

## 2 NO PERMIT REQUIRED, INCLUDING WAIVERS AND EXCLUSIONS

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## 2.3 INTRODUCTION

Certain regulated activities identified in 9VAC25-210-50 (§ 62.1-44.15:21 of the Code of Virginia) are not required to obtain a permit under the Virginia Water Protection (VWP) Permit Program. The activity may be excluded from permitting in accordance with 9VAC25-210-60; may qualify for a permit waiver in accordance with 9VAC25-210-220; or may be already covered by another state or federal permit in accordance with 9VAC25-210-130 H through J or 9VAC25-690-30 F. The action or decision by DEQ to not require a VWP permit for a certain activity is commonly referred to as “No Permit Required” or “NPR.”

## 2.4 EXCLUSIONS

Activities excluded from VWP permitting requirements are summarized below. Staff should carefully read [9VAC25-210-60](#) and this chapter when evaluating the applicability of an exclusion. In accordance with 9VAC25-210-60, upon request by the board, any person claiming one of these exclusions shall demonstrate to the satisfaction of the board that he qualifies for the exclusion. Therefore, staff may request additional information as necessary to determine if an activity qualifies for exclusion.

### 2.4.1 USACE PERMITS THAT DO NOT REQUIRE 401 CERTIFICATION ([9VAC25-210-60](#) 1)

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

### 2.4.2 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 excluded from the requirement to obtain a VWP Permit to prevent confusion between programs and duplicative regulatory processes between programs.

- Discharges permitted by a: Virginia Pollution Discharge Elimination System (VPDES) permit or Virginia Pollution Abatement (VPA) permit. [9VAC25-210-60](#) 2
- Discharges of stormwater from land-disturbing activities authorized under the Virginia Stormwater Management Program (VSMP) or Erosion and Sediment Control (E&SC) Program. [9VAC25-210-60](#) 2
- 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. [9VAC25-210-60](#) 7.

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](#). 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 a 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.

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#### 2.4.3 CERTAIN VIRGINIA MARINE RESOURCES (9VAC25-210-60 3 AND VA CODE § 62.1-44.15:21 G)

Activities governed under Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia by the VMRC or Local Wetlands Board do not require a VWP permit pursuant to 9VAC25-210-60 3 and Va. Code § 62.1-44.15:21 G, unless state certification is required by § 401 of the Clean Water Act. Chapter 13 is limited to the regulation of tidal wetlands. The Wetlands Guidelines 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. This exclusion means that activities in tidal wetlands that might otherwise require a VWP permit, but that will receive a permit from VMRC or a local wetlands board may not need a VWP Permit. The only instance in which a VWP permit would be required in a tidal wetland and an applicant has obtained a Chapter 13 permit, is when the U.S. Army Corps of Engineers also issues a Section 404 permit, which requires state §401 certification to be valid. In most instances, however, a Corps permit for these types of impacts will either be a Section 10 permit, or will be a Nationwide or Regional Permit for which DEQ has already provided §401 certification (See Chapter 1.3).

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#### 2.4.4 NORMAL RESIDENTIAL GARDENING AND LANDSCAPING (9VAC25-210-60 4)

Under VA Code §62.1-44.15:21 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, we mean minor, secondary or accidental impacts that are related to living in the residence. For 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 is not incidental and will result in the conversion of a wetland to an upland or different wetland type.
- 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.

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#### 2.4.5 MAINTENANCE OF CURRENTLY SERVICEABLE STRUCTURES (9VAC25-210-60 5)

Maintenance of currently serviceable structures, such as purpose-built stormwater and utility structures (including existing powerlines), 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.
- In order to qualify for this exclusion, emergency reconstruction shall occur as soon as practicable after damage occurs.
- 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 the board.
- For powerlines, activities within the permanent maintenance corridor that are associated with repair and maintenance are excluded from the need for permitting. In some cases the maintenance corridor has not been clearly defined and staff will have to work with the responsible party to determine the intended permanent maintenance corridor. Typically, the excluded activities associated with maintenance of powerlines will be limited to removal of vegetation to prevent damage to the lines, including mowing; removal of vegetation to access the lines, including mowing; in-kind replacement of poles; and temporary access roads/entries in order to conduct the maintenance. Activities associated with upgrading the lines, stock piling materials in wetlands, side-casting materials into wetlands, and/or constructing permanent access roads are not considered to be excluded activities.

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#### 2.4.5.1 MAINTENANCE OF DAMS

The Virginia Dam Safety Act, Va. Code [§ 10.1-609.2](#) prohibits the growth of trees and other woody vegetation on the slopes and crest of embankments and the emergency spillway area of a dam, and within a distance of 25 feet from the toe of the embankment and abutments and requires the dam owner to remove any such vegetation in these areas. This area is referred to as the “Required Vegetative Maintenance Area (RVMA)”.

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 5) but is silent regarding vegetation maintenance near dams or other impounding structures (although exclusion 9VAC25-210-60 12 may be considered applicable to vegetation maintenance). To maintain consistency between VWP Permit Program regulations and the Virginia Soil and Water Conservation Board (SW Board) Impounding Structure Regulations, 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.

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 RVMA for vegetative maintenance of dams. VWP staff should consider the RVMA as part of the serviceable structure of a dam and therefore should exclude the dam and RVMA from VWP requirements under 9VAC25- 210-60. Prior DEQ approval is required for wetland impacts, including permanent wetland conversion beyond the RVMA. In addition, permit writers should ensure that the RVMA for *new* dams is included as a permanent impact or conversion impact area within the authorization for that new structure.

Areas of temporary disturbance beyond the RVMA 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 permit will not be required under the following scenarios:

- The impacts will be temporary. The area will be restored to its pre-existing condition. Achieving pre-existing conditions may require seeding and/or grading to pre-existing contours. Planting or seeding

with appropriate wetland vegetation according to cover type (emergent, scrub/shrub, or forested) will be required.

AND

- The temporary impacts will not exceed 2 acres.

A permit should be required in the following situations, unless the structure is a stormwater management facility that was originally constructed on dry land (uplands) (See 9VAC25-210-60 12):

- The work beyond the RVMA causes permanent impact to wetlands, including the permanent conversion of a forested wetland to a scrub-shrub wetland or a scrub-shrub wetland to an emergent wetland. Although vegetation may be allowed to regrow between maintenance cycles, permit writers should consider the amount of time between maintenance cycles relative to the vegetation type of the original wetland. For example, if the wetland in question is scrub-shrub, and the maintenance cycle is 5-7 years, it is reasonable to assume that the wetland will revert to scrub-shrub cover prior to the next maintenance date, and the impact is temporary. If however, the original wetland is forested, the same 5-7 year maintenance cycle is not likely enough time to allow the wetland to revert back to its original forested state prior to being mowed again. In this case, the wetland will remain permanently converted to scrub-shrub;

OR

- The temporary impacts exceed two acres.

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#### 2.4.5.2 MAINTENANCE OF 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 Sections 2.4.6 and 2.4.8). Therefore, the following text applies only to those SWM facilities that were originally built within surface waters.**

This section provides clarification regarding 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)** Conducting maintenance activities in accordance with the maintenance plan does not require VWP Permitting. 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.
- **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 the board. 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. If the BMP was created on dry land (uplands), surface water impacts resulting from maintenance work are excluded. Once a maintenance plan has been established, maintenance activities within a designated maintenance area are not subject to VWP permitting. Maintenance activities outside of a designated maintenance area is subject to VWP Program review and possible permitting, unless the activities qualify for a different exclusion. Staff should work with supervisors when making this determination.
- **Features redesignated as SWM facilities.** Surface waters that will be converted to a SWM facility are 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 6, and as described in Section 2.4.6 below.

#### 2.4.6 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 and in other cases, staff may be evaluating work after the fact to determine if a permit was required.

Staff should evaluate the applicability of this exclusion on a case by case basis. In accordance with 9VAC25-210-60, upon request by the board, any person claiming one of these exclusions shall demonstrate to the satisfaction of the board that he qualifies for the exclusion. Therefore, staff may request additional information as necessary to determine if an activity qualifies for exclusion.

Dredging less than 5,000 cubic yards in non-tidal open water will generally qualify for this exclusion unless there is a specific aspect of the project that indicates the dredging would 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. 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 would be considered separately from the open water for permitting decisions.
- 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](#) downstream
- Are there any threatened or endangered species or anadromous fish concerns with this waterbody? If yes, the project proponent must coordinate with DGIF and DCR to ensure that the project will not have an

adverse effect on fish or wildlife resources. This includes complying with recommended time of year restrictions that to protect fisheries or spawning?

Tidal or non-tidal waterbodies in which there 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](#), 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 RCRA metals, BTEX, TPH and PCBs. Additional testing for TBT, pesticides and herbicides might be warranted, depending on site conditions.

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 is 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 (staff should evaluate historical aerial imagery or other resources on a case-by-case basis to ensure that emergent vegetation is not present during the growing season.)

Any request for coverage under this exclusion received by a Regional Office that relates to any surface water withdrawal should be forwarded to OWS for processing. Examples of these projects include:

- Dredging around an intake structure
- Dredging in any impoundment that is or has an existing water withdrawal associated with a water withdrawal (i.e., golf course ponds, reservoirs) or dredging for the purpose of creating or expanding an impoundment for a water withdrawal.

If an activity occurs under the exclusion, the activity is only excluded if the dredging or other activity within open waters causes a detrimental effect on public health, animal life or to the uses of such waters for domestic or industrial consumption, recreation, or other uses, the activity does not qualify for the exclusion. Upon being aware of such detrimental effects, the RO should consider a compliance response.

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## 2.4.7 AGRICULTURAL AND SILVICULTURE ACTIVITIES (9VAC25-60 8, -10, AND -11; AND 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.

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### 2.4.7.1 DEFINITIONS

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

**"Acre-foot"** means a unit of volume equal to 43,560 cubic feet or 325,853 gallons (equivalent to one foot of depth over one acre of area). (4VAC50-20-30)



**“Agricultural operation”** means any operation devoted to the bona fide production of crops, or animals, or fowl, including but not limited to the production of fruits and vegetables of all kinds; meat, dairy, and poultry products; nuts, tobacco, nursery and floral products; and the production and harvest of products from silviculture activity ([§ 3.2-300](#)).

**“Agricultural purpose dams”** means impounding structures which are less than 25 feet in height or which create a maximum impoundment smaller than 100 acre-feet and operated primarily for agricultural purposes (4VAC50-20-30).

**“Height”** means the hydraulic height of an impounding structure. If the impounding structure spans a stream or watercourse, height means the vertical distance from the natural bed of the stream or watercourse measured at the downstream toe of the impounding structure to the top of the impounding structure. If the impounding structure does not span a stream or watercourse, height means the vertical distance from the lowest elevation of the downstream limit of the barrier to the top of the impounding structure (4VAC50-20-30).

**“Impoundment”** means a structure, regardless of its 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 (GM #01-2012).

**“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 (GM01-2012).

**“Maximum impounding capacity”** means the volume of water or other materials in acre-feet that is capable of being impounded at the top of the impounding structure (4VAC50-20-30).

**“Normal agricultural activities”** means those activities defined as an agricultural operation in [§ 3.2-300](#) of the Virginia Code and any activity that is conducted as part of or in furtherance of such agricultural operation but shall not include any activity for which a permit would have been required as of January 1, 1997 under [33 USC §1344](#) or any regulations promulgated pursuant thereto (9VAC25-210-10).

**“Normal silvicultural activities”** means any silvicultural activity as defined in [§10.1-1181.1](#) of the Code of Virginia, and any activity that is conducted as part of or in furtherance of such silvicultural activity but shall not include any activity for which a permit would have been required as of January 1, 1997 under [33 USC §1344](#) or any regulations promulgated pursuant thereto (9VAC25-210-10).

**“Perennial stream”** means a well-defined channel that contains water year round during a year of normal rainfall. Generally, the water table is located above the stream bed for most of the year and groundwater is the primary source for stream flow. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water. (9VAC25-210-10)

**“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 (GM #01-2012).

**“Production agriculture and silviculture”** means the bona fide production or harvesting of agricultural or silvicultural products but shall not include the processing of agricultural or silvicultural products or the above ground application or storage of sewage sludge ([§ 3.2-300](#)). The definition of agricultural production under the FSA does not include certain forms of agriculture that are considered production by the Commonwealth of Virginia.

**Silvicultural activity:** means any forest management activity, including but not limited to the harvesting of timber, the construction of roads and trails for forest management purposes, and the preparation of property for reforestation (§ 10.1-1181.1).

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#### 2.4.7.2 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 regulations. A VWP permit application submitted for the new use should account for and propose mitigation for the impacts associated with the previously excluded activity. For 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 and provide appropriate compensatory mitigation.

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#### 2.4.7.3 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 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 8.
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 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. For example, if an area of emergent wetlands not currently used for pasture or crops is filled or ploughed for the purposes of turning it into pasture, the filling or ploughing 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.

5. 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

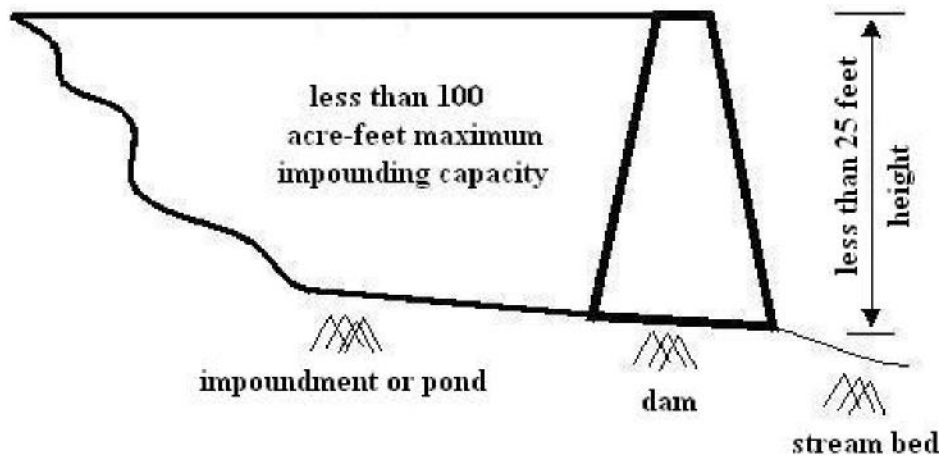
planned for alteration for agricultural purposes but the practice does not involve soil tillage followed by subsequent crop production. When NRCS provides a label of “manipulated wetland” and there are impacts to surface waters, Virginia Water Protection Permit (VWPP) staff should strive to provide permitting recommendations consistent with the Corps 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. Guidance Memorandum No. 10-2005 details the ten specific practices allowed in a “manipulated wetland” under the Food, Conservation, and Energy Act of 2008 (FSA) and discusses appropriate permitting considerations for each practice.

The Corps and NRCS provided input to GM No. 10-2005 and staff should review the full GM when applicable situations arise.

#### 2.4.7.4 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 H and subsequently the VWPP Permit Regulations 9VAC25-210-60 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 impoundments without 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 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 exempt excluded from VWP regulations.**

In addition, 9VAC25-210-60 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 U.S. Army Corps of Engineers Regional, General, or Nationwide Permit.

#### 2.4.7.4.1 WATER WITHDRAWAL

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**The Agricultural and Silvicultural exclusion does NOT apply to the surface water withdrawal activities.** Water withdrawal from these surface waters is still subject to VWP requirements. Any water withdrawal proposal must still be evaluated for water withdrawal impacts, and a determination must be made as to whether any of the water withdrawal activities are excluded under 9VAC25-210-310 apply. See section 9VAC25-210-310 for surface water withdrawal activities that are excluded.

Staff should defer to any discussion or evaluation of the project's water withdrawal permitting requirements to DEQ's Office of Water Supply.

#### 2.4.7.4.2 USACE PERMITS ON EXCLUDED IMPOUNDMENTS

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The U.S. Army Corps of Engineers (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 certification or a 401 waiver by the relevant state for any federal permit action to be valid. Staff should send a letter to the USACE permit manager stating that DEQ's §401 certification is waived<sup>1</sup>, provided that the activity **does not include a water withdrawal component**. Projects with a water withdrawal component should be referred to OWS.

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#### 2.4.7.5 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 10 d). 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 that the ditch is included in an existing drainage or irrigation easement, an existing drainage or irrigation system, on an existing drainage or irrigation map, or that 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.

#### 2.4.7.5.1 STREAMS, DITCHES, AND CHANNELIZED STREAMS

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DEQ staff is 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 jurisdictional (See Chapter 1.4.2.1). The proponent of a proposed maintenance activity within a jurisdictional channelized stream or ditch containing a stream

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<sup>1</sup> No VWP permit is being issued when this exclusion applies, thus no §401 certification is being issued (for individual permits see § 62.1-44.15:20 D; for general permit coverage, see 9VAC25-xxx-30 E).

must document that the stream is included in an existing drainage easement, an existing drainage system or map, or that the stream has historically been channelized for this secondary purpose. 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?
- Will the functions and values of the stream be diminished?
- Will the activity alter the physical, chemical, or biological nature of other waters?
- 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.

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

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#### 2.4.7.6 CONSTRUCTION OR MAINTENANCE OF FARM ROADS, FOREST ROADS, OR TEMPORARY ROADS FOR MINING (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 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 qualify for the exclusion to minimize the impact and maintain downstream hydrology. Staff must read this section of the regulation carefully.

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.

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#### 2.4.8 IMPACTS TO CERTAIN STORMWATER MANAGEMENT FACILITIES BUILT ON DRY LAND (9VAC25-60 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."

Per 9VAC25-870-10 (Virginia Stormwater Management Program), "Stormwater management facility" means a control measure that controls stormwater runoff and changes the characteristics of that runoff including, but not limited to, the quantity and quality, the period of release or the velocity of flow.

A VWP Permit is not required for activities that might occur within a stormwater management facility that was originally constructed outside of surface waters. Upon request by the board, applicants shall demonstrate to the satisfaction of the board that the project activities create no more than a minimal ecological impact. The exclusion is predicated on the facility having been originally constructed on dry land (uplands), including those located in

karst topography. The exclusion is also predicated on the purpose of conveying, treating, or storing stormwater; therefore, in order to qualify for this exclusion, the basin should not be used for the withdrawal of surface water. Lastly, to ensure no more than minimal ecological impacts, the facility should not contain listed federal or state threatened or endangered species.

#### 2.4.9 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 may require review to confirm applicability, and therefore may warrant a written determination from DEQ to inform the applicant of the Agency's concurrence. Staff should provide a response in such cases and follow the documentation and file retention for NPRs. NPR actions are not tracked in CEDS. The NPR-Exclusion-Waiver-Letter in Chapter 2 of this manual provides a template for written determinations. This should be signed by the Regional VWPP Program Manager.

### 2.5 WAIVERS (9VAC25-210-220)

In some circumstances, DEQ may waive the requirement to obtain a VWP permit or §401 Certification for activities that otherwise would require a VWP permit.

Applications for activities that may qualify for a waiver typically require review to determine applicability, as these types of actions tend to be a result of decisions made on a case-by-case basis. Therefore, waivers warrant a written determination from DEQ to inform the applicant of the Agency's decision to waive the requirement to obtain a VWP permit and, if necessary, to provide §401 certification of the USACE permit. If the need for a permit is being waived because the impact is to an IWOMEV, then §401 certification is not required because an IWOMEV would not be a jurisdictional feature under the CWA and presumably not authorized under a federal §404 permit.

The most common situation where a VWP permit may be waived is when both the USACE and VMRC assert their jurisdiction over the project. Review the project to identify whether the activities will be permitted by both the USACE and VMRC and any environmental concerns that would not be adequately addressed by either of the other permits. The 15-day timeframe for application completeness reviews applies to applications that may result in a waiver.

The template NPR-Exclusion-Waiver Letter provides the suggested wording.

#### 2.5.1 ISOLATED WETLANDS OF MINIMAL ECOLOGICAL VALUE (IWOMEV) (9VAC25-210-220 A)

Wetlands that qualify as an "isolated wetland of minimal ecological value" (IWOMEV) 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 threatened or endangered species. Refer to 9VAC25-210-220 A and the definition under 9VAC25-210-10 for the specific requirements for a wetland to be considered an IWOMEV. The 0.10 acre limit applies to the total size of the isolated wetland. It is not limited to the impact area, nor is it limited to the size of the wetland within the project boundary.

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 is applied to each individual feature. Additionally, the waiver applies even if the qualifying feature is associated with a project that is subject to permitting to authorize impacts to other surface waters onsite. 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 future confusion during compliance

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reviews, the area should be clearly identified on the authorized impacts map as an IWOMEV and also in the permit fact sheet.

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## 2.5.2 ACTIVITIES REGULATED BY VMRC AND USACE (9VAC25-210-220 B)

Activities that qualify for authorization from the USACE and the VMRC or Local Wetlands Board under chapters 12 or 13 of the Tidal Wetlands Act (see Chapter 1.3.3), and do not impact instream flows, may be waived from the requirement to obtain a VWP permit. This provision allows DEQ to reduce duplication of permitting. The regulation does not allow a waiver of VWP permitting requirements for surface water withdrawals (which impact instream flows) as VMRC and USACE do not regulate the withdrawal of surface water. Note also that this exclusion does not require that *all* impacts within a project are regulated by the USACE and VMRC, only that both entities are authorizing the overall project. If a significant aspect of a project under DEQ authority is not being reviewed by these other agencies, for instance a large acreage of isolated wetlands, that fact should be evaluated accordingly when making a decision regarding the appropriateness of waiving the VWP permit.

Note that the regulation does not indicate that VMRC and the Corps must have issued their authorizations prior to DEQ waiving the VWP permit requirement for a project. DEQ staff must use best professional judgment to make a determination if these projects will likely qualify for authorizations from these agencies. Language in the waiver template letter indicates that if the Corps and/or VMRC do not issue a permit for the activity, the waiver is not valid and the applicant must obtain a separate authorization from DEQ.

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## 2.5.3 EXCLUDED ACTIVITIES (9VAC25-210-220 C)

The board 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* regardless of the issuance of a permit by the U.S. Army Corps of Engineers.

See section 2.4.7 above.

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## 2.6 USACE GENERAL PERMIT WITH 401 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 §401 Water Quality Certification for selected Nationwide Permits and Regional 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 Certification<sup>2</sup>. If so, the Corps incorporates these conditions upon reissuing the Nationwide and Regional permits.

The most recent Final 401 Certification Letters can be reviewed at: <https://www.deq.virginia.gov/Programs/Water/WetlandsStreams/Regulations.aspx>.

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### 2.6.1.1 NO PERMIT REQUIRED PROCEDURES

Figure 2 below provides the process responding to applications for coverage under NWP or RPs. JPAs requesting coverage under a NWP should be marked as “PCN” on the top of the JPA form, unless it is a project occurring in the Tidewater area because that JPA form does not have the check box. VMRC will generally screen out any JPA’s

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<sup>2</sup> Section 401 of the CWA does not specifically require public notice of a state’s certification *decision*. The basis for requiring public notice of a §401 Water Quality Certification is found in state law (§ 62.1-44.15:20, § 62.1-44.15:22, and § 62.1-44.15:82).

marked PCN, but some might slip through to DEQ. The template NPR-Exclusion-Waiver-Letter provides language staff should use when a written response to a JPA is warranted or otherwise requested by an applicant.

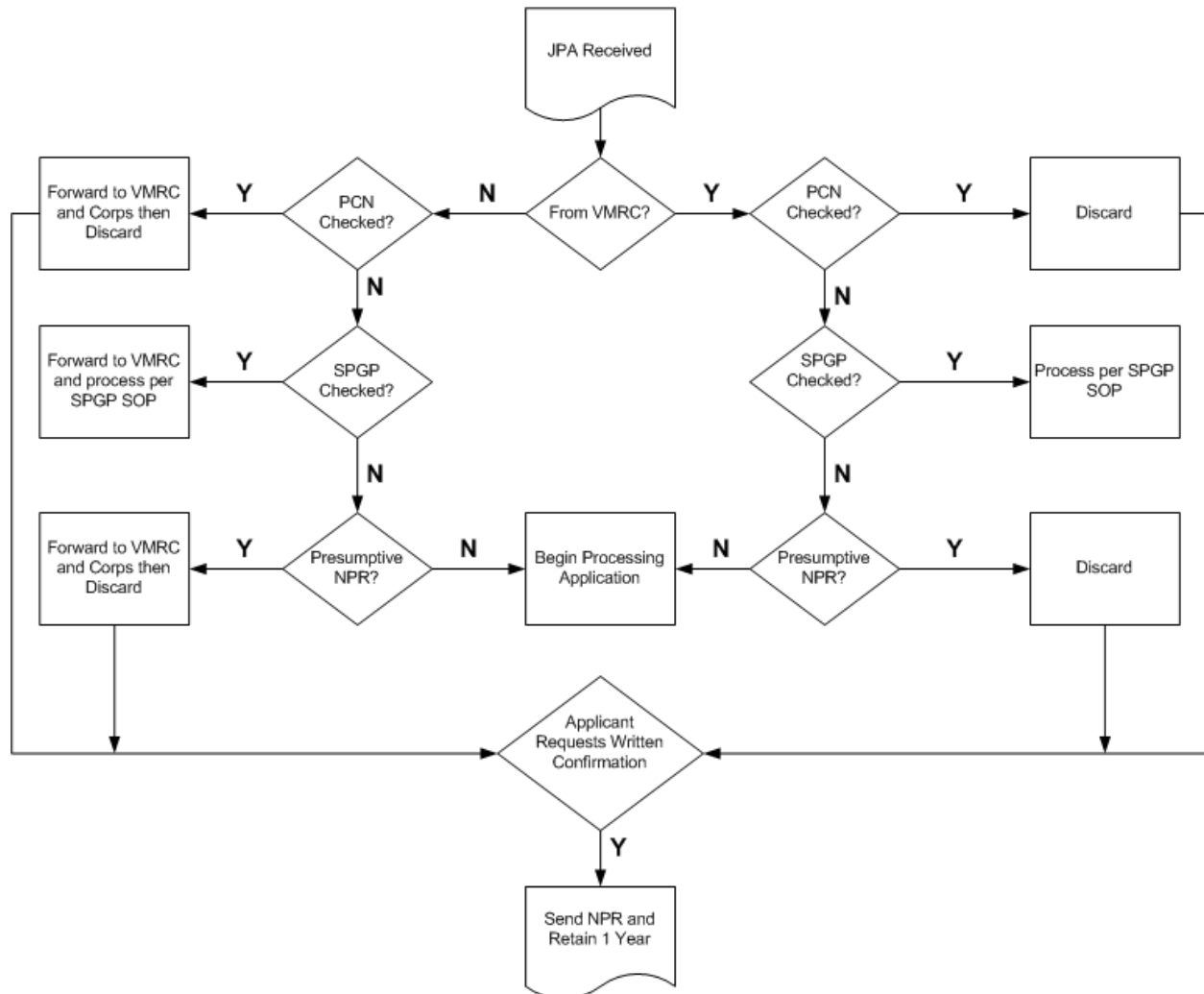


Figure 2. PCN-No Permit Required Flow Chart.

## 2.7 OTHER PROVISIONS AFFECTING VWP PERMIT CASE DECISIONS

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

### 2.7.1 MINING ACTIVITIES

9VAC25-690-30 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 Mines, Minerals and Energy. Some mining activities are regulated by the Department of Mines Minerals and Energy (DMME), and when a permit from the DMME includes a mitigation plan



for the impacts, the DMME permit is considered as coverage under the VWP WP4. DEQ staff is encouraged to coordinate with the DMME regarding such projects.

A VWP permit is not required to the open water features such as a barrow pit where a permit for the mine construction or excavation was issued. However, once the permit expires and the site is abandoned, then 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 VWPP program as long as the permit for the construction or excavation is active, which is consistent with the federal implementation of delineation practices (as they stand at the time of this manual revision, May 2017):

*“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 Corps does not typically consider WOUS.)*

### 2.7.2 COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) FACILITIES **40 CFR 300.400(e)(1)**

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(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.

### 2.7.3 USACE DREDGING AND AQUATIC RESTORATION PROJECTS **USACE, STATED IN DEQ'S LETTER DATED SEPTEMBER 29, 2015**

**Maintenance dredging** undertaken by the Corps 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 1.3.5). An approved FCD from DEQ means that a Corps 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 Corps 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 Corps' responsibility to submit the necessary FCD information to DEQ's Office of Environmental Impact Review for review prior to undertaking the project. Other Corps dredging projects (i.e., those projects undertaken by the Corps, or where the Corps would otherwise be viewed as "an applicant" or "a permittee") will also follow this decision process. Overboard disposal of dredge materials associated with Corps 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 Virginia Marine Resources Commission (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 Corps 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 Corps.

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#### 2.7.4 OTHER DREDGING ACTIVITIES [PENDING]