilitate agricultural activities; 2) that was subject to the exemptions in the Erosion and Sediment Control Law for Localities Not Administering a Virginia Erosion and Stormwater Management Program and/or Virginia Erosion and Stormwater Management Act; and 3) will be used subsequently by a regulated activity: stormwater management considerations for any road improvements, such as enlarging or resurfacing, should be incorporated into the stormwater management plan design for the land-disturbing activity that is subject to regulation (i.e., the pre enlargement and/or existing road surface and associated cleared shoulders and graded areas are considered an existing condition). In accordance with 9VAC25-875-510, stormwater management requirements apply to the entire land disturbing activity. This includes common plans of development where separate and distinct construction activities may be taking place at different times.

7. AGRICULTURAL STEWARDSHIP ACT

Under Chapter 4, Agricultural Stewardship, of Title 3.2 of the Code of Virginia, §§ 3.2-400 et seq., the Virginia Department of Agriculture and Consumer Services (VDACS) is responsible for investigating complaints of pollution coming from agricultural activities (§ 3.2-402.C of the Code of Virginia). The Agricultural Stewardship Act defines “agricultural activity” as “any activity used in the production of food and fiber, including farming, feedlots, grazing livestock, poultry raising, dairy farming, and aquaculture activities” (§ 3.2-400 of the Code of Virginia). VDACS’ first step in addressing an Agricultural Stewardship Act investigation is to determine if the Agricultural Stewardship Act has jurisdiction; if not, the complaint is dismissed (See the Agricultural Stewardship Act Guidelines, effective November 10, 2022). If the complaint is investigated and evidence is found that indicates pollution will be or is generated by the activity, the owner will be notified and have up to 60 days to submit an agricultural stewardship plan (§ 3.2-402.C of the Code of Virginia). The Agricultural Stewardship Act does not apply to any agricultural activity to which a water-related permit issued by DEQ applies; therefore, these activities are not under VDACS jurisdiction for purposes of the Agricultural Stewardship Act (§ 3.2-401 of the Code of Virginia).

E. EFFECTIVE DATE

This guidance document shall have a delayed effective date of 45 days after the conclusion of the 30-day public comment period that starts after publication in the Virginia Register of Regulations as required by subsection B of § 2.2-4002.1 of the Code of Virginia.