

**COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
WATER DIVISION**

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**Subject:** Water Guidance Memo No. 08-2012  
Farm Pond or Impoundment and Stock Pond or Impoundment Exemption from  
Virginia Water Protection Program Requirements

**To:** Regional Directors

**From:** Ellen Gilinsky, Ph.D., Director 

**Date:** October 1, 2008

**Copies:** James Golden, Rick Weeks, Regional VWP Managers, Regional Water Permit  
Managers, VWPP Staff, Enforcement Staff/Division

**Summary:**

This guidance provides Virginia Water Protection (VWP) Permit Program staff with information on a 2008 Virginia General Assembly action that changed the Code of Virginia (see §62.1-44.15:21 H) to exempt certain agricultural and silvicultural ponds and impoundments from VWP permit requirements. This guidance also clarifies how applications for these certain activities should be evaluated and processed relative to water withdrawal permitting and permit actions by the U.S. Army Corps of Engineers (USACE).

This guidance supersedes DEQ Guidance Memorandum GM02-2011: *Clarification of Farm or Stock Pond Exemption from Virginia Water Protection Permit Program Requirements.*

**Electronic Copy:**

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: <http://www.deq.virginia.gov>.

**Contact information:**

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**FARM POND AND IMPOUNDMENT AND STOCK POND AND  
IMPOUNDMENT EXCLUSION  
FROM  
VIRGINIA WATER PROTECTION PERMIT PROGRAM REQUIREMENTS**

**I. Purpose**

The purpose of this guidance memorandum is to identify a change in the Virginia Code (see §62.1-44.15:21 H), which exempts certain agricultural and silvicultural ponds and impoundments from VWP permit requirements, and to provide DEQ staff with guidance on implementation of the change.

**II. Background and Authority**

The State Water Control Law (§62.1-44.20 *et seq.*) and the VWP Permit Regulation (9 VAC 25-210-10 *et seq.*) regulate activities such as land clearing, dredging, filling, excavating, draining, or ditching in open water, streams, and wetlands in the Commonwealth of Virginia; and also identify activities that are exempt from the VWP regulation.

Section 9 VAC 25-210-60 A of the VWP Regulation details activities that do not require a VWP permit. Two of those exempt activities include the following:

“8. Normal agriculture and silviculture activities in a wetland such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices.”

“10. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharge associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exclusion.”

For a full listing of exempt activities, refer to 9 VAC 25-210-60 A.

In the 2008 Virginia General Assembly, House Bill 211 was signed by the Governor into law. It clarifies number 10 cited above in 9 VAC 25-210-60 A by defining which farm or stock ponds are exempt. The Code of Virginia § 62.1-44.15:21 H, which was enacted by HB211, states:

“No Virginia Water Protection Permit shall be required for impacts caused by the construction or maintenance of farm or stock ponds, but other permits may be required pursuant to state and federal law. For purposes of this exclusion, farm or stock ponds shall include all ponds and impoundments that do not fall under the authority of the Virginia Soil and Water Conservation Board pursuant to Article 2

(§ [10.1-604](#) et seq.) of Chapter 6 pursuant to normal agricultural or silvicultural activities.”

For the purposes of this guidance, § 62.1-44.15:21 H is referred to as “the 2008 code exclusion.”

§ 10.1-604 is cited in the 2008 code exclusion and it states that, “dams operated primarily for agricultural purposes which are less than twenty-five feet in height or which create a maximum impoundment capacity smaller than 100 acre-feet” do not fall under the definition of impounding structure and therefore do not fall under the authority of the Virginia Soil and Water Conservation Board Virginia Impounding Structure (Dam Safety) Regulations. Therefore, under the 2008 code exclusion the construction or maintenance of farm or stock ponds or impoundments is exempt from the VWP Permit Program if the activity meets the purpose and size such that it is exempt under § 10.1-604.

### **III. Definitions**

**Acre-foot:** a unit of volume equal to 43,560 cubic feet or 325,853 gallons (one foot of depth over one acre of area) (4 VAC 50-20-30).

**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:** 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 (4 VAC 50-20-30).

**Height:** means the structural 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 outside limit of the barrier to the top of the impounding structure (4 VAC 50-20-30).

**Impoundment:** 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:** 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 (GM #01-2012).

**Maximum impounding capacity:** means the volume in acre-feet that is capable of being impounded at the top of the impounding structure (4 VAC 50-20-30).

**Normal agricultural activities:** means those activities defined as an agricultural operation in §3.1-22.29 [recodified to § 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 (9 VAC 25-210-10).

**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 (9 VAC 25-210-10).

**Permanent (Perennial) stream:** a waterway that contains water at all times during a typical year and that has, or could have, a well established aquatic community (GM #01-2012).

**Pond:** 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).

**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).

#### **IV. VWP Policy Regarding the Regulation of Ponds and Impoundments**

Prior to the 2008 code exclusion, the construction or maintenance of farm and stock ponds used for agricultural or silvicultural purposes was exempt from VWP permitting. The construction or maintenance activities were exempt when the farm or stock pond met DEQ's guidance definition of a pond.

Effective July 1, 2008 the Virginia Code allows for the construction or maintenance 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.

Pursuant to 9 VAC 25-210-60 A 7 b and consistent with Dam Safety Regulations (4 VAC 50-20-20 *et seq.*), should the land use or owner change, the impounding structure and surface water activity may be subject to VWP regulations. The 2008 code exclusion only applies to those agricultural and silvicultural ponds or impoundments that are exempt from Dam Safety Regulations. If the land use or owner change and/or the structure is no longer exempt from Dam Safety Regulations, VWP staff can consider the impacts cumulatively in the event the dam owner applies for additional surface water impacts.

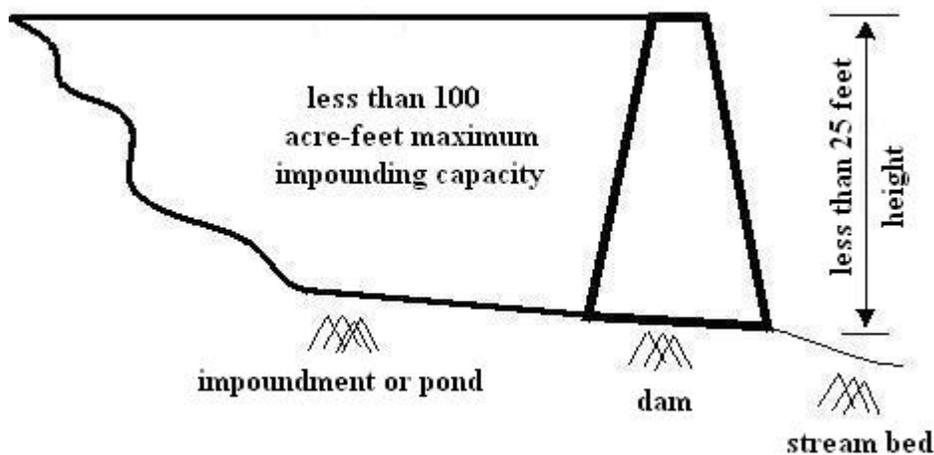


Figure 1. Physical characteristics of an agricultural or silvicultural impoundment exempt from VWP regulations.

## V. Water Withdrawal

Under the 2008 code exclusion, the construction or maintenance of farm or stock ponds and certain farm or stock impoundments is allowed without a VWP permit. 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 exempt under 9 VAC 25-210-60 B apply. See section 9 VAC 25-210-60 B for surface water withdrawal activities which are exempt.

If one or more of the exempt water withdrawal activities applies, then:

- No VWP permit is required for the withdrawal of water.
- Other state or federal permits may still be required, as noted in the opening paragraphs of 9 VAC 25-210-60 A and -60 B.
- Pursuant to 9 VAC 25-210-60 C, the DEQ may require any owner or operator of a withdrawal system exempt from the VWP permit requirements by subdivisions

B3 through B15 of 9 VAC 25-210-60 to cease withdrawals and file an application and receive a permit prior to resuming any withdrawal under certain circumstances.

## **VI. Section 401 Certification for the U.S. Army Corps of Engineers Permits**

While the 2008 code exclusion provides clarity as to which ponds and impoundments are exempt from VWP regulation, other permits may still be required pursuant to state and federal law. The U.S. Army Corps of Engineers (USACE) has a number of Section 404 permitting mechanisms to provide federal authorization of these VWP-exempt impoundments. The USACE is required by Section 401 of the Clean Water Act to obtain 401 certification or a 401 waiver by the relevant state for any federal permit action to be valid.

Where a VWP-exempt pond or impoundment is covered by a USACE general permit such as a nationwide permit or regional permit,

- If DEQ has certified the USACE general permit, and the water withdrawal conditions of the 401 certification are met,
  - DEQ's 401 certification of the USACE general permit suffices and no further action is required under the VWP permit program provided.
- If DEQ has certified the USACE general permit, and the water withdrawal conditions of 401 certification are *not* met,
  - DEQ staff should evaluate the project for a water withdrawal permit.
- If DEQ has not certified the USACE general permit,
  - DEQ staff will need to send a letter to the USACE permit manager stating that DEQ's Section 401 certification is waived for the proposed construction and maintenance.
  - DEQ staff should evaluate the project for a water withdrawal permit.

Where an excluded pond or impoundment project requires a USACE individual permit,

- DEQ staff will need to send a letter to the USACE permit manager stating that DEQ's Section 401 certification is waived for the proposed construction and maintenance.
- DEQ staff should evaluate the project for a water withdrawal permit.