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

### 1.1 Program Structure (Central and Regional Responsibilities)

Virginia Water Protection (VWP) Permit Program staff are located in the DEQ Central Office and in six regional offices: Northern, Piedmont, Southwest, Tidewater, Blue Ridge, and Valley. A map of regional office locations and jurisdictions is available at: <http://www.deq.virginia.gov/regions/homepage.html>. The regional offices process and manage VWP permits for most types of projects within their regional boundaries, and provide technical support to DEQ Enforcement staff, while Central Office staff maintains

the VWP permit regulations and provides program guidance. In addition, Virginia Department of Transportation (VDOT) projects are processed and managed out of the Central Office VWP staff, and surface water withdrawal projects are processed by staff of the Office of Water Supply in Central Office. Central Office VWP staff also directly coordinates with the U.S. Army Corps of Engineers (USACE or Corps) and the U.S. Environmental Protection Agency (EPA) on regulatory, procedural, technical, and administrative aspects of the wetlands program due to the statewide applicability. Regional office staff should attempt to coordinate project-specific issues with the applicable federal agency staff, but when issues of wetland policy or regulatory interpretations are involved, staff must consult with the Regional VWP Permit Program Manager. The Regional VWP Permit Program Manager will then coordinate with the Central Office VWP Permit Program Manager who will contact the appropriate federal agency, Virginia Office of the Attorney General, or other pertinent DEQ management as appropriate.

## 1.2 VWP Permit Program History

### 1.2.1 1974 to 2001 – Clean Water Act Sections 404 and 401

The Clean Water Act (CWA) is the basis for federal regulation of discharges of pollutants into Waters of the United States and water quality standards. The Federal Water Pollution Control Act (FWPC Act), enacted in 1948, formed the basis of the CWA, but the FWPC Act was significantly reorganized and expanded in 1972. Following the 1972 amendments, "Clean Water Act" became the FWPC Act's common name. Section 404 of the CWA establishes a program to regulate the discharge of dredged and fill material into waters of the United States, including wetlands. Section 401 of the CWA requires that an applicant for a federal § 404 permit obtain a certification from the state that the authorized discharge will not violate water quality standards.

In Virginia, the administration of the § 401 Water Quality Certification program was delegated to the State Water Control Board (SWCB) in June of 1970. In 1989, the General Assembly passed a law creating the Virginia Water Protection (VWP) Permit Program, which converted the § 401 Water Quality Certificate issued by the Board into a state VWP Permit, and added the provision that the Board must set minimum instream flow limits within a permit, where required, in order to protect instream beneficial uses. The first VWP Permit Regulation was adopted by the SWCB in 1992, and remained in effect until 2001.

### 1.2.2 Tulloch and Wilson Decisions

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

Following the issuance of the Tulloch Rule, the American Mining Congress sued the EPA, claiming that regulation of such fallback exceeded the scope of authority granted by the Clean Water Act. In 1997, the District Court agreed<sup>1</sup>, and in 1998, the U.S. Court of Appeals for the District of Columbia upheld the

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<sup>1</sup> American Mining Congress v. U.S. Army Corps of Engineers, 951 F.Supp. 267 (D.D.C. 1997)

District Court's decision<sup>2</sup>. As a result, the Corps could no longer regulate excavation and resultant drainage of wetlands anywhere in the United States. Between the date of the ruling and May 1999, as many as 10,000 acres were reportedly drained in coastal areas of North Carolina, and in Virginia over 2,000 acres were impacted<sup>3</sup>.

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

### 1.2.3 2001 Virginia Nontidal Wetlands Act

In response to growing concern regarding the lack of federal regulation of excavation in wetlands and any activities in isolated wetlands, the 2000 General Assembly amended § 62.1-44.15 *et seq.* of the Code of Virginia (relating to wetlands) to establish and implement policies and programs to further protect and enhance Virginia's wetland resources. With passage of the Virginia Nontidal Wetlands Act, the General Assembly removed the dependence of the VWP Permit Program on the issuance of a §404 permit by the Corps, thus enabling DEQ regulate all state waters, regardless of the jurisdiction established in the Clean Water Act or the Rivers and Harbors Act (RHA), and creating a non-tidal wetlands program independent of §401 Certification. The independence of the state VWPP program was further upheld by the 4<sup>th</sup> Circuit Court of Appeals in 2003 in *Treacy v. Newdunn*.

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

In October 2001, new VWPP program regulations became fully effective, broadly defining the type of activities that were regulated, expanding the program to all surface waters within the Commonwealth, and creating four general permits for varying activities impacting such surface waters.

### 1.2.4 Post-2001

On November 1, 2002, the first State Programmatic General Permit (SPGP) was granted to the Commonwealth of Virginia by the Norfolk District of the Corps for the discharge of dredged and/or fill material in nontidal wetlands and waters of the United States associated with residential, commercial, and institutional developments and linear transportation projects within the Commonwealth. At that time, the Norfolk District suspended Corps Nationwide Permits 14 and 39 in Virginia, where they applied to nontidal waters and overlapped the coverage provided by the SPGP. The SPGP was modified and

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<sup>2</sup> National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399 (D.C.Cir.1998)

<sup>3</sup> [Hershner, Carl M. Tulloch Ditching. Wetlands Program Technical Report, No 99-4. May 1999.](#)

reissued in 2007, 2012, and 2017. Currently, the SPGP applies to development projects with impacts up to 1 acre of nontidal wetlands or waters and 2,000 linear feet of stream channel, and linear transportation projects with impacts up to 1/2 acre of nontidal wetlands or waters and 1,000 linear feet of stream channel at any single impact site. The Norfolk District suspended Nationwide Permits 14, 39 (2002) and a portion of 29 (2012) in Virginia, where they apply to nontidal waters and overlap with the SPGP.

From 2001 to 2016, the main program regulation and general permit regulations were modified several times: in 2003, 2005, 2006, and 2008. Most of the modifications were minor, and, aside from the surface water withdrawal requirements, the essential elements of the VWPP program regulation did not change significantly until they were again revised in August 2016. Since 2016, VWPP program regulations have been revised to capture statutory amendments regarding certain natural gas pipelines and stormwater management facilities (2018) and compensatory mitigation options (2019).

### 1.3 Regulatory Environment

Several different federal, state and local agencies have regulatory interests in waters and wetlands. Although jurisdictional extent is different in each case, some overlap does occur.

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

Section 10 of the Rivers and Harbors Act of 1899, requires authorization from the Secretary of the Army, acting through the Corps, for the construction of any structure in or over any navigable water of the United States. The law applies to any dredging or disposal of dredged materials, excavation, filling, re-channelization, structure in, or any other modification of a water of the United States that is actually, or could feasibly be, navigable. Each Corps district maintains a list of waters subject to the Rivers and Harbors Act.

[http://www.nao.usace.army.mil/Portals/31/docs/regulatory/guidance/section\\_10\\_determinations.pdf](http://www.nao.usace.army.mil/Portals/31/docs/regulatory/guidance/section_10_determinations.pdf)

Section 404 of the Clean Water Act regulates the discharge of dredged and fill material into waters of the United States, including wetlands. EPA has delegated administration of the § 404 permit program to the Regulatory Branch of the U.S. Army Corps of Engineers. EPA has retained oversight and enforcement authority over all activities by § 404 within waters of the U.S. To be valid, all § 404 permits must be accompanied by state § 401 Water Quality Certification, which in Virginia comes in the form of a VWP permit, but may also be a stand-alone document.

The geographical extent of “waters of the U.S.” has expanded and contracted over time, in relation to various court decisions such as *Riverside Bayview* (1985)<sup>4</sup>, *SWANCC* (2003)<sup>5</sup> and *Rapanos* (2008)<sup>6</sup>.

The [Baltimore](#) and the [Norfolk](#) Districts of the Corps of Engineers administer the § 404 and Section 10 programs within Virginia, and [EPA Region III](#) staff oversee the Corps’ administration of the § 404 program.

Figure 1.1: Corps of Engineers Regulatory Jurisdiction. From “Regulatory Permitting Program Pamphlet”  
<http://www.nao.usace.army.mil>

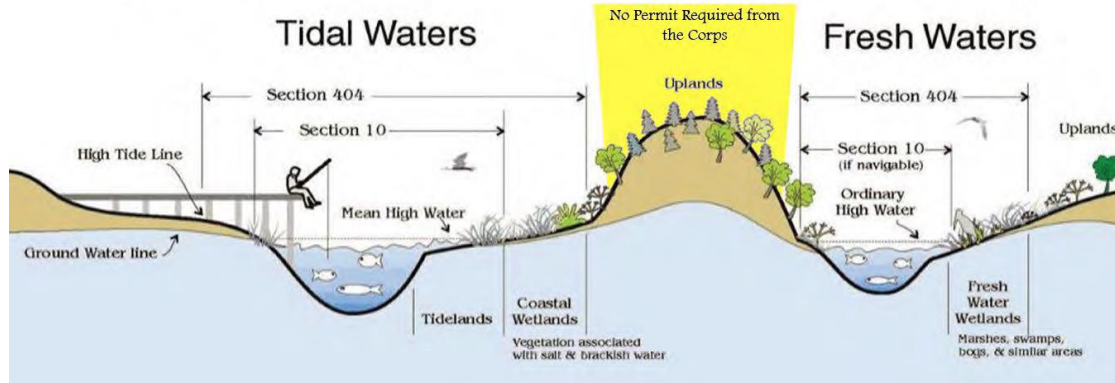
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<sup>4</sup> [United States v. Riverside Bayview Homes, 474 U.S. 121 \(1985\)](#)

<sup>5</sup> *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)

<sup>6</sup> *Rapanos v. United States*, 547 U.S. 715 (2006)

# CORPS OF ENGINEERS REGULATORY JURISDICTION



## 1.3.2 Nationwide and Regional Permits

Because of the large number and wide range of activities that occur within Waters of the U.S., the CWA allows the Corps to develop a set of general permits that allow a more simplified, streamlined permitting process for activities that are considered to have minimal impacts. Some of these permits may be used for activities regulated under Sections 9 or 10 of the RHA, as well. If a project meets the eligibility criteria and conditions within the general permit, the activity can typically be authorized by the Corps under one of these general permits within 45 days of application and without further sister agency or public comment. These general permits are developed by the Corps every five years, both on a nationwide and a district-specific basis, hence the names "[Nationwide Permits](#)" and "[Regional Permits](#)". The Norfolk District has also added district-specific conditions to the nationwide permit authorizations it issues.

In order to further streamline these permits, DEQ has issued blanket §401 Water Quality Certification for activities that qualify for some (but not all) [Nationwide Permits](#) and [Regional Permits](#). In order to further protect water quality, DEQ has also included certain conditions as part of its §401 Certification for these projects. The Corps provides a copy of these DEQ conditions to applicants within the permit authorization package. Projects that are granted coverage under one of these Nationwide Permits and that comply with any conditions of the agency's certification letter do not need any further authorization from the VWP Permit Program (See Chapter 2).

## 1.3.3 VWP Permit Program

State Water Control Law provides the State Water Control Board, and by extension DEQ, authority over all State Waters, which are defined as "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands". The VWP Permit program specifically regulates alterations to surface waters, which include "all state waters that are not groundwater" (9VAC25-210-10), including wetlands, streams and open water. Unlike the activities regulated under Section 404 of the CWA, the VWPP program does not need to demonstrate a connection or nexus to interstate commerce in order to exert jurisdiction over surface waters.

VWP permits function as independent state permits and as § 401 Water Quality Certificates. The VWPP Regulation (9VAC25-210 *et seq.*) provides detailed conditions and requirements for implementation of the VWPP program. Although DEQ has jurisdiction over tidal and nontidal waters and wetlands, VMRC is typically the lead state agency for projects occurring in tidal areas.

As stated above, the definition of “state waters” includes waters “partially within” or “bordering the Commonwealth”. Accordingly, activities originating in Virginia that impact the Potomac River and that are covered by VWPP program require a VWP permit. Therefore, Virginia users who seek to withdraw water from the Potomac River or who seek to construct an improvement appurtenant to the Virginia shoreline are required to obtain a VWP permit.

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

The Tidal Wetlands Act of 1972 (Title 28.2 of the Code of Virginia) gives the VMRC the responsibility for issuing permits for the use or development of state-owned tidal and non-tidal submerged and subaqueous bottom lands under Chapter 12, and tidal wetlands under Chapter 13. Chapter 14 requires permits for disturbance on coastal primary sand dunes and beaches.

Under Chapter 12, the Commission requires permits for impacts within perennial streams (tidal and nontidal) with a drainage area of at least 5 square miles or with a mean annual instream flow of 5 cubic feet per second, unless the landowner can demonstrate, through an unbroken chain of title, that the riparian land was acquired by a King’s grant prior to July 4, 1776.<sup>7</sup> Activities within waterways with characteristics below these drainage area or flow threshold attributes do not require authorization from VMRC. The Commission has also determined that the extent of its jurisdiction within non-tidal waterways extends no further landward than the ordinary high water mark. “Ordinary high water mark” on non-tidal rivers is generally the line on the shore established by the fluctuations of water and indicated by the physical characteristics such as a clear, natural line impressed on the bank, or shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding area. It is interesting to note that overhead crossings of these waterways with no direct impact impacts are considered a “use or development” and require authorization from VMRC under this chapter.

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

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

#### 1.3.5 Natural Resources Conservation Service

The Natural Resource Conservation Service (NRCS) implements the Food, Conservation, and Energy Act of 2008 (FSA), also known as the 2008 Farm Bill, by cooperating with landowners to facilitate conservation practices. NRCS identifies wetlands on program participants’ land and labels the wetland delineation map to identify the current or planned land use and associated acreage for each wetland area. Some wetland labels used by NRCS include, “wetlands” (W), “manipulated wetlands” (WX), and “artificial wetland” (AW). If the “manipulated wetland” label is given, a manipulated wetland plan developed with NRCS assistance is required by the FSA that will document the following:

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<sup>7</sup> See [http://www.virginiariversdefensefund.org/wp-content/uploads/2011/07/VMRC\\_kings\\_grant\\_criteria.pdf](http://www.virginiariversdefensefund.org/wp-content/uploads/2011/07/VMRC_kings_grant_criteria.pdf) for more information.

1. Record that prior to granting a “manipulated wetland” label, the participant demonstrated that alternatives were considered to avoid manipulation of the wetland, but were not possible;
2. Documentation of alternatives reviewed/considered to avoid/minimize adverse wetland impacts;
3. Map or diagram of the planned practices in relation to the wetland;
4. Present condition of the wetland or conditions prior to manipulation if a manipulation has already taken place;
5. Planned alterations to the wetland or existing alterations considered manipulation;
6. Planned use of the “manipulated wetland”;
7. Scheduled start dated of manipulation or date manipulation took place;
8. Scheduled completion date of manipulation;
9. Planned cover for the area, including species, seedling rates, and planting instructions;
10. Boundary post markers;
11. Allowable maintenance; and
12. Appropriate Federal, State, and local permits.

If the manipulated wetland is allowed to re-vegetate based on the manipulated wetland plan, then the landowner remains in compliance with the FSA. If the site is not allowed to re-vegetate or the plan is not followed, and it becomes capable of crop production (e.g. stumps eventually rot) then it becomes a converted wetland making the landowner ineligible for NRCS monies. When the wetland is considered converted by the NRCS, it falls under VWPP and the Corps regulations.

#### 1.3.6 Coastal Zone Management Program

The Virginia CZM Program is a networked program established in 1986 through an [Executive Order](#), which consists of several agencies administering the enforceable policies protecting land or water use or natural resources within [Virginia’s Coastal Zone](#). Pursuant to the [Coastal Zone Management Act \(CZMA\) of 1972](#), actions taken by federal agencies (including the issuance of permits) that consist of or authorize activities reasonably likely to affect natural resources within the Coastal Zone must be consistent with the enforceable policies of the Virginia CZM Program.

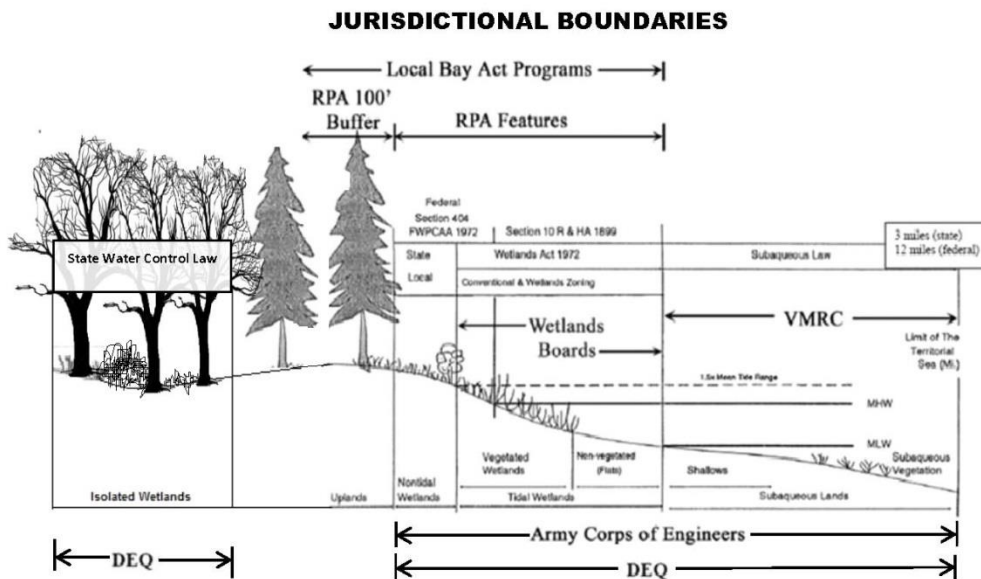
In order to ensure consistency with the Virginia CZM program, in addition to obtaining a DEQ VWP permit, an applicant requesting a Corps individual permit for activities within [Virginia’s Coastal Zone](#) must obtain CZMA federal consistency concurrence from the DEQ Office of Environmental Impact Review. A Corps individual permit may not be granted until the required certification has been obtained by the applicant and provided to the Corps. (The Corps obtains CZMA concurrence for Nationwide and Regional Permits when they are issued every 5 years; no additional action is required by an applicant for these types of permits.)

#### 1.3.7 Chesapeake Bay Preservation Act Program

The [Chesapeake Bay Preservation Act](#) (Bay Act) was enacted by the Virginia General Assembly in 1988 as a critical element of Virginia's non-point source management program. Each locality in Virginia’s Coastal Zone must adopt a program based on the Bay Act and the [Chesapeake Bay Preservation Area Designation & Management Regulations](#). The Bay Act and regulations recognize local government responsibility for land use decisions and are designed to establish a framework for compliance without dictating precisely what local programs must look like.

Under the Bay Act, there are two types of environmentally sensitive lands: Resource Protection Areas (RPAs) and Resource Management Areas (RMAs). RPAs protect and benefit water quality, and generally consist of: tidal wetlands and shores; nontidal wetlands connected and contiguous to tidal wetlands or water bodies with perennial flow; other lands as identified by the local government as necessary to protect the quality of state waters; and a 100 foot wide buffer adjacent to all each of these areas and along both sides of any waterbody with perennial flow. An RMA has the potential to damage water quality without proper management. RMAs generally consist of: floodplains; highly erodible soils, including steep slopes; highly permeable soils; nontidal wetlands not included in the Resource Protection Area; and other lands as identified by the local government as necessary to protect the quality of state waters. By carefully managing land uses within these areas, local governments help reduce the water quality impacts of nonpoint source pollution and improve the health of the Chesapeake Bay.

Figure 1.2: General jurisdictional boundaries of each agency. From <http://www.suffolkva.us/pcd/wetlands/jurisdictional-boundaries/>



### 1.3.8 Other Laws

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

#### 1.3.8.1 Administrative Process Act

The Administrative Process Act (APA) (§ 2.2-4000 *et seq.* of the Code of Virginia) sets forth the procedures that all regulatory agencies must follow during the promulgation of regulations and when making case decisions. The APA specifically addresses public participation during public comment periods, public hearings and Board meetings. In addition it sets forth procedures for agencies to make case decisions, which are determinations by an agency whether to issue or deny a permit, or that a person is in violation of a law, regulation or permit. The APA also sets qualifications for hearing officers and procedures for judicial review of regulations and case decisions.



### 1.3.8.2 Freedom of Information Act

The Freedom of Information Act is also integral to the daily business of DEQ. The FOIA sets procedures and timelines for DEQ to respond to information or records requests. Any verbal or written request for records in DEQ's possession should be treated as a FOIA request and handled pursuant to DEQ's [FOIA Policy](#). For more information on what constitutes a record, see Part IV of DEQ Agency Policy Statement No. 6-2014 at <http://www.deq.virginia.gov/Portals/0/DEQ/ConnectwithDEQ/FreedomofInformationAct/DEQFOIAPolicy.pdf>.

## 1.4 Regulated Areas

### 1.4.1 Surface Water Boundaries

In order to determine the surface water boundaries on a given site, and extent of jurisdiction over those surface waters, a delineation must first be performed. The regulation requires that *wetland* boundaries will be determined using a wetland delineation conducted in accordance with the Corps' 1987 Wetland Delineation Manual and any regional supplements approved for use by the Corps. Two [regional supplements](#) are currently in use in Virginia: the Atlantic and Gulf Coastal Plain Supplement, generally used east of Interstate 95, and the Eastern Mountains and Piedmont Supplement, generally used west of Interstate 95. The wetland delineation manual and supplements are methods to determine wetland boundaries and are not used to identify stream channels or other surface waters. Delineations for other surface waters (streams, open water, etc.) are to be conducted in accordance with applicable DEQ/Corps guidance or policy. Note that wetland delineations provide only the *geographic* extent of wetlands on the site; the *jurisdictional* extent will depend on each agency's independent statutory and regulatory authority, policies and guidance.

### 1.4.2 Jurisdictional Boundaries

As stated above, under the VWPP program, DEQ specifically regulates alterations to surface waters, which include "all state waters that are not groundwater", including wetlands, streams and open water (9VAC25-210 *et seq.*).

Jurisdictional Determinations (JDs) are written determinations of the boundaries of an agency's jurisdiction under its respective regulatory program. For permitting purposes, the DEQ utilizes the wetland boundaries confirmed in a Corps' JD. Stream channels and other water features are often, but not always, identified on the wetland delineation maps and included in the USACE's jurisdictional determinations. When possible DEQ uses the Corps' JD as representative of the extent of surface waters that are jurisdictional for VWP permitting purposes; however, in some instances, jurisdictional surface waters under the VWPP Program are different from jurisdictional waters under the CWA or Sections 9 or 10 of the Rivers and Harbors Act (for example, isolated wetlands).

**Nothing in the law, regulation or guidance precludes DEQ from independently performing its own delineations, confirmations of surface water boundaries or jurisdictional determinations.** If a situation arises in which DEQ's interests are best served by conducting an independent jurisdictional determination, staff should coordinate with their regional program manager. This most often occurs during investigations of potential non-compliance.

#### 1.4.2.1 Ditches

Based on the regulation, the following guidelines should be applied when determining whether a ditch containing wetlands and/or open water is jurisdictional under the VWPP Program. Note that these guidelines apply only to whether the ditches are jurisdictional. Staff should also compare the nature of the activity proposed to the exclusions found in the regulation (See Chapter 2).

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

The VWP regulation makes a distinction between ditches and channelized streams. In many parts of the state, streams have been channelized and used as stormwater conveyances (i.e., streams located along roads that serve as roadside ditches and streams that serve as drainages in certain low-lying localities). These streams may colloquially be called 'ditches' even though they are actually part of the stream

network. Streams that have been channelized, relocated, or incorporated into a ditch, wholly or in part, are still considered streams and are regulated as streams. (In other words, when a stream is relocated in whole or in part into a ditch, that ditch is regulated as a stream).

#### *1.4.2.2 Identifying Impacts*

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

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

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

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

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

1. Will mechanized equipment enter surface waters? (Will a dam be breached by working only in uplands?)
2. Will the area continue to meet the three wetland parameters? Will the overall Cowardin class change?

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

If the answer to any of these questions is yes, the activity may be considered a regulated impact under the VWP Permit program. However, permit writers should also review 9VAC25-210-60 and Chapter 2 of this manual to determine if an activity may be excluded by its nature.

## 1.5 Impact Authorization

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

### 1.5.1 No Permit Required

Certain activities or impacts to surface waters are regulated, but excluded from the requirement for a VWP permit by the regulation (9VAC25-210-60). General categories of excluded activities are listed below, and further details and guidance may be found in Chapter 2:

1. Discharges of stormwater authorized by MS4 or VSMP construction stormwater permits;
2. Discharges of effluent authorized by another form of VPDES or VPA permit;
3. Activities in tidal wetlands that are governed by VMRC under Chapter 13 of the Tidal Wetlands Act, unless §401 certification is required.
4. Activities in tidal wetlands permitted by a Section 10 Permit from the Corps, which does not require 401 certification;
5. Normal residential gardening and lawn and landscape maintenance in a wetland, or other similar activity;
6. Maintenance;
7. Minor open water impacts;
8. Temporary sediment basins or traps during construction;
9. Normal, ongoing agricultural or silvicultural activities;
10. Construction or maintenance of farm ponds or impoundments, stock ponds or impoundments, or irrigation ditches, or the maintenance drainage ditches; and/or
11. Construction or maintenance of farm roads, forest roads, or temporary mining roads.

The regulation provides detailed requirements for each exclusion, which should be carefully reviewed by the permit writer. In addition, the regulation states that upon request by DEQ, a person claiming an exclusion must demonstrate to the satisfaction of the board that he qualifies for the exclusion.

### 1.5.2 Waivers

Under certain circumstances, 9VAC25-210-220 allows DEQ the option of waiving the requirement for a VWP permit as outlined in Chapter 2. Waivers are available (but are not required) when an activity is 1)

authorized by a permit from the U.S. Army Corps of Engineers and a permit from VMRC or local wetlands board pursuant to Chapter 12 (§ 28.2-1200 et seq.) or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia, and DEQ staff determines that a VWP permit does not provide additional needed benefit to water quality or surface water resources, or 2) affects an isolated wetland of minimal ecological value (as defined by 9VAC25-210-10).

Note that the regulation allows DEQ the option of waiving the requirement for a VWP Permit under these circumstances, but DEQ is not prohibited from requiring a permit. The decision of whether or not to waive the permit requirement is in the sole discretion of the agency and is based on factors such as water quality concerns, impacts to surface waters of significance, staffing resources, etc. Chapter 2 describes waivers in more detail.

### 1.5.3 General Permits

The VWPP regulation provides four general permits for use by applicants for minor impacts to non-tidal surface waters:

1. WP1 for Impacts to wetlands or open water of less 0.5 acre and 300 linear feet of stream channel.
2. WP2 for Facilities and Activities of Utility and Public Service Companies Regulated by the Federal Energy Commission or the State Corporation Commission and Other Utility Line Activities.
3. WP3 for Linear Transportation Projects.
4. WP4 for Impacts from Development and Certain Mining Activities.

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

When a project will *permanently* impact less than or equal to 0.10 acre of wetland or open water and/or less than or equal to 300 linear feet of stream channel, neither compensatory mitigation nor a permit application fee is required. Thus, the authorization issued is commonly known as “Reporting Only” general permit coverage. In such situations, the conditions applicable to compensatory mitigation *only*, located in Section 100 Part II of each general permit regulation, would not apply.

### 1.5.4 Individual Permits

VWP individual permits are typically required when a proposed, regulated activity cannot be authorized under a VWP general permit regulation (see Chapter 5 and 9VAC25-210-130 B). Projects requiring a VWP individual permit may include:

1. proposed *nontidal* impacts that are greater than VWP general permit use thresholds;
2. activities within surface waters that cannot be authorized by one or more of the VWP general permits;
3. complex threatened or endangered species issues that cannot be overcome using project-specific conditions added to the coverage letter;

4. projects for which there are significant water quality, aquatic environment, or in-stream flow concerns that require the addition of special, project-specific conditions to ensure that the project will not have more than minimal impacts; and/or
5. impacts to tidal waters.

The VWP individual permit conditions are customized within each permit to address the specific impacts of the project. Refer to the VWP Permit Program Regulation 9VAC25-210 *et seq.* and Chapter 5 of this manual for detailed information concerning VWP individual permits.