



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Thomas C. Wright, Jr.  
Member, House of Delegates  
Post Office Box 1323  
Victoria, Virginia 23974

Dear Delegate Wright:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

## Issues Presented

You present several questions related to the Dam Safety Act and the application by the Department of Conservation and Recreation (“DCR”) of the agricultural exemption it contains.<sup>1</sup> You first ask whether a farm pond must be used for the irrigation of crops to qualify for the exemption. You also inquire whether the agricultural exemption applies in two situations: 1) for a farm pond available for fire suppression when located within forestland where conventional silviculture is practiced professionally, or 2) for a pond located in the middle of a pasture from which hay is cut, hay being a plant as well as an agricultural commodity. Finally, you ask what constitutes being a forester within the context of the Dam Safety Act and attendant regulations and guidance, and specifically, how a forester differs from an orchardist.

## Response

It is my opinion that irrigation is not a necessary element for a farm pond to qualify for the agricultural exemption, provided the impounded waters are utilized in a manner found to be required for agricultural production. It is further my opinion that, because the determination of whether the agricultural exemption applies to any particular structure is primarily a factual question reserved to the Director of DCR on a case-by-case basis, I must decline to render an opinion on the issues raised in the second question presented. Finally, it is my opinion that, absent a specific definition in the Dam Safety Act, it is appropriate to look to the definition of the term “forester” provided in the statutes governing the Department of Forestry as an interpretative guide, and that a forester differs from an orchardist in that an orchardist harvests fruit, nuts or sap from trees, while a forester is concerned with the timber itself.

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<sup>1</sup> You indicate that some of these questions arise from reports to you regarding DCR enforcement of the applicable regulations. You state that you have been informed that DCR has taken the position that fire suppression in a forest is not a use that would qualify the pond for the agricultural exemption and that DCR approves the agricultural exemption for such a pond only if water is being pumped from the pond for irrigation purposes.

## Background

With respect specifically to your second question, you relate that you have constituents who own what you describe as farm ponds. You identify at least two categories of uses to which such farm ponds are dedicated. The first category you describe comprises ponds located within forested land subject to conventional silvicultural practices in accordance with the guidelines of the Virginia Department of Forestry. The owners of these ponds assert that they are entitled to the agricultural exemption because the ponds serve a valuable fire suppression purpose. The second category contains ponds surrounded by open fields on which the owners cut hay and/or run livestock. In this instance, the owners assert that the ponds are operated for agricultural purposes and therefore subject to the agricultural exemption.

## Applicable Law and Discussion

The Dam Safety Act (“the Act”) provides for the regulation and permitting of impounding structures in the Commonwealth<sup>2</sup> in order to protect human life and property from the dangers of dam failure.<sup>3</sup> The Act exempts from regulation structures that are “operated primarily for agricultural purposes” and do not exceed certain height and impoundment capacity limitations.<sup>4</sup> This provision is generally referred to as the “25/100 exemption” or the “agricultural exemption.”

The General Assembly has directed the Soil and Water Conservation Board (“the Board”) to “adopt regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated.”<sup>5</sup> Pursuant to this authority, the Board has adopted the Impounding Structure Regulations.<sup>6</sup> These regulations define “agricultural purpose” as “the *production* of an agricultural commodity as defined in § 3.2-3900 of the Code of Virginia that *requires the use of impounded waters.*”<sup>7</sup> Section 3.2-3900 defines “agricultural commodity” as “any plant or part thereof, animal, or animal product, produced by a person (including farmers, ranchers, vineyardists, plant propagators, Christmas tree growers, aquaculturists, floriculturists, orchardists, foresters, nurserymen, wood treaters not for hire, or other comparable persons) primarily for sale, consumption, propagation, or other use by man or animals.”<sup>8</sup>

The Impounding Structure Regulations provide that “[a]n owner covered by an agricultural exemption pursuant to § 10.1-604 of the Code of Virginia and [4 VA. ADMIN. CODE § 50-20-30] may validate such exemption by submitting an Agricultural Exemption Report (Agricultural Exemption Report for Impounding Structures).”<sup>9</sup> This report requires, *inter alia*, “[a] list of the agricultural functions for which the impoundment supplies water” and “[t]he owner’s signature validating that the impoundment is operated primarily for agricultural purposes.”<sup>10</sup>

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<sup>2</sup> See VA. CODE ANN. §§ 10.1-604 through 10.1-613.5 (2012).

<sup>3</sup> See, e.g., § 10.1-608 (providing measures for “an unsafe dam constituting an imminent danger to life or property”).

<sup>4</sup> See § 10.1-604 (defining “impounding structure” as not including, *inter alia*, “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”).

<sup>5</sup> Section 10.1-605(A).

<sup>6</sup> See 4 VA. ADMIN. CODE §§ 50-20-10 through 50-20-400.

<sup>7</sup> 4 VA. ADMIN. CODE § 50-20-30 (emphasis added). Section 10.1-605 of the Code authorizes the Board to adopt regulations “to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated.”

<sup>8</sup> VA. CODE ANN. § 3.2-3900 (Supp. 2012).

<sup>9</sup> 4 VA. ADMIN. CODE § 50-20-165(B).

<sup>10</sup> 4 VA. ADMIN. CODE § 50-20-165(B)(5),(7).

Pursuant to a delegation of authority from the Board, DCR administers the Dam Safety Program.<sup>11</sup> The Director of DCR has issued a guidance document regarding the agricultural exemption requirements.<sup>12</sup> Although guidance documents do not have the force and effect of law, they serve to advise the agency's staff and the public of the agency's interpretations of its regulations.<sup>13</sup> Courts generally give such "interpretative" rules persuasive effect and will give "great deference to an administrative agency's interpretation of the regulations it is responsible for enforcing."<sup>14</sup>

In this document, the Director explains three scenarios that meet the agricultural exemption: (1) the dam owner demonstrates that the agricultural land consists of a minimum of five contiguous acres upon which the agricultural commodity is produced and the impounded water is used or held in reserve primarily to assist in this production; (2) the owner of the agricultural use certifies gross sales in excess of \$1,000 annually over the previous three years for the sale of agricultural commodities produced from the lands served by the impounding structure waters; or (3) the dam owner demonstrates that the land on which the agricultural commodity is produced is zoned for agricultural use and the impounded water is used or held in reserve primarily to assist in this production.<sup>15</sup>

Nothing in this guidance document, or in the applicable statutes or regulations, sets forth a requirement that a farm pond be used specifically for irrigation in order to qualify for the agricultural exemption. As the language of the document suggests, what is critical is that the impounded waters be used "to assist in [agricultural] production." No provision of law limits such assistance to irrigation. Thus, in response to your first question, I conclude that, provided the impounded waters otherwise are shown to be primarily used for agricultural purposes as required by § 10.1-604, irrigation is not a necessary element for a farm pond to be eligible to receive the 25/100 exemption.

Your next inquiry relates to eligibility for the exemption in two scenarios, as described above. With regard to the first scenario, silviculture clearly falls within the scope of the above-referenced definition of "agricultural commodity" and "agricultural purpose."<sup>16</sup> Nonetheless, the authorities cited above, including DCR's own guidance, do not address the question of whether possible fire suppression for traditional silviculture "requires the use of impounded waters," as the regulations require to qualify for the exemption.<sup>17</sup> In addition, it does not appear that the Department of Forestry<sup>18</sup> has issued any guidelines or descriptions of

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<sup>11</sup> See Minutes of the Virginia Soil and Water Conservation Board 9-10 (Dec. 11, 1991) (on file with DCR). See also § 10.1-605.1 (authorizing the Board to "delegate to the Director or his designee any of the powers and duties vested in the Board by [the Act], except the adoption and promulgation of regulations").

<sup>12</sup> DEP'T OF CONSERVATION & RECREATION, GUIDANCE DOCUMENT ON AGRICULTURAL EXEMPTION REQUIREMENTS (Nov. 30, 2010), available at [http://www.dcr.virginia.gov/dam\\_safety\\_and\\_floodplains/documents/DCR-VSWCB-022.pdf](http://www.dcr.virginia.gov/dam_safety_and_floodplains/documents/DCR-VSWCB-022.pdf).

<sup>13</sup> NRV Real Estate, LLC v. Va. Dep't of Health, 51 Va. App. 514, 526-27, 659 S.E.2d. 527, 533-34 (2008).

<sup>14</sup> *Id.* (citations omitted).

<sup>15</sup> *Supra* note 12 at 4.

<sup>16</sup> "Silvicultural activity" is defined as "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." Section 10.1-1181.1 (2012).

<sup>17</sup> 4 VA. ADMIN. CODE § 50-20-30.

<sup>18</sup> In addressing forest fires and fire suppression, the General Assembly has authorized the State Forester "to employ temporary forest wardens to extinguish forest fires . . . [and to] take such action as is authorized by law to prevent and extinguish forest fires." Section 10.1-1105 (2012). He is further authorized to "develop silvicultural best management practices, including reforestation, prevention of erosion and sedimentation, and maintenance of buffers for water quality." *Id.* The General Assembly has provided a statutory scheme for forest wardens and the suppression of forest

best management practices that speak to the use of impounded waters for possible fire suppression as part of silvicultural activity. I also am not aware of any court decisions addressing this question. The question you ask involves matters of specific silvicultural practices that do not appear in law and are left for the relevant agencies to address. It is for the relevant agencies to determine whether traditional silviculture activity requires impounded waters for possible fire suppression. Any agency determination on the matter will be entitled to deference by the courts unless plainly wrong or contrary to the agency's own rules.<sup>19</sup> Moreover, the General Assembly is presumed to be aware of the agency's construction of a particular statute and, when such a construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it.<sup>20</sup>

You similarly ask whether a farm pond located in the middle of a pasture from which hay is cut qualifies for the agricultural exemption. As with the first scenario, in the abstract, it is possible that growing hay will "require the use of the impounded waters," and it is also possible that the impounded waters would not be required for such an agricultural production. The question of whether a particular pond is maintained "primarily for agricultural purposes" as discussed in § 10.1-604, is for the Director to determine based on the particularized facts of each case. I am therefore unable to render an opinion as to whether the exemption would be available in any particular circumstance in either scenario.

Lastly, you ask what constitutes being a forester within the context of the Act and attendant regulations and guidance and how a forester differs from an orchardist. As discussed above, the Act exempts from regulation certain structures that are "operated primarily for agricultural purposes," where an "agricultural purpose" includes "the production of an agricultural commodity . . ."<sup>21</sup> Relative to your inquiry, "agricultural commodity" is "any plant or part thereof, animal, or animal product, produced by a person (including . . . orchardists [and] foresters . . .) primarily for sale, consumption, propagation, or other use by man or animals."<sup>22</sup> Neither the Act, the regulations, nor the guidance document provide a definition of "forester" or "orchardists."

Nonetheless, as for "forester," because the *Code of Virginia* constitutes a single body of law, other sections may be looked to where the same phraseology is used.<sup>23</sup> In the statutes governing the Department of

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fires, as well as a certified prescribed burning manager program. *See* Article 6 ("Forest Wardens and Fires") and Article 6.1 ("Certified Prescribed Burning Manager Program") of Chapter 11 of Title 10.1 of the *Code of Virginia*. The Department of Forestry has adopted regulations regarding fire prevention, *see, e.g.*, 4 VA. ADMIN. CODE § 10-30-180 ("Fires, lighted cigarettes, etc."), but does not address impounding structures used for possible fire suppression and whether or not they are considered part of a silvicultural operation.

<sup>19</sup> *See* Level 3 Commc'ns of Va. v. State Corp. Comm'n, 268 Va. 471, 478, 604 S.E.2d 71, 74 (2004) (agency's "interpretation of its own rules is entitled to deference"); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) ("[A]n agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted.") (internal quotation marks omitted).

<sup>20</sup> *See* *Commonwealth v. Am. Radiator & Standard Sanitary Corp.*, 202 Va. 13, 19, 116 S.E.2d 44, 48 (1960) ("when [a public official's construction of a statute] has long continued without change the legislature will be presumed to have acquiesced therein"); *Miller v. Commonwealth*, 180 Va. 36, 42, 21 S.E.2d 721, 723 (1942) ("The Legislature is presumed to be cognizant of [the construction given to a statute by public officials], and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction"). *See also* 2011 Op. Va. Att'y Gen. 143, 145; 1986-87 Op. Va. Att'y Gen. 194, 194.

<sup>21</sup> *See* 4 VA. ADMIN. CODE § 50-20-30.

<sup>22</sup> Section 3.2-3900.

<sup>23</sup> *See* *First Nat'l Bank of Richmond v. Holland*, 99 Va. 495, 504, 39 S.E. 126, 129-30 (1901). *See also* 2012 Op. Va. Att'y Gen. No. 11-053, available at <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2012opns/11-053%20Petersen.pdf>.

Forestry, the General Assembly has defined “forester” as “any person who is engaged in the science, profession and practice of forestry and who possesses the qualifications required by this article.”<sup>24</sup> The statute further defines “forestry” as “the science, art and practice of creating, managing, using and conserving forests and associated natural resources for human benefit and in a sustainable manner to meet desired goals, needs, and values.”<sup>25</sup> I conclude that, absent a specific definition in the Act, it is appropriate to look to the definition of “forester” in § 10.1-1181.8 as an interpretative guide for determining the meaning of the term as it is used in the dam safety context.<sup>26</sup>

Unlike “forester,” the General Assembly has not provided a definition of “orchardist” in the *Code of Virginia*. In the absence of a statutory definition, a term is given its ordinary meaning, given the context in which it is used.<sup>27</sup> The common definition of “orchardist” is “an owner or supervisor of orchards,” and “orchard” is commonly defined as “a planting of fruit trees, nut trees, or sugar maples.”<sup>28</sup> I therefore conclude that a forester differs from an orchardist in that an orchardist harvests fruit, nuts and sap from trees, while a forester “creat[es], manag[es], us[es] and conserv[es] forests and associated natural resources for human benefit and in a sustainable manner to meet desired goals, needs, and values.”<sup>29</sup> Thus, an orchardist is concerned with the products of trees, while a forester is interested in the timber itself.

### Conclusion

Accordingly, it is my opinion that irrigation is not a necessary element for a farm pond to qualify for the agricultural exemption, provided the impounded waters are utilized in a manner found to be required for agricultural production. It is further my opinion that, because the determination of whether the agricultural exemption applies to any particular structure is primarily a factual question reserved to the Director of DCR on a case-by-case basis, I must decline to render an opinion on the issues raised in the second question presented. Finally, it is my opinion that, absent a specific definition in the Dam Safety Act, it is appropriate to look to the definition of the term “forester” provided in the statutes governing the Department of Forestry as an interpretative guide, and that a forester differs from an orchardist in that an orchardist harvests fruit, nuts or sap from trees, while a forester is concerned with the timber itself.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>24</sup> Section 10.1-1181.8 (2012). *See also* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 457 (10th ed. 1994) (defining “forester” as “a person trained in forestry”).

<sup>25</sup> Section 10.1-1181.8. *See also* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 457 (10th ed. 1994) (defining “forestry” as “the science of developing, caring for, or cultivating forests . . . the management of growing timber”).

<sup>26</sup> *See First Nat’l Bank*, 99 Va. at 504, 39 S.E. at 129-30. *See also* 1975-76 Op. Va. Att’y Gen. 3, 4-5.

<sup>27</sup> *See Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982); *Loyola Fed. Savings v. Herndon*, 218 Va. 803, 805, 241 S.E.2d 752, 753 (1978).

<sup>28</sup> *See* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 818 (10th ed. 1994).

<sup>29</sup> Section 10.1-1181.8 (definition of “forestry”).