


COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Programs Coordination

SUBJECT: **GUIDANCE MEMORANDUM 02 – 2016**
 Issuance of Virginia Water Protection Permits for Surface Water Impacts in the
 Potomac River

TO: Regional Directors

FROM: Larry G. Lawson, P.E. 

DATE: August 7, 2002

COPIES: Regional VWPP Permit Managers, Martin Ferguson, Ellen Gilinsky, Kathy Frahm

Summary:

The purpose of this guidance is to provide a framework for Virginia Water Protection permit requirements applicable to the Potomac River and to guide applicants and the Department of Environmental Quality in issuing VWP Permits for surface water impacts to the Potomac River. These impacts include regulated activities affecting wetlands and streams and water withdrawals. This guidance document shall take effect when the Attorney General certifies to the Department of Environmental Quality that the current litigation *Virginia v. Maryland*, No. 129, Orig., pending in the United States Supreme Court, has been concluded or resolved in a manner not inconsistent with the exercise of authority described in this guidance.

Contact information:

Please contact Ellen Gilinsky, Virginia Water Protection Permit Program Manager, at 804-698-4375 or egilinsky@deq.state.va.us if you have any questions about this guidance.

Disclaimer:

This document provides procedural guidance to the permit staff. This document is guidance only. It does not establish or affect legal rights or obligations. It does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by applying the State Water Control Law and the implementation regulations on the basis of the site specific facts when permits are issued.

Issuance of Virginia Water Protection Permits for Surface Water Impacts in the Potomac River

BACKGROUND

The legal authority for issuance of Virginia Water Protection Permits is contained in Section 62.1-44.5 of The Code of Virginia, "Prohibition of waste discharges or other quality alterations of state waters except as authorized by permit", as follows:

"A. Except in compliance with a certificate issued by the [State Water Control] Board, it shall be unlawful for any person to:

1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances;
2. Excavate in a wetland;
3. Otherwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses;
4. On and after October 1, 2001, conduct the following activities in a wetland:
 - a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;
 - b. Filling or dumping;
 - c. Permanent flooding or impounding; or
 - d. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

Further, Section 62.1-44.15:5 of the Code of Virginia, Virginia Water Protection Permit, states that:

"A. Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act.

B. The Board shall, after providing an opportunity for public comment, issue a Virginia Water Protection Permit if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect instream beneficial uses.

C. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values is a beneficial use of Virginia's waters. Conditions contained in a Virginia Water Protection Permit may include, but are not limited to, the volume of water which may be withdrawn as a part of the permitted activity. Domestic and other existing beneficial uses

shall be considered the highest priority uses.

The regulations promulgated by the State Water Control Board pursuant to the above sections of the Code of Virginia provide as follows with respect to the issuance of a Virginia Water Protection ("VWP") Permit, in 9VAC 25-210-50. "Prohibitions and requirements for VWP permits":

- A. Except in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical or biological properties of surface waters, excavate in wetlands, or on or after October 1, 2001, conduct the following activities in a wetland:
 1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;
 2. Filling or dumping;
 3. Permanent flooding or impounding; or
 4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

DEFINITIONS

The following pertinent definitions are taken from the Virginia Water Protection Permit Regulation (9 VAC 25-210-10):

"Adjacent" means bordering, contiguous or neighboring; wetlands separated from other surface waters by man-made dikes or barriers, natural river berms, sand dunes and the like are adjacent wetlands.

"Beneficial use" means both instream and offstream uses. Instream beneficial uses include, but are not limited to: the protection of fish and wildlife habitat; maintenance of waste assimilation; recreation; navigation; and cultural and aesthetic values. Offstream beneficial uses include, but are not limited to: domestic (including public water supply); agricultural; electric power generation; and commercial and industrial uses.

"Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of any pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.

"Draining" means human-induced activities such as ditching, excavation, installation of tile drains, hydrologic modification by surface water runoff diversion, pumping water from wells, or similar activities such that the activities have the effect of artificially dewatering the wetland or altering its hydroperiod.

"Dredged material" means material that is excavated or dredged from surface waters.

"Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.

"Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil or rock.

"Fill" means replacing portions of surface water with upland, or changing the bottom elevation of a surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris.

"Fill material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose.

"Permanent flooding or impounding" means an increase in the duration or depth of standing water on a land surface, other than that resulting from extended-detention basins and enhanced extended-detention basins designed, constructed, and maintained to function in accordance with Virginia Department of Conservation and Recreation (DCR) standards for such facilities (Virginia Stormwater Management Handbook, First Edition, 1999, Volume 1, Chapter 3) or local standards that, at a minimum, meet the DCR standards.

"Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution.

"Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution" for the terms and purposes of this chapter.

"Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions.

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.

"Surface water" means all state waters that are not ground water as defined in Section 62.1-255 of the Code of Virginia.

"VWP permit" means an individual or general permit issued by the board under §[62.1-44.15:5](#) of the Code of Virginia that authorizes activities otherwise unlawful under §[62.1-44.5](#) of the Code of Virginia or otherwise serves as the Commonwealth of Virginia's §401 certification.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

In addition, the following definitions are applicable to this guidance:

"Originating in Virginia" means regulated impacts from projects that are connected to or begin on Virginia's land or shoreline; such impacts include water withdrawals from facilities located in Virginia, pipelines emanating from Virginia facilities, excavation or other bottomland disturbances related to the construction or expansion of facilities with Virginia addresses.

COVERAGE

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 (see 9 VAC 25-210-50) 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 will be required to obtain a VWP permit.

VWP Permits will be processed according to the VWP regulation and the procedures outlined in the VWP Permit Manual (Guidance Memorandum 02-2005, May 1, 2002).

For water withdrawal permits, the statutory considerations applicable to the issuance of a VWP Permit include protecting "instream beneficial uses." [Section 62.1-44.15:5(B) of the Code of Virginia]. Those beneficial uses are flexibly described as follows:

C. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values is a beneficial use of Virginia's waters. Conditions contained in a Virginia Water Protection Permit may include, but are not limited to, the volume of water which may be withdrawn as a part of the permitted activity. Domestic and other existing beneficial uses shall be considered the highest priority uses.

The statute also calls for consultation with other agencies prior to issuance of a VWP permit, in Section 62.1-44.15:5 F of the Code of Virginia:

"F. Prior to the issuance of a Virginia Water Protection Permit, the Board shall consult with, and give full consideration to the written recommendations of, the following agencies: the Department of Game and Inland Fisheries, the Department of Conservation and Recreation, the Virginia Marine Resources Commission, the Department of Health, the Department of Agriculture

and Consumer Services and any other interested and affected agencies. Such consultation shall include the need for balancing instream uses with offstream uses. Agencies may submit written comments on proposed permits within forty-five days after notification by the Board. The Board shall assume that if written comments are not submitted by an agency within this time period, the agency has no comments on the proposed permit." (Emphasis added).

For VWP Permits sought by Virginia users of the Potomac River, the Maryland Department of Environment shall be furnished copies of the applications and as an "interested and affected agency" shall be consulted in the same manner as are Virginia agencies under subsection (F) above.

For users seeking to withdraw water through a pipe or intake extending from the Virginia side of the Potomac River, any approved VWP permit shall include such provisions as are necessary to comply with, and to effect the purposes of, the Potomac River Low Flow Allocation Agreement, dated January 11, 1978, by and among the United States of America, the State of Maryland, the Commonwealth of Virginia, the District of Columbia, the Washington Suburban Sanitary Commission and the Fairfax County Water Authority.

Please contact Ellen Gilinsky, Virginia Water Protection Permit Program Manager, at 804-698-4375 with any questions about the application of this guidance.