

VWPP – WATER SUPPLY PLANNING WORK GROUP

MEETING

**AMENDMENTS
TO THE
VIRGINIA WATER PROTECTION PERMIT REGULATIONS**

**Department of Environmental Quality – Piedmont Regional Office
Monday, February 28, 2005**

Meeting Minutes

Meeting Attendees	
VWPP Water Supply Work Group	Resource Group
Carlock, John (HRPDC)	Bowman, Steve (VMRC)
Field, John (Roanoke River Basin Advisory Commission)	Gray, Tom (VDH)
Foster, Larry (James City Service Authority)	Interested Parties
Hayes, Tim (Hunton & Williams)	Hauger, Curt (City of Norfolk)
James, Eldon (Rappahannock River Basin Commission)	Kyger, Katie (VA Agribusiness Council)
Kierman, Brian (Phillip Morris USA)	Lan, John (McGuire Woods LLP)
Paylor, Dave (SNR)	Mitchell, Becky (City of VA Beach)
Petrini, Art (Henrico County)	Thacker, Mike (Appalachian Power)
Sanders, Frank (City of Winchester)	Waters, Brent (Golder Associates)
Taylor, Cathy (Dominion Resources)	Staff
Weeks, Rick (DEQ): Represented by Bob Burnley (DEQ)	Harold, Catherine (DEQ)
	Hulburt, Barbara (The McCammon Group)
	Kudlas, Scott (DEQ) (Team Leader)
	Linker, Rick (DEQ)
	Norris, Bill (DEQ)
	Rubin, Mark (The McCammon Group)
	Wagner, Terry (DEQ)

1. **Welcome and Goals:** Barbara Hulburt welcomed the meeting attendees and proposed an abbreviated meeting schedule for the meeting since the weather had kept a number of members from attending. She and Mark Rubin will be serving as the meeting facilitators. Bob Burnley officially welcomed the attendees and thanked them for volunteering to assist in the continued development of these Amendments to the Virginia Water Protect Permit Regulations. He noted that he was looking forward to open discussions on balancing in-stream and off-stream uses; measuring of cumulative impacts; and how to use Minimum In-stream Flow

Requirements properly. He noted that the plan is for this work group to complete its work by late summer or early fall so that the completed regulation can be presented to the State Water Control Board in December. Scott Kudlas, who will be serving as the Team Leader for the work group, noted that there will be a little more in-depth discussion on the schedule, goals and discussion topics at the next meeting.

2. **Introductions:** Brief introductions were made by those attending prior to the start of the meeting.
3. **Process and Expectations:** Barbara Hulburt noted that the people at the table served as the Members of the Work Group and those seated around the room were Resource members. An “empty chair” concept will be utilized throughout this process to allow those “resource” people and interested parties who are not at the table an opportunity to “come-to-the-table” to express their views and concerns. After making their comments, these individuals would return to their seats, leaving the “empty chair” to be available to the next person who needed it.

Mark Rubin presented the concept of a “Consensus-Based Process” and issues associated with the use of this process (Handout: Issues Related to Consensus-Based Processes). The hope is to get everyone to a point that they can live with the final regulation language. This is an opportunity to come up with what the regulation will look like. The goal is to take issues as problems that need to be solved while taking into account everyone’s interests.

4. **History of VWP:** Joe Hassell provided a brief history of the VWP Process and the current VWPP regulations (Power Point Presentation). He noted that there have been changes to the VWP almost annually. The last major change occurred in 2000 when language was added that required consistency with the provisions of the Clean Water Act and the State Water Control Law, while protecting in-stream beneficial uses (Handout: Virginia Acts of Assembly – 2000 Reconvened Session – Chapter 1054 – *An Act to amend and reenact §§ 62.1-44.3, 62.1-44.5, 62.1-44.15, 62.1-44.15:5, and 62.1-44.29 of the Code of Virginia, relating to wetlands.*).
5. **Review of NOIRA:** Scott Kudlas presented a review of the NOIRA process for the Virginia Water Protection Permit Regulations Amendments (Handout: Notice of Intended Regulatory Action – NOIRA – Agency Background Document). The main changes associated with the NOIRA include the following:

(1) to incorporate changes to the Code of Virginia relating to the emergency permitting of water withdrawal projects (Handout: Chapter 399 – *An Act to amend and reenact § 62.1-44.15:5 of the Code of Virginia, relating to the issuance of emergency water supply permits.*);

(2) to incorporate the U.S. Supreme Court’s ruling in Virginia vs. Maryland (Handout: Supreme Court of the United States – Virginia vs. Maryland – October Term, 2003);

(3) to incorporate changes already made to the general permit regulations that corrected administrative procedures, clarified application and permitting requirements, and allowed for a more efficient application review process;

(4) to implement a formal pre-application scoping process for water supply projects (Handout: Senate Bill No. 1248 – 2005 Session – *Allows a pre-application process at the request of the applicant*);

(5) to clarify the requirement for cumulative impact assessment for water supply projects (*level of detail issues – need to evaluate the need to establish submission standards and processes for determining cumulative impacts on flow over the long term*);

(6) to clarify requirements for alternatives analysis for water supply projects (*need to establish submission standards and processes for assessing local needs; need to look at time periods for planning vs. permitting*);

(7) to investigate ways to simplify, clarify and improve coordination of state agency reviews and comments for water supply projects (*Senate Bill 1248 establishes that DEQ and MRC permits should be issued within one year of each other.*);

(8) to clarify who does and does not need a permit for a water withdrawal by more clearly defining certain terms in light of the statutory “grandfathering” of certain withdrawals (*The terms ‘existing withdrawal’; ‘new withdrawal’ and ‘increased withdrawal’ need to be defined.*); and,

(9) to clarify the process and criteria for establishing minimum in-stream flow requirements and evaluation of responses during drought conditions.

6. NOIRA Issues (Issue/Change # 3): Ellen Gilinsky reviewed the proposed changes to **9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation** based on General Permit Regulation Changes and on Staff Comments. (Handout: 9 VAC 25-210-10 et seq. with changes indicated in “Red with dark shading” for proposals based on General Permit Regulation Changes and in “Green with light shading” for proposals based on Staff Comments.)

- Want to change language in regulation to match the language changes made in the General Permits.
- **9 VAC 25-210-10. Definitions:** Definitions needed to be clarified. (Definitions for “plan view sketch” & “profile sketch” still being

developed.) – A question was raised regarding the definition for “temporary impacts” which refers to “impacts to surface waters, including wetlands...” Is this duplicative since “surface waters” as defined includes “wetlands”? The terms “existing withdrawal”; “new withdrawal” and “increased withdrawal” need to be defined. There was also a question regarding the use of the term “alteration” in the definitions of “permanent impacts” and “temporary impacts”. Is this the correct term to use in these definitions?

- **9 VAC 25-210-60. Exclusions:** Adding in qualifiers to identify what the exclusion actually covers.

- **9 VAC 25-210-80. Application for a VWP Permit:** Most of the changes in the General Permits were in this area and were the result of changes in the simplifying of the permit process. This section contains the bulk of the submission requirements for the applicant and represents the bulk of the proposed changes.
 - i. Also, there is no longer an addendum for water withdrawals, so the language in the body of the regulation needs to address “water withdrawal projects” and “minimum in-stream flow projects”.

 - ii. Electronic submittals are now acceptable.

 - iii. It was suggested that the following language should be added on Page 7 of the regulation: Part II, A.1. The amount of time...application for any project, *resulting in an impact*, excluding...

 - iv. Section K (1) was reworded to more clearly identify what is needed in an analysis. It was suggested that since all “water withdrawal projects” were not the same that the following change should be made to Section K (1): For wetland impacts...and for all minimum in-stream flow and water withdrawals projects, *as applicable*, the assessment....

 - v. It was noted that there had been a lot of changes to Section K (4) (Pages 9 & 10) to correspond with the changes that had been made to the General Permit. One specific change that was identified was the inclusion of the use of “a protective instrument” instead of “deed restrictions” for compensation sites which will allow for more compensation for Government owned lands.

 - vi. It was noted that other than the inclusion of the concept of “minimum in-stream flow” in Section K (2) that no other changes to the application requirements have been made to this section.

- **9 VAV 25-120-90. Conditions applicable to all VWP permits:** It was suggested that the term “emergency” that had been inserted as a recommended change on page 12 should be defined. There is a difference in whether you were dealing with a “drought emergency” or “a National Security emergency”. It was agreed that this should be revisited.
- **9 VAC 25-210-100. Signatory requirements:** Electronic submittals and scanned-in signatures are now acceptable.
- **9 VAC 25-210-115. Evaluation of mitigation alternatives:** This section identifies how mitigation alternatives will be evaluated. A lot of time was spent during the General Permit discussions to clarify the language dealing with the concepts of “avoidance”; “mitigation”; and “compensation”. An effort was made to include and better define the concept of compensation for “stream impacts”. It was suggested that we need to look closely at Section B (2) to ensure that we are including as many different types of compensation as possible. It was noted that the term “function” used in Section C was not defined. It was agreed that the term “function” as it applies to “no net loss of functions in all surface waters” should be defined.

Staff noted that the proposed changes in Section D suggest replacing the term “alternatives analysis” with the concept of “practicable and ecologically-preferable compensation alternatives”. It was suggested that the idea of “ecologically-preferable” might be difficult to define since off-site mitigation might make sense because you can’t physically do it on-site.

Staff noted that the 404 Guidelines are incorporated by reference into this regulation. The concepts of mitigation in the same or adjacent watershed or same or adjacent HUC Code were discussed. Tim Hayes was asked to look over Section D (1&2) for any clarifying language changes/needs. It was noted that the term “alternatives” analysis was still included in the last sentence of Section D (2) on page 15 and, for consistency, this needs to be changed.

There was a request for clarification of the concept of “out-of-kind” mitigation. It was suggested that mitigation of an “emergent wetland” impact in a “forested wetland” might carry a higher function and value than mitigation in an “emergent wetland”. Another example of an “out-of-kind” mitigation might be the mitigation of an in-stream impact by doing a fish passage project rather than restoring a stream. The over-ruling concept is that you have to have no-net loss of wetland acreage. It was also noted that the concept of “stream water quality benefits or functions” (Page 15; Section E.3.3) was now being accepted by trust funds.

- **9 VAC 25-210-130. VWP general permits:** It was noted that the language in this section was changed to clarify the differences between “regulation” and “authorization”. The General Permit is a “regulation”. An applicant receives an “authorization” under the General Permit. Section H (4) clarifies the difference between the CORPS Nationwide Permit and the state General Permit. The state’s regulation does not allow “preservation” by itself to meet the compensation mitigation requirements.
 - **9 VAC 25-210-180. Rules for modification, revocation, and reissuance and termination of VWP permits:** It was noted that “Termination for cause” cases have to go before the Board. Changes to this section (F) provide the guidelines for “termination by mutual consent” which can be handled by the Director of DEQ and would not have to go before the Board for approval.
 - **9 VAC 25-210-200. Transferability of VWP Permits:** There was some discussion on the changes to the deadlines in Section B. Staff suggested that there might be some issues regarding consistency with other regulations that should be examined. It was noted that these changes had been part of the General Permit regulatory changes and were being included here for consistency. Staff noted that these deadline changes may be appropriate in a General Permit but might not be appropriate for an Individual Permit. This section will be looked at by staff to clarify any out-standing issues.
 - **9 VAC 25-210-210. Minor Modification:** Proposed changes to this section further define reasons for seeking a “minor modification” to a project, for example: “it doesn’t change the impact” or “an additional temporary impact” or a “decreased impact” or “use of a different, approved mitigation bank”. These changes also provide a mechanism for adjusting the “compensation requirements” based on these “minor modifications”.
 - **FORMS:** Some additional form references have been included at the end of the regulation.
7. **NOIRA Issues (Issue/Change #1):** Joe Hassell provided a summary of the amendment to the VWPP Regulation which would “incorporate changes to the Code of Virginia relating to the emergency permitting of water withdrawal projects”. (Handout: Chapter 399: *An Act to amend and reenact § 62.1-44.15:5 of the Code of Virginia, relating to the issuance of emergency water supply permits.*)
- Section J of Section 399 provides for the issuance of an Emergency Virginia Water Protection Permit during drought conditions.

- Staff noted that this section does not contain an expiration date for the emergency permit.
- It was suggested that there may be a need to define what a “water supply emergency” is and what constitutes “mandatory conservation measures”.
- Chapter 399 specifies a 5-day comment period for agency comments and recommendations. This could be handled by email, but it may need to be clarified in the regulation.
- After the issuance of the “emergency permit” the applicant has 14 days within which to apply for a normal VWP Permit. A VWP Permit for a water withdrawal is normally issued for the maximum 15 year period. However, since by the time that an applicant has gotten an “emergency permit”, they are usually coming out of the drought, there should be consideration given to issuance of these permits for a shorter term.
- The definition of the term “mandatory conservation measures” should be included in Section 9 VAC 25-210-80 of the regulation.
- The term “water supply emergency” should be defined in the regulation.

Staff agreed to take the language of the statute and propose a way to incorporate it into the regulation, taking into account the questions and concerns noted above.

- 8. Dates, calendar, close:** Barbara Hulburt requested input from the Work Group as to possible meeting dates and “to-avoid” dates for the next several months. This input will be examined and possible meeting dates for the next several months will be distributed via email. All the meeting attendees were thanked for their attendance and participation.
- 9.** The meeting was adjourned at approximately 12:12 PM.