



FREQUENTLY ASKED QUESTIONS

Effective July 1st, 2006, § 62.1-44.15:55.E (formerly § 10.1-563.E) of the Virginia Erosion and Sediment Control Law (VESCL) allows submittal of general erosion and sediment control (ESC) specifications for wetland and/or stream mitigation banks to DEQ in lieu of submitting individual site ESC plans to localities for review and approval. Additional language was added in July 2008 to include stream mitigation banks. On July 1, 2013 this authority was transferred to DEQ.

Who are eligible?

Persons who

1. engage in the creation and operation of mitigation banks, and
2. operate in multiple localities in Virginia.

"Person" means any individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, cooperative, county, city, town, or other political subdivision of the Commonwealth, governmental body, including a federal or state entity as applicable, any interstate body, or any other legal entity.

How do mitigation banks differ from permit-specific compensatory mitigation?

Unavoidable impacts to wetlands and streams caused by construction projects may require mitigation in the form of creation, restoration, enhancement and/or protection of wetlands and/or streams.

- Mitigation banks are commercial ventures, with the purpose of creating mitigation credits which can be purchased to satisfy mitigation requirements of projects that impact wetlands or streams. Mitigation banks are authorized through the approval of a Mitigation Banking Instrument (MBI) approved by DEQ and the Corps.
- Permit-specific mitigation is required by water quality permitting agencies for unavoidable impacts to wetlands and/or streams for a specific project, and is considered by DEQ to be a part of the land-disturbing activities of the project for which they are required.
- Land disturbance associated with compensatory mitigation projects for individual project impacts (*i.e.*, not for the purpose of selling mitigation credits) are not eligible to be covered under § 62.1-44.15:55.E and must comply with the requirements of the local ESC program.

What are the advantages of mitigation banks?

Since mitigation banks are professionally designed to be self-sustaining within a natural landscape setting, desirable natural functions are substantially improved with the size of the bank. A mitigation bank has many advantages over multiple small mitigation sites.



These may include:

- Ecological diversity as a design goal for bank sites, enhancing wildlife value.
- Flood storage is improved with larger sites.
- “Edge effects” are minimized with larger sites, reducing negative impacts from adjacent land uses.
- Mitigation banks often incorporate stream restoration as an integral part of a holistic site design. These design opportunities are simply not practicable on smaller sites.

How do mitigation bank construction activities differ from typical construction sites?

The construction of a mitigation bank involves unique challenges to ESC not found on many construction sites. These include:

- Mitigation bank projects occur over relatively short construction periods, with staged construction and stabilization as the norm, resulting in much lowered risk from large rainfall events.
- Land-disturbing activities occur within regulated natural resources. Traditional controls such as silt fence are often impractical.
- Wetland bank sites are low to level grade, restricting use of sediment traps and basins.
- Mitigation bank sites are subject to frequent flooding and inundated soils.
- Wetland soils are subject to compaction.
- Mitigation bank projects have unique soil, soil amendment, and planting specifications.
- Mitigation bank projects often include construction of permanent berms, diversions, and other water control structures to enhance site hydrology.

Because of these unique site conditions, variances are typically required for ESC practices that are modified from or substituted for practices specified in the minimum standards of the Virginia Erosion & Sediment Control Regulations.

Can a mitigation bank project be considered an agricultural or forestry operation and therefore exempt from the VESCL?

No. In the VESCL, § 62.1-44.15:55.E. specifically addresses construction of mitigation banks as regulated land-disturbing activities. The VESCL defines a land-disturbing activity as any man-made change to the land surface that may result in soil erosion from water or wind and the movement of sediments into state waters or onto lands in the Commonwealth. Consequently, any land-disturbing activity associated with the creation, enhancement, or restoration of wetlands or streams is subject to regulation under the VESCL.



How are mitigation banks regulated?

Land-disturbing activities associated with mitigation banks are regulated under the VESCL, either through the local ESC program, or by DEQ if the site is covered by an approved set of general ESC standards and specifications. DEQ also has jurisdiction over activities on mitigation bank construction sites requiring a Virginia Stormwater Management Program (VSMP) construction general permit. Certain stream projects may not require a VSMP permit, if construction activities in upland areas do not exceed the permit's 1 acre threshold. In addition, any unavoidable impacts to wetlands or streams in the creation of a mitigation bank are regulated through federal and state water-quality permits.

Instruments for mitigation banks are reviewed and approved by an Interagency Review Team (IRT) consisting of multiple federal and state environmental regulatory and advisory agencies. These banking instruments detail the location, design, establishment, use, operation and long-term oversight of the banks. DEQ serves as co-chair on the IRT.

The establishment, use, operation and maintenance of the mitigation banks are carried out in accordance with the following authorities:

Federal:

- Clean Water Act (33 USC 1251 et seq.);
- Rivers and Harbors Act (33 USC 403);
- Fish and Wildlife Coordination Act (16 USC 661 et seq.);
- Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-332);
- Guidelines for Specification of Disposal Sites for Dredged and Fill Material(40 CFR Part 230);
- Endangered Species Act (16 USC 1531 et. seq.);
- Magnuson Stevens Fishery Conservation and Management Act (16 USC 1801 et. seq.);
- Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990);
- Regulatory Guidance Letter No. 05-01. U.S. Army Corps of Engineers, February 14, 2005; and
- Regulatory Guidance Letter No. 08-03. U.S. Army Corps of Engineers, October 10, 2008.

Commonwealth of Virginia:

- Sections 62.1-44.15:20-23 of the Code of Virginia;
- Virginia Water Protection Permit Regulation (9 VAC 25-210); and
- Guidelines for the Establishment, Use, and Operation of Tidal Wetland Mitigation Banks in Virginia (4 VAC 20-390-10 et seq.).

What activities are covered under general ESC specifications approved by DEQ?



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All land-disturbing activities associated with the construction, restoration or enhancement of wetlands or streams as part of a mitigation bank that has been approved in accordance with applicable federal and state guidance, laws, and regulations.

What information is included in general ESC specifications submitted to DEQ?

- A statement of the company's obligations to ensure self-inspection/monitoring, reporting, training, certification, environmental protection, and safety.
- Discussion of how the company will meet the Minimum Standards of the VESCR (9VAC25-840-40).
- A listing of the ESC practices that will be employed during the land-disturbing activity as specified in the Virginia Erosion and Sediment Control Handbook (Handbook), the Virginia Stormwater Management Handbook, and the Virginia Stream Restoration and Stabilization Best Management Practices Guide.
- A description of each ESC practice from the Handbook proposed to be used in a manner other than that specified in the Handbook.
- A description of each innovative ESC practice not specified in the Handbook.
- Project-specific information on all mitigation bank projects planned to be constructed.

The company must also notify DEQ of any additional projects to be built under a set of approved general ESC standards and specifications as they are developed.

How do general ESC specifications approved by DEQ affect the locality's jurisdiction over the construction of a mitigation bank?

At the option of the eligible person, they have come under the jurisdiction of DEQ for land-disturbing activities of applicable mitigation bank projects they construct throughout Virginia. Similar to linear projects, a locality no longer has ESC plan-approval, inspection, or enforcement authority for those projects covered under the DEQ-approved general ESC specifications. However, DEQ should be notified of any potential compliance issues noted by the locality for any project covered under general ESC specifications approved by DEQ. Please note that the owner or operator is not relieved from compliance with any other local ordinances and regulations (i.e., other than ESC) including requirements to submit plans, obtain permits, or provide financial assurances as may be required by such ordinances and regulations.

Who is responsible for inspection and enforcement of sites built under general ESC specifications approved by DEQ?

Similar to linear projects, the sites covered under the approved general ESC standards and specifications are under the jurisdiction of DEQ, not the local ESC program. Site-specific ESC plans are still required. The company is also obligated to ensure self-inspection, monitoring and



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reporting on all applicable sites. DEQ provides oversight through inspections and enforcement under the authority of the *Virginia Erosion and Sediment Control Law* (Title 62.1, Chapter 3.1, Article 2.4 of the Code of Virginia), the *Virginia Erosion and Sediment Control Regulations* (9VAC25-840), and the Virginia Stormwater Management Program Permit Regulations (9VAC25-870 & 880).

Does DEQ's jurisdiction overlap or supercede that of other federal, state, or local entities?

DEQ approval of annual ESC specifications does not relieve the owner or operator from compliance with any other federal, state, or local ordinances and regulations (i.e., other than local ESC) including requirements to submit plans and obtain permits as may be required by such ordinances and regulations. DEQ approval of annual ESC specifications does not mean that a specific mitigation bank has been approved or will be approved by DEQ or result in the release of mitigation credits.

Will a VSMP general permit be required for sites built under general ESC specifications approved by DEQ?

Yes. As of January 29, 2005 all construction projects disturbing one (1) acre or more of land require a Virginia Stormwater Management Program (VSMP) General Permit, including the preparation of a site-specific stormwater pollution prevention plan (SWPPP). However, certain stream projects may not require a VSMP permit, if construction activities in upland areas do not exceed the 1 acre threshold. While construction activities that discharge dredged or fill material into surface waters that are regulated under §404 of the CWA are exempt, activities outside of these jurisdiction impact areas are not exempt.

With general ESC specifications approved by DEQ, are individual project specific plans still required?

Yes. Project specific ESC plans are still required (9VAC25-840-30.B).

How often do general ESC specifications need to be renewed?

General ESC specifications must be submitted to DEQ annually for review and approval.

Who do I contact with questions about general ESC specifications for mitigation banks?

Please address questions to David.Aho@deq.virginia.gov, or at (804) 527-5024.