

**MEMORANDUM OF AGREEMENT BETWEEN
THE VIRGINIA MARINE RESOURCES COMMISSION
AND THE VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY
FOR IMPLEMENTATION OF 2023 Va. Acts Chs. 258 and 259 REGARDING PERMITTING IN
NON-TIDAL WATERS OF THE COMMONWEALTH**

Amendment 1

WHEREAS, the Virginia Marine Resources Commission (VMRC) administers a regulatory program that governs the Commonwealth's state-owned submerged lands under the authority of § 28.2-1200 *et seq.* of the Code of Virginia and the Commission's existing regulations and guidelines found at <https://mrc.virginia.gov/regulations/regindex.shtm#habitat>; and

WHEREAS, the Virginia Department of Environmental Quality (DEQ) administers the Virginia Water Protection Permit Program under the authority of §§ 62.1-44.15:20-23.1 and §§ 62.1-44.15:80-84 of the Code of Virginia and the Virginia Water Protection Program Regulations 9VAC25-210 *et seq.* and 9VAC25-660 through -690; and

WHEREAS, DEQ provides water quality certificates under the authority of § 401 of the federal Clean Water Act (CWA) for projects needing federal permits and licenses; and

WHEREAS, pursuant to 2023 Va. Acts Chs. 258 and 259, to be codified at § 28.2-1203 A.9 of the Code of Virginia, any activity conducted in nontidal waters is not required to obtain a permit issued by VMRC provided that the person performing such activity obtains a Virginia Water Protection Permit and complies with all requirements of the Virginia Water Resources and Wetlands Protection Program pursuant to Article 2.2 (§ 62.1-44.15:20 *et seq.*) of Chapter 3.1 of Title 62.1. In determining whether to issue a Virginia Water Protection Permit, the Department of Environmental Quality shall be guided by the factors set forth in subsection A of § 28.2-1205 of the Virginia Code; and

WHEREAS, VMRC and DEQ executed an MOA to implement 2023 Va. Acts Chs. 258 and 259 on June 23, 2023 (the "Original MOA") and it is the intent of VMRC and DEQ for this MOA, once signed by the parties, to immediately supersede the Original MOA; and

WHEREAS, VMRC and DEQ shall follow procedures outlined in the stipulations below, unless amended or superseded by execution of a new MOA; and

NOW, THEREFORE, the VMRC and DEQ agree to permit activities affecting subaqueous lands in accordance with the following stipulations:

STIPULATIONS

I. Clearinghouse and initial processing of Joint Permit Applications (JPAs)

- A. Evaluation:** VMRC shall remain the clearinghouse for all JPAs and shall continue to process those submitted JPAs using current guidance and practices.
- B. File Documentation:** VMRC shall receive JPAs thru "VITA Share" (or scan JPAs that were not submitted thru VITA Share) and electronically submit those to DEQ staff using current guidance and practices. VMRC shall continue to track all JPAs received and maintain postings on its website using current guidance and practices. VMRC shall continue to submit via email weekly reports to DEQ listing all JPAs received. DEQ email recipients will be kept current for purposes of this email distribution.

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II. Permit Applications for Projects located in Tidal Waters

- A. Evaluation:** VMRC shall continue to issue subaqueous land permits for projects located in tidal waters in accordance with current regulations, guidance, and practices. VMRC shall continue collecting permit fees and royalties in accordance with current regulations, guidance, and practices.
- B. File Documentation:** VMRC shall maintain all project and permit files in accordance with current regulations, guidance, and practices.

III. Permit Applications for Projects located in Non-tidal Waters

A. Evaluation:

1. VWP Individual Permit or General Permit Coverage¹ Required

At no time will VMRC exert jurisdiction and require a subaqueous lands encroachment permit for any instream work in non-tidal waters (i.e., encroachments into (on) state-owned submerged lands channelward of ordinary high water) requiring VWP individual or general permit coverage. To ensure that the public trust responsibilities outlined in the Virginia Constitution and Section 28.2-1205 of the Virginia Code are met, DEQ will issue its Virginia Water Protection Permit for any permissible uses of instream encroachments or deny such if the proposed impacts are deemed unacceptable in accordance with current regulations, guidance and practices. DEQ's VWP individual and general permit process require DEQ to conduct a completeness review within 15 days of receipt of an application. DEQ will copy VMRC on all such reviews and the final decision on any such projects. Pursuant to 2023 Va. Acts Chs. 258 and 259, in determining whether to issue a VWP permit DEQ shall be guided by the factors set forth in subsection A of § 28.2-1205 of the Code of Virginia. DEQ shall continue collecting DEQ permit fees in accordance with current regulations, guidance, and practices. In such situations, pursuant to 2023 Va. Acts Chs. 258 and 259, a VMRC permit shall not be required for the activity. VMRC may continue collecting permit fees and royalties in accordance with current regulations, guidance, and practices.

2. VWP Individual Permit or General Permit Coverage NOT Required

For projects proposing impacts to non-tidal perennial streams, when DEQ determines that a VWP individual permit or general permit coverage is not required, DEQ staff will copy VMRC of such determination. VMRC shall continue to issue subaqueous land permits for projects that encroach under or over state-owned submerged lands in non-tidal waters in accordance with current regulations, guidance, and practices. VMRC may continue collecting permit fees and royalties in accordance with current regulations, guidance, and practices.

3. Examples

¹ VWP General Permits are issued in regulation by the State Water Control Board. VWP General Permit Coverage is a letter issued by DEQ to an applicant which acknowledges that a project meets the requirements of the VWP General Permit regulation.

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Situations and circumstances where a VWP permit or coverage may **NOT** be required include, but are not limited to:

- a. Activities conducted in non-tidal waters that have no proposed impacts to state waters regulated by DEQ (i.e., aerial encroachments or subterranean encroachments that do not have associated surface water impacts such as those often needed for access, or activities excluded by VWP permit regulations pursuant to 9VAC25-210-60, such as:
 - i. Maintenance of currently serviceable structures, such as purpose-built stormwater and utility structures, 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. If the original design is not available, the permittee shall submit the best available information on the design for consideration and approval by the department. In order to qualify for this exclusion, emergency reconstruction shall occur as soon as practicable after damage occurs.
 - ii. Impacts to open waters that do not 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.
 - iii. Discharges of dredged or fill material into state waters, except wetlands, which are addressed under a U.S. Army Corps of Engineers Regional, General, or Nationwide Permit, and for which no § 401 Water Quality Certificate is required.
- b. Activities conducted in non-tidal water that require a U.S. Army Corps of Engineers nationwide or regional permit, and for which DEQ has programmatically provided CWA Section 401 Water Quality Certification.

B. File documentation: VMRC and DEQ shall maintain all relevant correspondence in their project and permit files in accordance with current regulations, guidance, and practices.

IV. Dispute Resolution

Any controversial concerns or policy related issues regarding this MOA should be coordinated with VMRC and DEQ management.

V. Amendment and Termination



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A. Amendment:

1. If VMRC or DEQ determines that the terms of this MOA cannot be implemented, either VMRC or DEQ may propose in writing that this MOA be amended.
2. Within 30 days of such proposal to amend, VMRC and DEQ will meet and confer to discuss any proposed amendment. All signatories to this MOA must agree in writing to any proposed amendment by executing an amended version of this MOA.

B. Termination: If VMRC or DEQ determines that the terms of this MOA cannot be implemented, either VMRC or DEQ may, instead of proposing an amendment, terminate this agreement upon thirty (30) days written notice to the other party, or immediately upon mutual agreement of both parties.

C. If this MOA is terminated by VMRC or DEQ, all responsibilities assigned within shall revert to those established within guidance documents within each agencies delegated authority.

VIII. MISCELLANEOUS

- A.** Participation in this MOA does not imply endorsement of all aspects of a project or permitting strategy.
- B.** Nothing in this MOA is intended to diminish, modify, or otherwise affect the statutory and/or regulatory authorities of VMRC and DEQ.
- C.** This MOA is not a contract, and it is not enforceable in any judicial or administrative forum. This MOA does not confer any right or benefit, substantive or procedural, enforceable at law or equity, upon VMRC or DEQ. This MOA does not create any rights or duties of any third party.
- D.** This MOA becomes effective when signed by VMRC and DEQ.
- E.** All written notices required by this MOA should be sent by U.S. Mail to:

Virginia Department of Environmental Quality
Attn. VWP Program
P.O. Box 1105
Richmond, VA 23218

Virginia Marine Resources Commission
Building 96, 380 Fenwick Road
Ft. Monroe, VA 23651

IX. DURATION OF MOA

This MOA shall continue in full force and effect until it has been amended or terminated in accordance with Article V.

This MOA becomes effective when the appropriate officials, designated to act for VMRC and for DEQ, have signed below.




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Jamie L. Green (Date)
Commissioner
Virginia Marine Resources Commission



Michael S. Rolband, PE, PWD, PWS *Emeritus* (Date)
Director
Virginia Department of Environmental Quality