

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

CHAPTER 210.

VIRGINIA WATER PROTECTION PERMIT PROGRAM REGULATION.

PART I.

GENERAL.

9 VAC 25-210-10. Definitions.

Unless a different meaning is required by the context, the following terms, as used in this chapter, shall have the following meanings:

"Act" or "Clean Water Act" means 33 USC § 1251 et seq. as amended 1987.

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

"Applicant" means ~~an individual, operator or owner filing a joint permit to dredge or fill, or both, or requiring a Federal Energy Regulatory Commission (FERC) permit or conducting other activities which require a permit under this chapter~~ a person applying for a VWP individual or general permit.

~~"Approval authority" means the executive director of the State Water Control Board.~~

"Aquatic resources" or "aquatic environment" mean surface waters and the habitat they provide, including both plant and animal communities.

"Avoidance" means not taking or modifying a proposed action or parts of an action so that there is no adverse impact to the aquatic environment.

"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.

"Best management practices [(BMPs)]" means a schedule of activities, prohibition of practices, maintenance

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procedures and other management practices to that prevent or reduce the pollution of surface waters.

"Board" means the State Water Control Board.

~~"Certificate" means certification required under §401 of the Clean Water Act (33 USC §1341), provided by the State Water Control Board.~~

["Code" means Code of Virginia.]

"Compensation" or "compensatory mitigation" means actions taken that provide some form of substitute aquatic resource for the impacted aquatic resource.

~~"Composite sample" means a combination of individual samples of sediment or water taken in proportion to the area to be impacted which ensures that a representative sample is obtained.~~

"Consumptive use" means the withdrawal of surface waters, without recycle of said waters to their source or basin of origin.

"Creation" means the establishment of a wetland or other aquatic resource where one did not formerly exist.

"Director" means [the] Director of the Department of Environmental Quality [(DEQ) or an authorized representative.]

"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.

"Draft VWP permit" means a ~~prepared~~ document indicating the board's tentative decision relative to a VWP permit action.

"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 excavating in which material is removed or relocated from beneath surface

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"Ecologically preferable" means capable of providing a higher likelihood of replacing existing wetland functions and values, water quality, and fish and wildlife resources, than alternative proposals.

"Effluent" means dredged material or fill, including return flow from confined sites.

"Enhancement" means activities conducted in existing wetlands or other aquatic resources that increase one or more aquatic functions or values.

"Environmental Protection Agency (EPA)" means the United States Environmental Protection Agency.

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

"Executive director" means executive director of the State Water Control Board.

"Fill" means replacing portions of surface water with upland, or changing the bottom elevation of a [water body or wetland 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 [water body surface water] for any purpose.

"General permit" means a permit [issued] by the Corps of Engineers, such as Regional or Nationwide Permits or a permit issued by the State Water Control Board (SWCB)[under 40 CFR Part 241] authorizing a specified category of activities within a geographic area.

"Geographic area of a delineated wetland" means the area contained within and up to a wetland boundary determined by delineation methods consistent with this chapter.

"Impairment" means the damage, loss or degradation of the functions and values of state waters.

"In-lieu-fee fund" means a monetary fund operated by a nonprofit organization or governmental agency which receives financial contributions from persons impacting wetlands or streams pursuant to an authorized permitted activity and which expends the monies received to provide consolidated compensatory mitigation for permitted wetland or stream impacts.]

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"Isolated wetlands of minimal ecological value" means those wetlands that[:] (i) do not have a surface water connection to other state waters; (ii) are less than one-tenth of an acre in size; (iii) are not located in a FEMA Federal Emergency Management Agency] designated 100-year floodplain; (iv) are not identified by the Virginia Natural Heritage Program as a rare or state significant natural community; (v) are not forested; and (vi) do not contain listed federal or state threatened or endangered species.

"Joint Permit Application (JPA)" means an application form that is used to apply for permits from the Norfolk District [Army] Corps of Engineers, the Virginia Marine Resources Commission, the Virginia Department of Environmental Quality, and local wetland boards for work in waters of the United States and in surface waters of Virginia.

["Law" means the State Water Control Law of Virginia.]

"Minimization" means lessening impacts by reducing the degree or magnitude of the proposed action and its implementation.

"Mitigation" means sequentially avoiding and minimizing impacts to the maximum extent practicable, and then compensating for remaining unavoidable impacts of a proposed action.

["Mitigation bank" means a site providing off-site, consolidated compensatory mitigation that is developed and approved in accordance with all applicable federal and state laws or regulations for the establishment, use and operation of mitigation banks, and is operating under a signed banking agreement.]

"Mitigation banking" means compensating for unavoidable wetland [or stream] losses in advance of development actions through the sale, purchase or use of credits from a mitigation bank [that is operating under a signed banking instrument in accordance with all applicable federal and state laws or regulations for the establishment, use and operation of mitigation banks].

"Multi-project mitigation site" means an area of wetland restoration, creation, enhancement and, in appropriate circumstances, preservation of wetlands [or streams] or upland buffers adjacent to wetlands or other state waters, that is or has been utilized to meet compensation requirements for more than one project but that is not a mitigation bank.

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"Nationwide permit" means a general permit [issued by the USACE under 40CFR Part 241 and] governing specified activities, issued by the U.S. Army Corps of Engineers, the conditions of which are applicable nationwide.

"Nonpoint source" means a source of pollution, such as a farm, forest or construction site run-off, urban storm water run-off or mine run-off that is not collected or discharged as a point source.]

"Normal agricultural activities" means those activities defined as an agricultural operation in §3.1-22.29 of the Code of Virginia and any activity that is conducted as part of or in furtherance of such agricultural operation, but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC § 1344 or any regulations promulgated pursuant thereto.

"Normal residential gardening, lawn and landscape maintenance" means ongoing noncommercial residential activities conducted by or on behalf of an individual occupant, including mowing, planting, fertilizing, mulching, tilling, vegetation removal by hand or by hand tools, placement of decorative stone, fencing and play equipment. Other appurtenant noncommercial activities, provided that they do not result in the conversion of a wetland to upland or to a different wetland type, may also be included.

"Normal silvicultural activities" means any silvicultural activity as defined in § 10.1-1181.1 of the Code of Virginia, and any activity that is conducted as part of or in furtherance of such silvicultural activity, but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC §1344 or any regulations promulgated pursuant thereto.

"Permanent flooding or impounding" means an increase in the duration [and/or 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.

"Permit" means a Virginia Water Protection Permit (VWP) which is the Commonwealth of Virginia's § 401 Water Quality Certification.

"Permittee" means an owner or operator the person who currently has an effective VWP permit issued by the

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board holds a VWP individual or general permit.

"Person" means any firm, corporation, association, or partnership, one or more individuals, or any governmental unit or agency of it.

"Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. ~~It does not mean water, gas or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well is used either to facilitate production or for the disposal purposes if approved by the Department of Mines, Minerals and Energy unless the board determines that such injection or disposal will result in the degradation of surface or groundwater resources.~~

"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.

"Practicable" means available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.

"Preservation" means the protection of resources in perpetuity through the implementation of appropriate legal and physical mechanisms.

"Public hearing" means a fact finding proceeding held to afford interested persons an opportunity to submit factual data, views and comments to the board pursuant to the board's Procedural Rule No. 1 [(9 VAC 25-230-10 et seq.)].

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"Regional permit" means a ~~type of general permit [issued by the USACE under 40CFR Part 241 and] issued by the Corps of Engineers authorizing a specified category of activities applicable within the Commonwealth of Virginia or other a specified geographic region and whose conditions are applicable within the geographic area specified.~~

"Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.

"Schedule of compliance" means a schedule of remedial measures including a sequence of enforceable actions or operations leading to compliance with the Act, the law, and the board regulations, standards and policies.

"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 ~~[(as defined by the Cowardin classification system or similar terminology)]~~ resulting in the loss or more than minimal degradation of its existing ecological functions.

~~["Single and complete project" means the total project proposed or accomplished by one person. For linear projects, the "single and complete project" (i.e., a single and complete crossing) will apply to each crossing of a separate water of the United States (i.e., a single waterbody) and to multiple crossings of the same waterbody at separate and distinct locations. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland, lake, etc. are not separate waterbodies. A single and complete project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent utility.]~~

"State general permit" means a VWP permit issued by the Commonwealth of Virginia through the State Water Control Board, and applicable statewide, for activities of minimal environmental consequence.

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the

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Commonwealth or within its jurisdiction, including wetlands.

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

- ~~1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;~~
- ~~2. All interstate waters including interstate wetlands;~~
- ~~3. All other waters such as inter/intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce, including any such waters:
 - ~~a. Which are or could be used by interstate or foreign travelers for recreational or other purposes;~~
 - ~~b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or~~
 - ~~c. Which are used or could be used for industrial purposes by industries in interstate commerce;~~~~
- ~~4. All impoundments of waters otherwise defined as surface waters under this definition;~~
- ~~5. Tributaries of waters identified in subdivisions 1 through 4 of this definition;~~
- ~~6. The territorial sea; and~~
- ~~7. "Wetlands" adjacent to waters, other than waters that are themselves wetlands, identified in subdivisions 1 through 6 of this definition.~~

"Toxic pollutant" means any agent or material including, but not limited to, those listed under § 307(a) of the Act (33 USC § 1317(a)), which after discharge will, on the basis of available information, cause toxicity. Toxicity means the inherent potential or capacity of a material to cause adverse effects in a living organism, including acute or chronic effects to aquatic life, detrimental effects on human health or other adverse environmental effects.

"USACE" means the United States Army Corps of Engineers.

"VMRC" means the Virginia Marine Resources Commission.]

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"VWP general permit" means a regulation that constitutes a VWP permit for a category of activities.

"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.

"Water Quality Standards" means water quality standards adopted by the board [promulgated and approved] by the administrator of the EPA under §303 of the Act[. ~~Note: these can be found at as defined at 9 VAC 25-26-10 et seq.~~ 9 VAC 25-260-10 et seq.]

"Wetlands" means those areas that are inundated or saturated by surface or ground water 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.

9 VAC 25-210-20. Purpose. (Repealed.)

~~This chapter delineates the procedures and requirements to be followed in connection with the Virginia Water Protection Permit issued by the board pursuant to the State Water Control Law. This chapter supersedes Procedural Rule No. 3 of the regulations of the State Water Control Board.~~

9 VAC 25-210-30. Authority for chapter. (Repealed.)

~~The authority for this chapter is pursuant to the State Water Control Law (law), Chapter 3.1 (§ 62.1-44.2 et seq.) of Title 62.1, in particular §§ 62.1-44.15:5, 62.1-44.15(7) and 62.1-44.15(10); and 33 USC § 1251 et seq.~~

[9 VAC 25-210-40. Federal guidelines. (Repealed.)

~~The following federal guidelines are incorporated by reference:~~

~~Guideline for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230 (Federal Register December 24, 1980).]~~

9 VAC 25-210-45. Wetland delineation.

Each delineation shall be conducted in accordance with the [U.S. Army Corps of Engineers' USACE] "Wetland Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" (Federal Manual). The Federal Manual

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~~shall be interpreted in a manner consistent with [Corps USACE] guidance [and the requirements of this regulation, and any delineation guidance adopted by the board as necessary to ensure consistency with the USACE implementation of delineation practices.]~~

9 VAC 25-210-50. Prohibitions and requirements for VWP permits.

A. ~~[No Except in compliance with a VWP permit,] no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, excavate in a wetland, or otherwise alter the physical, chemical or biological properties of surface waters, except as authorized pursuant to a Virginia Water Protection Permit, or as excluded in 9 VAC 25-210-60~~ excavate in wetlands, or on or after October 1, 2001, conduct the following activities in a wetland[₇ :]

~~[(i) 1.]~~ New activities to cause draining that significantly alters or degrades existing wetland acreage or functions[₇ :]

~~[(ii) 2.]~~ Filling or dumping[₇ :]

~~[(iii) 3.]~~ Permanent flooding or impounding[₇ :] or

~~[(iv) 4.]~~ New activities that cause significant alteration or degradation of existing wetland acreage or functions.

B. No VWP permit shall be issued for the following:

1. Where the proposed activity or the terms or conditions of the VWP permit do not comply with state law or regulations including but not limited to § 10.1-1408.5 of the Code ~~[of Virginia of Virginia];~~

2. For the discharge of any radiological, chemical or biological warfare agent or high level radioactive material into surface waters;₂

3. ~~For any discharge which will result in the pollution of surface waters or the violation of standards, regulations or policies adopted by the board pursuant to state law.~~

9 VAC 25-210-60. Exclusions.

The following do not require a ~~Virginia Water Protection Permit~~ VWP permit] but may require other permits under state and federal law[₂]

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~~[4. A.] Discharges of dredged or fill material into state waters, excepting wetlands. which are [addressed authorized] under a [U.S. Army Corps of Engineers USACE] Regional, General or Nationwide Permit, and for which [no § 401 Water Quality Certificate is required_Certification has been granted as of the date of this chapter.] Such permits include the following activities:~~

- ~~a. The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR 66, Subchapter C, § 10).~~
- ~~b. Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (33 CFR 322.5(g), § 10).~~
- ~~c. The repair, rehabilitation or replacement of any previously authorized, currently serviceable structure or fill, or any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted. Maintenance dredging and beach restoration are not authorized under nationwide permits (33 CFR 330.5(a), § 10).~~
- ~~d. Fish and wildlife harvesting devices and activities such as pound nets, crab traps, eel pots, duck blinds, and clam and oyster digging (33 CFR 330.5(a), § 10).~~
- ~~e. Staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar scientific structures (33 CFR 330.5(a), § 10).~~
- ~~f. Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes. Drilling of exploration-type bore holes for oil and gas exploration is not authorized by any nationwide permit (33 CFR 330.5(a), § 10).~~
- ~~g. Structures for the exploration, production, and transportation of oil, gas and minerals on the outer~~

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~~continental shelf within areas leased for such purposes by the Department of Interior, Mineral Management Service, provided these structures are not placed within the limits of any designated shipping safety fairway or traffic separation scheme (33 CFR 330.5(a), § 10).~~

~~h. Structures placed within anchorage or floating areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard (33 CFR 330.5(a), § 10).~~

~~i. Noncommercial, single boat, mooring buoys (33 CFR 330.5(a), § 10).~~

~~j. Temporary buoys and markers placed for recreational use such as water skiing and boat racing provided that the buoy or marker is removed within 30 days after its use has been discontinued (33 CFR 330.5(a), § 10).~~

~~[2. B.] Any activity discharge, other than an activity in a surface water governed by §[62.1-44.5 and] 62.1-44.15:5 [of the Code], permitted by a Virginia Pollutant Discharge Elimination System (VPDES) permit in accordance with 9 VAC 25-3031-10 et seq.[;]~~

~~[3. C.] Any activity, other than an activity in a surface water governed by §[62.1-44.5 and] 62.1-44.15:5 [of the Code], permitted by a Virginia Pollution Abatement (VPA) permit in accordance with 9 VAC 25-3032-10 et seq.[;]~~

~~[4. D.] Land disposal activities including septic tanks when authorized by a State Department of Health permit or a State Department of Waste Management Permit; Septic tanks, when authorized by a State Department of Health Permit.~~

~~[5. E.] Discharges authorized by EPA under the Safe Drinking Water Act Underground Injection Control Program (UIC). Any activity permitted under Chapter 13 of Title 28.2 [of the Code], Fisheries and Habitat of the Tidal Waters, Tidal Wetlands, unless state certification is required by §401 of the Clean Water Act[;]~~

~~[6. F.] Normal residential gardening, lawn and landscape maintenance[;]~~

~~[67a. G.] Normal farming agriculture and silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices.~~

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~~[7b. 1.]~~ To fall under this exclusion, the activities specified in ~~[subdivision 7 a of this]~~ subsection [G of this section] must be part of an established (i.e., ongoing) ~~[farming agriculture]~~ or silviculture, ~~or ranching~~ operation, and must be in accordance with applicable best management practices set forth in either Forestry Best Management Practices for Water Quality in Virginia [Manual Technical Guide] (3rd ed., 1997) or Virginia Agricultural BMP Manual ([1998 2000]), which facilitate compliance with the §404(b)(1) Guidelines (40 CFR 230). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

~~[7c. 2.]~~ Activities which bring a new area into ~~[farming agricultural, or silviculture silvicultural or ranching use]~~ are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If the activity takes place outside surface waters, ~~[or does not involve a discharge,]~~ it does not need a §401 Water Quality Certificate, and therefore no ~~[Virginia Water Protection VWP]~~ permit, whether or not it is part of an established ~~[farming agriculture, or]~~ silviculture ~~[or ranching]~~ operation.

~~[3.]~~ For the purposes of ~~[subdivision 7 of this subsection G,]~~ cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

~~[(1) a.]~~ "Cultivating" means physical methods of soil treatment employed within established ~~[farming agriculture,]~~ ranching and silviculture lands on farm~~[,]~~ ranch~~,~~ or forest crops to aid and improve their growth, quality, or yield.

~~[(2) b.]~~ "Harvesting" means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silviculture lands to bring about their removal from farm ~~[or]~~ forest ~~[land], [or ranch land,]~~ but does not include the construction of farm~~[, or]~~ forest~~[, or ranch]~~ roads.

~~[(3) c.]~~ "Minor drainage" means:

~~[(a) (1)]~~ The discharge of dredged or fill material incidental to connecting upland drainage

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facilities to surface waters, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into surface waters; ~~and as such never require a §401 Water Quality Certificate, and hence no Virginia Water Protection Permit;~~

~~[(b) (2)]~~ (2) The discharge of dredged or fill material for the purpose of installing ditching or other water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, or other wetland crop species, where these activities and the discharge occur in surface waters which are in established use for such agricultural and silviculture wetland crop production;

~~[(c) (3)]~~ (3) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Act, and which are in established use for the production of rice, or other wetland crop species;

~~[(d) (4)]~~ (4) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year after such blockages are discovered in order to be eligible for exclusion; and

~~[(e) (5)]~~ (5) Minor drainage in surface waters is limited to drainage within areas that are part of an established ~~[farming~~ agriculture or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a nonwetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions),

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

or conversion from one wetland use to another (for example, silviculture to ~~farming~~ agriculture). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting surface water. Any discharge of dredged or fill material into surface water incidental to the construction of any such structure or waterway requires a VWP permit.

~~[(4) d.]~~ "Plowing" means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm~~, or~~ forest ~~or ranch~~ land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of surface water to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities does not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

~~[(5) e.]~~ "Seeding" means the sowing of seed and placement of seedlings to produce farm~~, ranch~~ or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

~~[7-8. H.]~~ Maintenance, including emergency reconstruction of recently damaged parts~~,~~of currently serviceable structures such as dikes, groins, levees, dams, riprap breakwaters, causeways, bridge abutments or approaches, and transportation and utility structures. Maintenance does not include modifications that change the character, scope, or size of the original design. In order to qualify for this exemption, emergency reconstruction must occur within a reasonable period of time after damage occurs.

~~[8-9. I.]~~ Construction or maintenance of farm or stock ponds or irrigation ditches~~,~~ or the maintenance (but not construction) of drainage ditches. Discharge associated with siphons, pumps, headgates, wingwalls, weirs,

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exclusion. [The maintenance dredging of existing ditches is included in this exclusion provided that the final dimensions of the maintained ditch do not exceed the average dimensions of the original ditch. This exclusion does not apply to the construction of new ditches or to the channelization of streams.]

~~[9-10. J.]~~ Construction of temporary sedimentation basins on a construction site which does not include the placement of fill materials into surface waters [or excavation in wetlands]. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term "construction site" also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in run-off of sediment is controlled through the use of temporary sedimentation basins.

~~[10-11. Any activity with respect to which the Commonwealth of Virginia has an approved program under §208(b)(4) of the Act which meets the requirements of §208(b)(4)(B) and (C) (33 USC §1288).]~~

~~[11-12. K.]~~ Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with applicable best management practices (BMPs) set forth in either Forestry Best Management Practices for Water Quality in Virginia Manual Technical Guide] (3rd ed., 1997) or Virginia Agricultural BMP Manual ([1998 2000]), to ensure that flow and circulation patterns and chemical and biological characteristics of surface waters are not impaired, that the reach of such waters is not reduced, and that any adverse effect on the aquatic environment will otherwise be minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:

~~[a. 1.]~~ Permanent roads (for farming agriculture] or forestry activities), temporary access roads (for mining, forestry, or farm purposes), and skid trails (for logging) in surface waters shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific [farming agriculture], silviculture or mining operations, and local topographic and climatic conditions;

~~[b. 2.]~~ All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into surface waters;

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

~~[e- 3.]~~ The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

~~[d- 4.]~~ The fill shall be properly stabilized and maintained to prevent erosion during and following construction;

~~[e- 5.]~~ Discharges of dredged or fill material into surface waters to construct road fill shall be made in a manner which minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within state waters (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

~~[f- 6.]~~ In designing, constructing, and maintaining roads, vegetative disturbance in surface waters shall be kept to a minimum;

~~[g- 7.]~~ The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

~~[h- 8.]~~ Borrow material shall be taken from upland sources whenever feasible;

~~[i- 9.]~~ The discharge shall not take, or jeopardize the continued existence of a federal or state listed threatened or endangered species as defined under the Endangered Species Act (16 USC §1531 et seq.) and the Code ~~[of Virginia]~~ §29.1-566 and 4 VAC §15-20-130 B and C, except as provided in §29.1-568, or adversely modify or destroy the critical habitat of such species;

~~[j- 10.]~~ Discharges into the nesting and breeding areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

~~[k- 11.]~~ The discharge shall not be located in proximity of a public water supply or intake;

~~[l- 12.]~~ The discharge shall not occur in areas of concentrated shellfish production;

~~[m- 13.]~~ The discharge shall not occur in a component to the National Wild and Scenic River System;

~~[n- 14.]~~ The discharge material shall consist of suitable material free from toxic pollutants in toxic amounts; and

~~[o- 15.]~~ All temporary fills shall be removed in their entirety and the area restored to its original elevation.

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

9 VAC 25-210-70. Effect of a VWP permit.

A. As to the permitted activity, compliance with a VWP permit constitutes compliance with the VWP permit requirements of the [~~State Water Control~~] Law and regulations.

B. The issuance of a VWP permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize injury to private property or any invasion of personal rights or any infringement of federal, state or local law or regulation.

PART II.

VWP PERMIT APPLICATION AND ISSUANCE DEVELOPMENT.

9 VAC 25-210-80. Application for a VWP permit.

A. Duty How to apply. Any person who is required to obtain a ~~Federal 404 permit or federal license or relicense which requires a § 401 Certification and proposes the discharge of dredged or fill material into or adjacent to surface waters, or proposes to construct an intake for the purpose of withdrawing water from surface waters which has the potential to affect the beneficial use of such waters, or is required to have a permit under 9 VAC 25-210-50, and who does not have an effective permit except persons excluded under 9 VAC 25-210-60, VWP permit shall submit a complete ~~Joint VWP permit application to the State Water Control Board DEQ through the [Virginia Marine Resources Commission (VMRC) VMRC], consisting of the Joint Permit Application (JPA) with the DEQ VWP Permit Addendum, or [shall] submit a complete registration statement for coverage under a VWP general permit, as applicable. [These applications are available from VMRC, the Norfolk District, U.S. Army Corps of Engineers, or DEQ. The Virginia Department of Transportation (VDOT) may use its monthly Interagency Coordination Meeting (IACM) process for submitting JPAs or registration statements.]~~~~

1. ~~A complete Joint Permit Application shall be completed and submitted to the Virginia Marine Resources Commission (VMRC) by any owner or applicant who discharges or proposes to discharge dredged or fill materials or requires a FERC permit before a Virginia Water Protection Permit can be issued. These applications are available from VMRC, the Norfolk District, U.S. Army Corps of Engineers, or the State Water~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

~~Control Board. This item does not apply where Nationwide or general permits, for which the board has waived certification, are applicable.~~

~~[1. The amount of time allowed by §62.1-44.15:5. D of the Code for DEQ to process a complete VWP [permit] application for any project, excluding water withdrawal projects, is 15 days for completeness review; 120 days for processing the complete application by issuing a VWP permit, issuing a VWP permit with conditions, denying the VWP permit, or deciding to conduct a public meeting or hearing; 60 days to hold a public meeting or hearing; and 90 days after the public meeting or hearing, if held, to make a final VWP permit decision. The required 15-day timeframe for completeness review for all projects, with the exception of minimum instream flow and water withdrawal projects, will commence upon receipt of the application by the DEQ office having authority over the project (i.e., the regional office in the region in which the project is located, or central office for VDOT projects).]~~

~~2. A complete 404/401/VWPP application to the State Water Control Board, as a minimum, consists of the following:~~

- ~~a. A joint 404/401/VWPP application being completed in its entirety and all maps, attachments and addenda being included;~~
- ~~b. The application must be accompanied by a Local Government Approval Form;~~
- ~~c. The application must have an original signature;~~
- ~~d. A detailed location map of the impact area with the latitude and longitude, hydrologic unit code, stream classification, the drainage area of the affected surface waters and the watershed in which the surface water occurs clearly identified on the map. The map should be of sufficient detail such that the site may be easily located for site inspection;~~
- ~~e. An assessment of functional values of the affected surface waters including information on existing beneficial uses of the surface waters at the proposed project location;~~
- ~~f. A complete narrative description of the project, with detailed sketches, of the type of activity to be conducted and showing any physical alteration to surface waters;~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

- ~~g. If dredged or fill material is involved the applicant must provide evidence that the material is free from toxic contaminants, or that the material, if not free of contaminants, will be placed in an approved disposal area;~~
- ~~h. An assessment of the impacts of the activity to existing beneficial uses;~~
- ~~i. A delineation map of all wetlands if any on the site as required by the U.S. Army Corps of Engineers or U.S. EPA or the Federal Energy Regulatory Commission, including the data utilized to develop the delineation map and the latitude and longitude of the center of the wetland area to be impacted;~~
- ~~j. The drainage area of any wetland identified in subdivision i above, or the watershed in which the wetland occurs;~~
- ~~k. A plan of mitigation for unavoidable impacts to surface waters which must include: measures taken to avoid impacts, the measures proposed to reduce the impacts to surface waters and where impacts could not be avoided the means by which mitigation will be accomplished (e.g., channel relocation, aquatic habitat enhancement, wetland replacement, recreational enhancement etc.).~~

[2. There shall be no commencement of any activity for which a VWP permit is required prior to the issuance of a VWP permit.]

~~3. In addition to requirements of subdivision 2 of this subsection, applications involving a surface water withdrawal or a FERC license or relicense also shall include:~~

- ~~a. The drainage area, the average annual flow and the median monthly flows at the withdrawal point;~~
- ~~b. The average daily withdrawal, the maximum daily and instantaneous withdrawals and information on the variability of the demand by season;~~
- ~~c. The consumptive use and the average daily return flow of the proposed project and the location of the return flow;~~
- ~~d. Information on the proposed use of the surface water and information on how the demand for surface water was determined;~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

~~e. Information on flow dependent beneficial uses at the proposed project location; and~~

~~f. Information on the aquatic life at the proposed project location, including species and habitat requirements.~~

~~4. Where an application is considered incomplete, the board may require the submission of additional information after an application has been filed, and may suspend processing of any application until such time as the applicant has supplied missing or deficient information and the board considers the application complete. Further, where the applicant becomes aware that he omitted one or more relevant facts from a permit application, or submitted incorrect information in a permit application or in any report to the board, he shall immediately submit such facts or the correct information.~~

~~[1. The required 15-day timeframe for completeness review for all projects, with the exception of minimum instream flow and water withdrawal projects, will commence upon receipt of the application by the office having authority over the project (i.e., the regional office in the region in which the project is located, or central office for Virginia Department of Transportation projects).]~~

~~[5. 2.] Any person proposing a new discharge for an individual permit of dredged or fill material shall submit a complete Joint Permit Application at least 180 days prior to the date planned for commencement of the activity resulting in the discharge. Any person proposing a new discharge which meets the criteria for a nationwide or state general permit shall submit a complete Joint Permit Application at least 60 days prior to the commencement of the activity resulting in the discharge. [There shall be no discharge of dredged or fill material commencement of any activity for which a VWP permit is required prior to the issuance of a VWP permit.]~~

~~6. For any person possessing a §401 Water Quality Certificate as of December 31, 1989, such certificate shall remain valid and enforceable until such time as the certificate expires, or reapplication or modification is necessary. For certificates issued under §401 of the Act after December 31, 1989, the board may at its option issue a Virginia Water Protection Permit.~~

~~7. Any person with an existing unpermitted discharge of dredged or fill material shall submit a Joint Permit~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

~~Application immediately upon discovery by the owner or within 30 days upon being requested to by the board which ever comes first.~~

~~8. Pursuant to § 62.1-44.15:3 of the Code of Virginia no application for a new permit will be deemed complete until the board receives notification from the local government body of the county, city or town in which the discharge is to take place that the location and operation of the discharging activity is consistent with all ordinances adopted pursuant to Chapter 11 (§ 15.1-427 et seq.) of Title 15.1. and Chapter 21 (§ 10.1-2100 et seq.) of Title 10.1 of the Code of Virginia where applicable.~~

B. Duty to reapply.

~~1. Any permittee with an effective permit shall submit a new permit application at least 180 days before the expiration date of an effective permit unless permission for a later date has been granted by the board.~~

~~2. Owners or persons who have effective permits shall submit a new application 180 days prior to any proposed modification to their activity which will:~~

~~a. Result in significantly new or substantially increased discharge of dredged or fill material, or significant change in the nature of the pollutants; or~~

~~b. Violate or lead to the violation of the terms and conditions of the permit or the water quality standards of the Commonwealth.~~

~~C. Informational requirements. All applicants for a Virginia Water Protection Permit shall provide information in accordance with § 404(b)(1) Guidelines for Specification of Disposal Sites of Dredged or Fill Material, 40 CFR 230.60 and 230.61, as revised 1990, where appropriate. All applicants for a permit must submit a complete permit application in accordance with 9 VAC 25-210-80 A.~~

~~D. Confidentiality. In accordance with §62.1-44.21 of the Code of Virginia or as otherwise required by state or federal law and as provided in 9VAC 25-210-80 A information submitted to the executive director in accordance with this subpart may be claimed as confidential.~~

B. Informational requirements.

~~1. A complete VWP permit application, at a minimum, consists of [the following: A a] JPA completed in its~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

entirety with all appropriate maps, appendices, attachments and addenda included. The JPA must include the following information:

- a. Name and address of [permitter applicant] (and property owner, if different).
- b. Name and address of authorized agent (if applicable).
- c. Name of the waterbody or receiving waters, as applicable, at the project site.
- d. Name of the city or county where the project occurs.
- e. Project purpose, need and description. The purpose and need for the project shall be specified. A complete narrative description of the project shall include: the type of activity to be conducted; any physical alteration to surface waters; and all impacts, permanent and temporary, associated with the project. Wetland impacts should be [defined by the quantified according to their] Cowardin classification [method] or similar terminology. Conversion of one type of wetland to another type of wetland is considered to be a permanent impact.
- f. Amount of surface water impacts (wetlands, streams [and/or or] open water) by type in square feet or acres, or linear feet for streams (if applicable).
- g. Materials assessment. If dredged or fill material is involved, the applicant must provide evidence or certification that the material is free from toxic contaminants, or that the material, if not free of contaminants, will be placed in an approved disposal area. If applicable, the applicant may be required to conduct grain size and composition analyses, tests for specific parameters or chemical constituents, or elutriate tests on the dredge material.
- h. Proposed construction schedule. An estimate of the construction timeframe for the project will be used to determine the VWP permit term.
- i. Signed and dated signature page. The application signature page, either on the copy submitted to VMRC or to the DEQ, must have an original signature.
- j. Appendices (from the JPA) that apply to the project.

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

k. ~~The Department of Environmental Quality DEQ] Addendum, including latitude and longitude (to the nearest second) at the center of the project, United States Geological Survey Hydrologic Unit Code for the project and compensatory mitigation site, DEQ stream classification, stream drainage area, functions and values assessment for wetlands impacts (if applicable), wetlands delineation information, state and federal listed threatened and endangered species information, mitigation plan (demonstrating avoidance and minimization to the maximum extent practicable, and compensation for unavoidable impacts).~~

~~(1) For wetland impacts greater than one acre and for all water withdrawals, the assessment of functional values of the affected surface waters must include information on existing beneficial uses of the surface waters and information on fish and wildlife resources and habitat at the proposed project location[;:]~~

~~(a) Functional values may include: water quality, floodflow desynchronization, nutrient import or export, stormwater retention or detention, ground water recharge or discharge, fish and wildlife habitat, recreation, education, and aesthetics. These values shall be assessed using an acceptable method appropriate for the type of impacted resource. This information will be used to determine the type of compensatory mitigation required to ensure no net loss of wetland functions.~~

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

~~(b) Beneficial uses 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.]~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

(2) The assessment of potential impacts to federal and state listed threatened or endangered species shall include correspondence or documentation from federal or state resource agencies addressing potential impacts to listed species.

(3) A delineation map must be provided of the geographic area of a delineated wetland for all wetlands on the site, in accordance with 9 VAC 25-210-45, including the wetlands data sheets, and the latitude and longitude (to the nearest second) of the center of the wetland impact area. Wetland types ~~[should shall]~~ be noted ~~[using the according to their]~~ Cowardin classification ~~[scheme]~~ or similar terminology. A copy of the ~~[Corps of Engineers' USACE]~~ delineation confirmation~~[,or other correspondence from the USACE indicating their approval of the wetland boundary,]~~ shall also be provided at the time of application, or if not available at that time, as soon as it becomes available during the VWP permit review. ~~[If written confirmation is not available at the time of application, verbal confirmation must be provided and the written confirmation submitted during the VWP permit review.]~~ The delineation map should also include the location of all impacted and non-impacted streams, open water and other surface waters on the site~~[, as well as the~~. The approximate] limits of any Chesapeake Bay Resource Protection Areas (RPAs) ~~[shall be shown on the map, as Additional additional]~~ state or local requirements may apply if the project is located within an RPA.

(4) The plan of mitigation for unavoidable impacts to surface waters must include, in accordance with current federal regulations: measures taken to avoid impacts to the maximum extent practicable, the measures proposed to reduce the impacts to surface waters [to the maximum extent practicable], and where impacts could not be avoided, the means by which compensation will be accomplished [to achieve no net loss of wetland acreage and function.]

(a) A narrative description must be provided detailing the measures taken during project design and development both to avoid and minimize impacts to surface waters to the maximum extent practicable (see 9 VAC 25-210-115 A)[;..]

(b) The compensatory mitigation plan, unless dependent solely on wetland banking or ~~[trust~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

~~fund contributions~~ monetary contribution to an in-lieu-fee fund], shall include the goals and objectives of the plan, in terms of replacement of functions and values and expressed in acres of each wetland or stream type. The plan shall also address any inclusion of buffers, any structures and features necessary for the success of the site, and the schedule for compensatory mitigation site construction.

(c) In order for an application to be deemed complete, at a minimum, a conceptual compensatory mitigation plan must be submitted, and shall include: the goals and objectives in terms of replacement of wetland or stream acreage and function; a location map, including latitude and longitude (to the nearest second) at the center of the site; a hydrologic analysis, including a draft water budget based on expected monthly inputs and outputs which will project water level elevations for a typical [year,] a dry [year,] and [a] wet year; ground water elevation data, if available, or the proposed location of ground water monitoring wells to collect [this these] data; wetland delineation [confirmation and data sheets and maps] ~~and a jurisdictional determination from [the Corps of Engineers USACE]~~ for existing wetland areas on the proposed site(s); a conceptual grading plan; a conceptual planting scheme, including suggested plant species, zonation and acreage of each vegetation type proposed; a proposed soil preparation and amendment plan addressing both topsoil and subsoil conditions; and a draft design of any water control structures[.].

(d) The final compensatory mitigation plan must include complete information on all components of the conceptual compensatory mitigation plan detailed [~~subpart~~ in subdivision (ii) ~~(b)~~ 1 k (4) (c) ~~above~~ of this subsection], as well as a site access plan; a monitoring plan, including proposed success criteria, monitoring goals, and the location of photostations, monitoring wells, vegetation sampling points, and reference wetlands [or streams] (if available); an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan; a construction schedule; and proposed deed restriction language for protecting the compensation [site(s) site or sites] in perpetuity. The final compensatory mitigation plan must include protection of all surface waters and upland areas that are to be preserved in perpetuity

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

within the compensation [site(s) site] boundary.

[(e) Any compensation plan proposing to include contributions to an in-lieu-fee fund shall include proof of the willingness of the entity to accept the donation and documentation of how the amount of the contribution was calculated.

(e) (f) Any [wetland] compensation plan proposing the purchase of [wetland mitigation] banking credits shall include:

(i) The name of the proposed [wetland] mitigation bank [within the same or adjacent hydrologic unit code within the same river watershed with available credits];

(ii) The number of credits proposed to be purchased; and

(iii) Certification from the bank owner of the availability of credits.

[(f) (g)] Applicants proposing off-site compensatory mitigation, [including] purchase or use [of mitigation bank credits, or contribution to an in-lieu-fee fund shall [first] discuss the feasibility of on-site compensatory mitigation. If on-site compensatory mitigation is practicable, applicants must provide documentation as to why the proposed off-site compensatory mitigation [mitigation banking, or in-lieu fee fund] is ecologically preferable. The evaluation should include, at a minimum, a comparison of the following criteria: water quality benefits, hydrologic source, hydrologic regime, watershed, [wetlands surface water] functions and values, vegetation type, soils, impact acreage, distance from impacts, timing of compensation [vs. versus] impacts, acquisition, constructability, and cost.

[(g) (h)] Any compensation plan involving stream restoration shall submit a plan that includes: goals and objectives in terms of water quality benefits; location map, including the latitude and longitude (to the nearest second) at the center of the site; the proposed stream segment restoration locations, including plan view and cross-section sketches; the stream deficiencies that need to be addressed; the restoration measures to be employed, including proposed design flows and types of instream structures; and a proposed construction schedule.

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

~~(h)~~ (i) Compensation for open water impacts may be required, as appropriate, to protect state waters and fish and wildlife resources from significant impairment.]

l. Detailed project location map[.]. The detailed location map (e.g., a United States Geologic Survey topographic quadrangle map) of the impact area must include the latitude and longitude for the project, hydrologic unit code, and stream classification (if applicable) clearly identified on the map. The map should be of sufficient detail such that the site may be easily located for site inspection [;.].

m. Project plan view and cross-sectional sketches. All plan view sketches and cross-sectional sketches must include, at a minimum, north arrow, scale, existing structures, existing and proposed (if available) contours, limit of ~~jurisdictional~~ surface water] areas, ebb and flood or direction of flow, impact limits, [and] location and dimension of all structures in impact areas.

n. Application processing fee. The applicant will be notified by the board as to the appropriate fee for the project in accordance with 9 VAC 25-20-10 et seq. The board will continue to process the application, but the fee must be received prior to release of a draft VWP permit.

2. In addition to requirements of subdivision 1 of this subsection, applications involving a surface water withdrawal or a Federal Energy Regulatory Commission (FERC) license or re-license shall include:

a. The drainage area, the average annual flow and the median monthly flows at the withdrawal point, and historical low flows if available;

b. The average daily withdrawal, the maximum daily and instantaneous withdrawals and information on the variability of the demand by season;

c. Information on how the proposed withdrawal will impact flows in terms of flow reduction;

d. The consumptive use and the average daily return flow of the proposed project and the location of the return flow;

e. Information on the proposed use [of] and need ~~of~~ for] the surface water and information on how the demand for surface water was determined (e.g., per capita use, population growth rates, new uses, changes to service areas, and if applicable, acreage irrigated and evapotranspiration effects);

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

f. Information on flow dependent beneficial uses at the proposed project location; and

g. Information on the aquatic life at the proposed project location, including species and habitat requirements.

C. Additional information. The board [may shall] require additional information [if] needed to evaluate compliance with this [chapter regulation].

[D. Incomplete application.

1. Where an application is not accepted complete by the board within 15 days of receipt, the board may request additional specific information from the applicant, and may suspend processing of any application until such time as the applicant has supplied missing or deficient information and the board considers the application complete.

2. Further, where the applicant becomes aware that he omitted one or more relevant facts from a VWP permit application, or submitted incorrect information in a VWP permit application or in any report to the board, he shall immediately submit such facts or the correct information.

D. Incomplete application. Where an application is not accepted as complete by the board within 15 days of receipt, the board [may shall request additional specific information from the applicant, and may suspend processing of any application until such time as the applicant has supplied missing or deficient information and the board considers the application complete. Further, where the applicant becomes aware that he omitted one or more relevant facts from a VWP permit application, or submitted incorrect information in a VWP permit application or in any report to the board, he shall immediately submit such facts or the correct information.]

9 VAC 25-210-90. Conditions applicable to all VWP permits.

A. Duty to comply. The permittee shall comply with all conditions of the VWP permit. Nothing in this chapter shall be construed to relieve the [~~VWP holder~~ permittee] of the duty to comply with all applicable federal and state statutes, regulations [~~and toxic standards~~] and prohibitions. Any VWP permit ~~noncompliance~~ violation is a violation of the ~~Act and [law- Law]~~, and is grounds for enforcement action, VWP permit termination, revocation, modification, or denial of [~~an application for~~] a VWP permit ~~renewal application~~ extension or reissuance.

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

B. Duty to cease or confine activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the activity for which a VWP permit has been granted in order to maintain compliance with the conditions of the VWP permit.

C. Duty to mitigate. The permittee shall take all reasonable steps to ~~(i) avoid all adverse environmental impact which could result from the activity, (ii) minimize the adverse environmental impact where avoidance is impractical, and (iii) provide mitigation of the adverse impact on an in-kind basis where impacts cannot be avoided~~ minimize or prevent any impacts in violation of the permit which may have a reasonable likelihood of adversely affecting human health or the environment.

D. VWP permit action.

1. A VWP permit may be modified, revoked and reissued, or terminated as set forth in this ~~regulation~~ chapter.

2. If a permittee files a request for VWP permit modification, revocation, or termination, or files a notification of planned changes, or anticipated noncompliance, the VWP permit terms and conditions shall remain effective until the request is acted upon by the board. This provision shall not be used to extend the expiration date of the effective VWP permit. If the permittee wishes to continue an activity regulated by the VWP permit after the expiration date of the VWP permit, the permittee must apply for and obtain a new VWP permit [or comply with the provisions of 9 VAC 25-210-185.]

3. VWP permits may be modified, revoked and reissued or terminated upon the request of the permittee [or other person at the board's discretion], or upon board initiative to reflect the requirements of any changes in the statutes or regulations[,], or as a result of VWP permit noncompliance as indicated in subsection A of this section[, or for other reasons listed in 9 VAC 25-210-180].

E. Inspection and entry. Upon presentation of credentials, any duly authorized agent of the board may, at reasonable times and under reasonable circumstances:

1. Enter upon any permittee's property, public or private, and have access to, inspect and copy any records that must be kept as part of the VWP permit conditions;

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

2. Inspect any facilities, operations or practices (including monitoring and control equipment) regulated or required under the VWP permit; ~~[and]~~

3. Sample or monitor any substance, parameter or activity for the purpose of ensuring compliance with the conditions of the VWP permit or as otherwise authorized by law.

F. Duty to provide information.

1. The permittee shall furnish to the board, ~~within a reasonable time,~~ any information which the board may request to determine whether cause exists for modifying, revoking, reissuing ~~and or]~~ terminating the VWP permit, or to determine compliance with the VWP permit. The permittee shall also furnish to the board, upon request, copies of records required to be kept by the permittee.

2. Plans, specifications, maps, conceptual reports and other relevant information shall be submitted as required by the board prior to commencing construction.

G. Monitoring and records requirements.

1. Monitoring of parameters, other than pollutants, shall be conducted according to approved analytical methods as specified in the VWP permit ~~as approved by the board. The board may require sediment monitoring in all surface waters where it determines the potential presence of contaminated sediments exists.~~ Analysis of pollutants will be conducted according to 40 CFR Part 136 (2000), Guidelines Establishing Test Procedures for the Analysis of Pollutants.

2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

3. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart or electronic recordings for continuous monitoring instrumentation, copies of all reports required by the VWP permit, and records of all data used to complete the application for the VWP permit, for a period of at least three years from the date of the expiration of a granted VWP permit. This period may be extended by request of the board at any time.

4. Records of monitoring information shall include:

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

- a. The date, exact place and time of sampling or measurements;
- b. The name of the individuals who performed the sampling or measurements;
- c. The date [and time] the analyses were performed;
- d. The name of the individuals who performed the analyses;
- e. The analytical techniques or methods supporting the information such as observations, readings, calculations and bench data used; ~~and~~
- f. The results of such analyses-; and
- g. Chain of custody documentation.

9 VAC 25-210-100. Signatory requirements.

~~[Any application, report, or certification shall be signed as follows:]~~

~~1. Application.~~

- a. ~~For a corporation: by a responsible corporate official. For purposes of this section, a responsible corporate official means (i) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or (ii) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25,000,000 (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.~~
- b. ~~For a municipality, state, federal or other public agency by either a principal executive officer or ranking elected official. (A principal executive officer of a federal, municipal, or state agency includes the chief executive officer of the agency or head executive officer having responsibility for the overall operation of a principal geographic unit of the agency.)~~
- c. ~~For a partnership or sole proprietorship, by a general partner or proprietor respectively.~~

~~[d. 1. A. Application.] Any application for a VWP permit under this chapter must bear the signatures of the~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

~~responsible party and any agent acting on the responsible party's behalf~~ applicant's signature or the signature of a person acting in the applicant's behalf, with the authority to bind the applicant.

[~~2.~~ B.] Reports. All reports required by VWP permits and other information requested by the board shall be signed by:

[~~a.~~ 1.] One of the persons described in [~~subdivision 1 a, b or c~~ subsection A] of this section; or

[~~b.~~ 2.] A duly authorized representative of that person. A person is a duly authorized representative only if:

[~~(1)~~ a.] The authorization is made in writing by a person described in [~~subdivision 1 a, b or c~~ subsection A] of this section; [~~and~~]

[~~(2)~~ b.] The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, superintendent, or position of equivalent responsibility. A duly authorized representative may thus be either a named individual or any individual occupying a named position[; .]

[~~(3)~~ c.] If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization must be submitted to the board prior to or together with any separate information, or applications to be signed by an authorized representative.

[~~3.~~ C.] Certification of application and reports. Any person signing a document under [~~subdivision 1 or 2~~ subsection A or B] of this section shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."

9 VAC 25-210-110. Establishing applicable standards, limitations or other VWP permit conditions.

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

In addition to the conditions established in 9VAC 25-210-90 and 9VAC 25-210-100, each VWP permit ~~may~~ shall include conditions meeting the following requirements where applicable[~~:-~~]

[~~4- A.~~ A.] Instream flow conditions. Subject to the provisions of Chapter 24 (§ 62.1-242 et seq.) of Title 62.1 of the Code [~~of Virginia~~], and subject to the authority of the State Corporation Commission over hydroelectric facilities contained in Chapter 7 (§ 62.1-80 et seq.) of Title 62.1 of the Code [~~of Virginia~~], instream flow conditions may include but are not limited to conditions that limit the volume and rate at which water may be withdrawn at certain times and conditions that require water conservation and reductions in water use.

[~~2- B.~~ B.] Water quality standards and state requirements. The VWP permit shall include requirements to comply with all appropriate provisions of state laws and regulations. [~~VWP permit limitations shall be based on water quality, technology and/or best professional judgment as appropriate.~~]

[~~3- C.~~ C.] Toxic pollutants.

[~~a- 1.~~ 1.] Where the board finds that appropriate limitations may not ensure compliance with the [~~law~~ Law] or state water quality standards the board shall require the permittee to follow a program of biological or chemical toxics monitoring. The requirement may include a VWP permit reopener to allow the imposition of toxicity reduction or elimination measures determined to be necessary as a result of the board's evaluation of the results of the toxic monitoring and other available information. Based upon this determination, appropriate limitations will be included in the VWP permit to ensure the reduction or elimination of toxic pollutants and allow the board to ensure that the proposed project will comply with water quality standards and other appropriate requirements of [~~state law~~ the Law].

[~~b- 2.~~ 2.] Limitations will be included in the VWP permit to control all toxic pollutants which the board determines (based on information reported in a VWP permit application or a notification or on other information) are or may be discharged at a level which would adversely affect the beneficial use of the receiving waters.

[~~4- D.~~ D.] Duration of VWP permits. ~~Virginia water protection~~ VWP permits issued under this ~~regulation~~ chapter shall have an effective [date] and expiration date which will determine the life of the permit. ~~Virginia water protection~~ VWP permits shall be effective for a fixed term based upon the projected duration of the project, the

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

length of any required monitoring, or other project operations or VWP permit conditions; however, the term shall not exceed 15 years and will be specified in the conditions of the VWP permit. The term of these VWP permits shall not be extended by modification beyond the maximum duration. Extension of VWP permits for the same activity beyond the maximum duration specified in the original VWP permit will require reapplication and reissuance of a new VWP permit [unless the permittee complies with the provisions of 9 VAC 25-210-185.]

~~[5. E.]~~ Monitoring requirements as conditions of VWP permits ~~may include but are not limited to:~~

~~a. All permits shall specify:~~

~~[(1) a. 1.]~~ Requirements concerning the proper use, maintenance and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate) when required as a condition of the VWP permit;

~~[(2) b. 2.]~~ Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity and including, when appropriate, continuous monitoring and composite samples;

~~[(3) c. 3.]~~ Applicable reporting requirements based upon the impact of the regulated activity on water quality ~~;~~ [and]

~~b. All permits shall include~~

~~[d. 4.]~~ Requirements to report monitoring results with a frequency dependent on the nature and effect of the [discharge regulated activity.] ~~, but in no case less than once per year.~~

~~c. In addition, the following monitoring requirements may be included in the permits:~~

~~(1) Mass or other measurements specified in the permit for each pollutant limited in the permit;~~

~~(2) The volume of effluent discharged; or~~

~~(3) Other measurements as appropriate, including intake water.~~

~~[6. F.]~~ Best Management Practices (BMPs). The VWP permit may require the use of BMPs to control or abate the discharge of pollutants.

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

[7. G.] Reissued VWP permits. When a VWP permit is renewed or reissued, limitations, standards or

conditions must be in conformance with current limitations, standards, or conditions.

[8. H.] Reopening VWP permits. Each VWP permit shall have a condition allowing the reopening of the VWP permit for the purpose of modifying the conditions of the VWP permit to meet new regulatory standards duly adopted by the board. Cause for reopening VWP permits ~~include~~ includes, but ~~are~~ is not limited to:

~~a. When state law prohibits conditions in a permit which are more stringent than an applicable effluent limitation guideline;~~

~~b. When subsequently promulgated effluent guidelines are modified, and are based on best conventional pollutant control technology; or~~

~~c. when the circumstances on which the previous VWP permit was based have materially and substantially changed, or special studies conducted by the board or the permittee show material and substantial change, since the time the VWP permit was issued and thereby constitute cause for VWP permit modification or revocation and reissuance.~~

9 VAC 25-210-115. Evaluation of mitigation alternatives.

A. Avoidance and minimization opportunities shall be evaluated as follows: The applicant must demonstrate to the satisfaction of the board that practicable alternatives, including design alternatives, have been evaluated and that the proposed activity, in terms of impacts to water quality and fish and wildlife resources, is the least environmentally damaging practicable alternative. The applicant must also demonstrate to the [satisfaction of the] board that all steps have been taken [in accordance with [the] Guideline for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230 (Federal Register December 24, 1980)] to first avoid and then minimize adverse impacts to [state surface] waters to the maximum extent practicable. Measures, such as reducing the size, scope, configuration, or density of the proposed project, that would avoid or result in less adverse impact to [state surface] waters shall be considered to the maximum extent practicable.

B. Compensatory mitigation proposals shall be evaluated as follows:

1. On-site, in-kind compensatory mitigation, when available, shall be deemed the most ecologically

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

preferable form of compensation for project impacts, in most cases. However, off-site [and/or or] out-of-kind compensation opportunities [may be considered] that prove to be more ecologically preferable or practicable [may be considered]. When the applicant can demonstrate satisfactorily that an off-site [and/or or] out-of-kind compensatory mitigation proposal is practicable and ecologically preferable, then such proposal may be deemed appropriate for compensation of project impacts.

2. Compensatory mitigation for unavoidable project impacts may be met through wetland [or stream] creation or restoration, the purchase or use of mitigation bank credits, or a contribution to an approved in-lieu-fee fund. [Compensation may incorporate ~~Preservation~~ preservation] of wetlands [or streams] or preservation or restoration of upland buffers adjacent to state waters [is acceptable] when utilized in conjunction with creation, restoration, or mitigation bank credits as appropriate to ensure protection [and/or or] enhancement of state waters or fish and wildlife resources and their habitat.

[3.] Generally, preference shall be given in the following sequence: restoration, creation, mitigation banking, in-lieu-fee fund. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland [or stream] acreage and function.

C. No net loss. Compensatory mitigation for project impacts shall be sufficient to achieve no net loss of existing wetland acreage and functions. Compensatory mitigation ratios appropriate for the type of aquatic resource impacted and the type of compensation provided shall be applied to permitted impacts to help meet this requirement. Credit may be given for preservation of upland buffers already protected under other ordinances to the extent that additional protection and water quality and fish and wildlife resource benefits are provided.

D. Alternatives analysis.

1. An alternatives analysis shall be required to justify that the following alternatives are ecologically preferable and practicable compensatory mitigation options to on-site, in-kind compensation: off-site [including] purchase or use of mitigation bank credits[÷ .] or contribution to an in-lieu-fee fund; [or] out-of-kind[÷ .]

2. An alternatives analysis shall include, but is not limited to, the following criteria, which shall be compared

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

between the impacted and replacement sites: water quality benefits; acreage of impacts; distance from impacts; hydrologic source; hydrologic regime; watershed; functions and values; vegetation type; soils; constructability; timing; property acquisition; and cost. The alternatives analysis shall compare the ability of each compensatory mitigation option to replace lost acreage and function.

E. In-lieu-fee fund approval.

1. In order for contribution to an in-lieu-fee fund to be an acceptable form of compensatory mitigation, the fund must be approved for use by the board and must be dedicated to the achievement of no net loss of wetland [or stream] acreage and function [through the preservation, restoration and creation of wetlands or streams.]

2. The board may approve the use of a fund by:

a. Approving use of a fund [~~on a VWP permit-specific basis for a specific project~~] when approving a [~~n individual VWP individual~~] permit; [or]

b. Granting approval of a fund at a board meeting[~~;-or-.~~]

[~~c. Entering into a memorandum of agreement with the fund administrator.~~]

3. In order for the board to approve the use of a fund, the fund must meet the following criteria:

a. Demonstration of a no net loss policy in terms of wetland [~~and~~] or stream acreage and function [by adoption of operational goals or objectives for preservation, creation or restoration of wetland or stream acreage and function;

b. [~~Inclusion of DEQ as a significant participant in the management or oversight of the fund; and Consultation with the DEQ on selection of sites for preservation, restoration, or creation.~~

c. [~~Proof, and/or a commitment to provide proof in the future, of disbursement of fund contributions in the watersheds of project impacts through an annual report submitted to the board, which includes an accounting of financial receipts, expenditures and compensatory mitigation projects completed and in progress.~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

c. A commitment to provide annual reports to the board detailing contributions received and acreage and type of wetlands or streams preserved, created or restored in each watershed with those contributions, as well as the mitigation credits contributed for each watershed of project impact;

d. A mechanism to establish fee amounts that will ensure each contribution will be adequate to compensate for the wetland or stream acreage and function lost in the impacted watershed; and

e. Such terms and conditions as the board deems necessary to ensure a no net loss of wetland or stream acreage and functions from permitted projects providing compensatory mitigation through contributions to the fund.

4. Such approval may be granted for up to five years and may be renewed by the board upon a demonstration that the fund has enhanced wetland or stream acreage or function through the preservation, creation or restoration of surface waters including wetlands or streams. Such demonstration may be made with the reports submitted pursuant to subdivision 3 c of this subsection.]

[4. 5.] The board may approve the use of an in-lieu-fee fund only after publishing a notice of its intent in the Virginia Register of Regulations at least 45 days prior to taking such action and after accepting and considering public comments on its approval of the fund for at least a 30-day period. Where approval is contemplated in accordance with subdivision 2 a of this subsection, compliance with the public notice and comment requirements for approval of the VWP permit shall meet this requirement.

F. Use of mitigation banks and multi-project mitigation sites. The use of mitigation banks or multi-project mitigation sites for compensating project impacts shall be deemed appropriate if the following criteria are met:

1. [Except as specified below, the The] bank or multi-project mitigation site [must be in the same U.S.G.S. cataloging unit as the project impacts, or an adjacent cataloging unit within the same river basin: meets the criteria and conditions found in §62.1-44.15:5 E of the Code.

a. The U.S.G.S. cataloging units are derived from the Hydrologic Unit Map of the United States (U.S.G.S. 1980).

b. The river basins are defined in the Water Quality Standards (9 VAC 25-260-5 et seq.).

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

~~c. The criteria do not apply if the following criteria are met:~~

~~(1) The impacts are a result of a Virginia Department of Transportation linear project or a locality project for a locality with a jurisdiction crossing multiple river basins;~~

~~(2) There is no practical compensatory mitigation alternative within the same river basin;~~

~~(3) The impacts for a single and complete project are less than one acre within a cataloging unit;~~

~~(4) There is no significant harm to water quality or fish and wildlife resources within the river basin of the impacts; and~~

~~(5) Impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed (within the Commonwealth) as close as possible to the impact, or impacts within U.S.G.S. cataloging units 02080108, 02080208, and 03010205 are mitigated in-kind within those same cataloging units as close as possible to the impacts. [Note:] After July 1, 2002, [the above this] provision for cataloging units 02080108, 02080208, and 03010205 shall only apply to areas within these three units where overlapping watersheds occur, as determined by the board.]~~

~~2. The bank or multi-project mitigation site is ecologically preferable to practicable on-site and off-site individual compensatory mitigation options;~~

~~3. For mitigation banks only, the banking instrument, if approved after July 1, 1996, has been approved by a process that involved public review and comment [in accordance with federal guidelines;]~~

~~4. The applicant provides verification to DEQ of purchase of the required amount of credits; and~~

~~5. For multi-project mitigation sites, the VWP permit shall include conditions sufficient to ensure long term monitoring and maintenance of [wetlands surface water] functions and values.~~

9 VAC 25-210-120. Draft VWP permit formulation.

~~A. Upon receipt~~ After evaluation of a complete application, the board shall make a decision to tentatively issue or deny the ~~application~~ VWP permit pursuant to this section.

B. If [a the] tentative decision is to issue the VWP permit then a draft VWP permit shall be prepared in advance

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

of public notice. The following tentative determinations shall be incorporated into a draft VWP permit:

1. Conditions, discharge limitations, standards and other requirements applicable to the VWP permit in accordance with 9 VAC 25-210-90 and 9 VAC 25-210-110;
2. Monitoring requirements in accordance with 9 VAC 25-210-110; and
3. Requirements for mitigation of adverse environmental impacts in accordance with 9 VAC 25-210-115.

~~B.~~ C. If the tentative decision is to deny the application, the board shall do so in accordance with 9VAC 25-210-230.

~~C.~~ D. Should a decision be made to waive the requirement for a VWP permit, the board shall do so in accordance with 9 VAC 25-210-220.

9 VAC 25-210-130. ~~State~~ VWP general permits.

~~A.~~ A. The board may issue ~~state~~ VWP general permits by regulation for certain specified categories of activities which have been determined to be of minimal environmental consequence as it deems appropriate.

~~A.~~ After public interest review, and after such general permits have been issued, individual activities falling within the categories that are authorized do not have to receive an individual permit as described by the procedures of this chapter.

~~B.~~ The board will determine by regulation the appropriate conditions, duration of the permit and restrictions to protect the interests of the citizens of the Commonwealth for each general permit issued.

~~C.~~ B. When the board determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, the board may ~~exercise its authority to require individual applications and~~ VWP individual permits rather than issuing approving coverage under a VWP general permit. Cases where a [~~an individual VWP individual~~] permit may be required include the following:

1. Where the ~~discharges are~~ activity may be a significant contributors of contributor to pollution;
2. Where the ~~dischargee~~ applicant or permittee is not in compliance with the conditions of the VWP general permit;

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

3. When ~~a discharger~~ an applicant or permittee no longer ~~meets~~ qualifies for coverage under the VWP general permit ~~[conditions]; [and]~~

4. ~~Any owner~~ When a permittee operating under a VWP general permit ~~may request~~ requests to be excluded from the coverage of the VWP general permit by applying for ~~an a~~ a VWP individual permit~~[-];~~

~~[5. When an a VWP individual permit is issued to an owner a permittee, the applicability of the VWP general permit to the individual permittee is automatically terminated on the effective date of the VWP individual permit;~~

6. ~~When a VWP general permit is issued which applies to an owner a permittee already covered by an individual permit, such owner person may request exclusion from the provisions of the VWP general permit and subsequent coverage under an a VWP individual permit; and~~

7. ~~A VWP general permit may be revoked as to an individual owner permittee for any of the reasons set forth in 9 VAC 25-210-180 subject to appropriate opportunity for a hearing.~~

~~C. Coverage under a VWP general permit shall be approved for a fixed term for each category of activities based upon project length and duration. If the VWP general permit under which a project was authorized expires prior to the expiration of the coverage term, the project shall remain authorized under the replacement VWP general permit unless project conditions have materially changed, and all conditions and requirements imposed under the initial VWP general permit shall be continued and enforced under the replacement VWP general permit. Notwithstanding any other provision, a request for a reissuance of certification of coverage under a VWP general permit in order to complete monitoring requirements shall not be considered an application for coverage and no application fee will be charged.~~

~~C. When a VWP individual permit is issued to a permittee, the applicability of the VWP general permit to the individual permittee is automatically terminated on the effective date of the VWP individual permit.~~

~~D. When a VWP general permit is issued which applies to a permittee already covered by a [a VWP] individual permit, such person may request exclusion from the provisions of the VWP general permit and subsequent coverage under a VWP individual permit.~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

E. A VWP general permit may be revoked from an individual permittee for any of the reasons set forth in 9 VAC 25-210-180 subject to appropriate opportunity for a hearing.

F. When all permitted activities requiring notification have been completed, the permittee shall be required to submit a notice of termination.

G. Activities authorized under a VWP general permit regulation shall be authorized for a fixed term based upon project length and duration. When a general permit regulation is amended or replaced, it shall contain provisions such that coverage authorized under the general permit existing as of the effective date of the amended or replacement VWP general permit regulation may continue under the amended or replacement VWP general permit and that all terms and conditions of the authorization may continue in full force and effect. Notwithstanding any other provision, a request for reissuance of authorization of coverage under a VWP general permit in order to complete monitoring requirements shall not be considered a new application for coverage and no application fee will be charged.

H. The board may certify, or certify with conditions, a nationwide or regional permit proposed by the USACE in accordance with § 401 of the Clean Water Act as meeting the requirements of this regulation and the requirements for a VWP general permit if the nationwide or regional permit, including any conditions contained in the certification:

1. Requires that wetland or stream impacts be avoided and minimized to the maximum extent practicable;
2. Does not allow impacts that cause or contribute to a significant impairment of state waters or fish and wildlife resources;
3. Requires compensatory mitigation sufficient to achieve no net loss of existing wetland acreage and function; and
4. Requires that compensatory mitigation be provided through wetland or stream creation or restoration, purchase or use of mitigation bank credits in accordance with § 62.1-44.15:5 E, contribution to an in-lieu-fee fund approved by the board in accordance with these regulations, or preservation or restoration of upland buffers adjacent to wetlands or other state waters or preservation of wetlands or streams when done in conjunction with creation, restoration or mitigation bank credits.

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

Such certifications may be provided only after the board has advertised and accepted public comment on its intent to provide certification for at least thirty days.

I. Coverage under a nationwide or regional permit promulgated by the USACE and certified by the board in accordance with this section shall be deemed coverage under a VWP general permit upon submission of proof of coverage under the nationwide or regional permit and any other information required by the board through the certification process. Notwithstanding the provisions of 9 VAC 25-20-10, no fee shall be required from applicants seeking coverage under this subsection.]

PART III.

PUBLIC INVOLVEMENT.

9 VAC 25-210-140. Public notice of VWP permit action and public comment period.

A. Every draft VWP permit shall be given public notice paid for by the ~~owner~~ applicant, by publication once in a newspaper of general circulation in the area affected by the ~~[discharge proposed activity]~~. The public notice must be published within 14 days of issuance of a draft VWP permit, or the 120-day VWP permit processing timeframe will be suspended until such publication.

B. The board shall ~~allow provide]~~ a [comment] period of at least 30 days following the date of the public notice for interested persons to submit written comments on the tentative decision and to request a public hearing [on the VWP permit]. [All written comments submitted during the comment period shall be retained by the board and considered during its final decision on the VWP permit.]

C. The contents of the public notice of an application for a VWP permit or proposed VWP permit action shall include:

1. Name and address of the applicant. If the location of the activity differs from the address of the applicant the notice shall also state the location in sufficient detail such that the specific location may be easily identified;
2. Brief description of the business or activity to be conducted at the ~~[discharge]~~ site [of the proposed activity];

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

- 3. The name of the receiving waterway;
- 4. A statement of the tentative determination to issue or deny a VWP permit;
- 5. A brief description of the final determination procedure;
- 6. The address, e-mail address and phone number of a specific person at the DEQ office from whom further information may be obtained; and
- 7. A brief description on how to submit comments and request a public hearing.

D. Public notice shall not be required for submission or approval of plans and specifications or conceptual engineering reports not required to be submitted as part of the application.

E. When a VWP permit is denied[,] the board will do so in accordance with 9 VAC 25-210-230.

9 VAC 25-210-150. Public access to information.

All information pertaining to VWP permit processing or in reference to [any] ~~source of discharge of any pollutant, including discharges of dredged or fill material,~~ activity requiring a VWP permit under this chapter shall be available to the public, unless the applicant has made a showing that the information has been identified is protected by the applicant as a trade secret covered by § 62.1-44.21 of the Code ~~of Virginia~~. All information claimed confidential must be identified as such at the time of submission to the board and ~~[Virginia Marine Resources Commission VMRC]~~.

9 VAC 25-210-160. Public comments and hearing.

~~[A. The board shall provide a comment period of at least 30 days following the date of public notice of the formulation of a draft VWP permit during which interested persons may submit written comments and requests for an informal public hearing on the VWP permit. All written comments submitted during the comment period shall be retained by the board and considered during its final decision on the VWP permit.]~~

~~[B. A.]~~ The ~~executive director~~ board shall consider all written comments and requests for ~~an informal a public~~ public hearing received during the comment period, and shall make a determination on the necessity of ~~an informal a~~ public hearing in accordance with Procedural Rule No. 1 (9 VAC 25-230-10 et seq.). All proceedings, ~~informal public~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

hearings and decisions from it will be in accordance with Procedural Rule No. 1. [(9 VAC 25-230-10 et seq.).]

[C. B.] Should the ~~executive~~ [director board], in accordance with Procedural Rule No. 1. [(9 VAC 25-230-10 et seq.).], determine to dispense with the ~~informal~~ public hearing, [he it] may grant the VWP permit, or, at [his its] discretion, transmit the application or request, together with all written comments from it and relevant staff documents and staff recommendations, if any, to the board for its decision.

[D. C. Any ~~owner~~ applicant or] permittee aggrieved by [~~any an~~] action of the board taken without a ~~formal~~ public hearing[, or inaction of the board,] may request in writing a [~~formal~~] hearing pursuant to Procedural Rule No. 1. [(9 VAC 25-230-10 et seq.)]

9 VAC 25-210-170. Public notice of hearing.

A. Public notice of any ~~informal~~ public hearing held pursuant to 9 VAC 25-210-160 shall be circulated ~~as~~ follows:

1. Notice shall be published once in a newspaper of general circulation in the county or city where the activity is to occur; [~~and~~]
2. Notice of the ~~informal~~ public hearing shall be sent to all persons and government agencies ~~which that~~ received a copy of the notice of VWP permit application and to those persons requesting ~~an informal a~~ public hearing or having commented in response to the public notice.

B. Notice shall be effected pursuant to subdivisions A 1 and 2 of this section at least 30 days in advance of the ~~informal~~ public hearing.

C. The content of the public notice of any ~~informal~~ public hearing held pursuant to 9VAC 25-210-160 shall include at least the following:

1. Name and address of each person whose application will be considered at the ~~informal~~ public hearing and a brief description of the person's activities or operations;
2. The precise location of such activity and the surface waters that will, or may, be affected. The location should be described, where possible, with reference to route numbers, road intersections, map coordinates or similar information;

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

- 3. A brief reference to the public notice issued for the VWP permit application, including identification number and date of issuance unless the public notice includes the ~~informal~~ public hearing notice;
- 4. Information regarding the time and location for the ~~informal~~ public hearing;
- 5. The purpose of the ~~informal~~ public hearing;
- 6. A concise statement of the relevant water quality[, or fish and wildlife resource] issues raised by the persons requesting the ~~informal~~ public hearing;
- 7. Contact person and the address, e-mail address and phone number of the ~~State Water Control Board~~ DEQ office at which the interested persons may obtain further information or request a copy of the draft VWP permit prepared pursuant to 9 VAC 25-210-120; and
- 8. A brief reference to the rules and procedures to be followed at the ~~informal~~ public hearing.

D. Public notice of any ~~formal~~ public hearing held pursuant to 9 VAC 25-210-160 ~~[D C]~~ shall be in accordance with Procedural Rule No. 1 (9 VAC 25-230-10 et seq.).

PART IV.

VWP PERMIT MODIFICATION, REVOCATION, AND REISSUANCE, TERMINATION AND DENIAL.

9 VAC 25-210-180. Rules for ~~the~~ modification, revocation, and reissuance and termination [of VWP permits].

VWP permits shall be modified, revoked, and reissued, or terminated only as authorized by this section ~~as follows:]~~

~~[1- A.]~~ A VWP permit may be modified in whole or in part, revoked and reissued or terminated [~~;~~]

~~[2- B.]~~ VWP permit modifications shall not be used to extend the term of a VWP permit [~~;~~ beyond 15 years from the date of original issuance.]

~~[3- C.]~~ Modification, revocation and reissuance, or termination may be initiated by the board, on the request of the permittee, or other person at the board's discretion under applicable laws or the provisions of this chapter [~~;~~ and]

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

[4. ~~D.~~] After ~~public~~ notice and opportunity for a formal hearing pursuant to Procedural Rule No. 1 (9 VAC 25-230-100) a VWP permit can be terminated for cause. Causes for termination are as follows:

- [~~a.~~ 1.] Noncompliance by the permittee with any condition of the VWP permit;
- [~~b.~~ 2.] The permittee's failure in the application or during the VWP permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time;
- [~~c.~~ 3.] The permittee's violation of a special or judicial order;
- [~~d.~~ 4.] A determination by the board that the permitted activity endangers human health or the environment and can be regulated to acceptable levels by VWP permit modification or termination;
[~~and~~]
- [~~e.~~ 5.] A change in any condition that requires either a temporary or permanent reduction or elimination of any ~~discharge of dredged and fill material~~ activity controlled by the VWP permit [~~;~~ and]
- [~~f.~~ 6.] A determination that the permitted activity has ceased and that the compensatory mitigation for unavoidable adverse impacts has been successfully completed.

9 VAC 25-210-185. VWP permit extension.

Any permittee with an effective VWP permit for an activity that is expected to continue after the expiration date of the VWP permit, without any change in the activity authorized by the VWP permit, shall submit written notification requesting an extension. The permittee must file the request prior to the expiration date of the VWP permit. Under no circumstances will the extension be granted for more than 15 years beyond the original effective date of the VWP permit. If the request for extension is denied, the VWP permit will still expire on its original date and, therefore, care should be taken to allow for sufficient time for the board to evaluate the extension request and to process a full VWP permit [~~amendment~~ modification], if required.

9 VAC 25-210-190. Causes for modification.

A VWP permit may be modified, but not revoked and reissued, except when the permittee agrees or requests, when any of the following developments occur:

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

~~[1- A.]~~ When additions or alterations have been made to the affected facility or activity which require the application of VWP permit conditions that differ from those of the existing VWP permit or are absent from it;

~~[2- B.]~~ When new information becomes available about the operation or ~~discharge activity~~ covered by the VWP permit which was not available at VWP permit issuance and would have justified the application of different VWP permit conditions at the time of VWP permit issuance;

~~[3- C.]~~ When a change is made in the promulgated standards or regulations on which the VWP permit was based;

~~[4- D.]~~ When it becomes necessary to change final dates in schedules due to circumstances over which the permittee has little or no control such as acts of God, materials shortages, etc. However, in no case may a compliance schedule be modified to extend beyond any applicable statutory deadline of the Act;

~~5. When an effluent standard or prohibition for a toxic pollutant must be incorporated in the permit in accordance with provisions of § 307(a) of the Act;~~

~~[6-5- E.]~~ When changes occur which are subject to "reopener clauses" in the VWP permit; or

~~[7-6- E.]~~ When the board determines that minimum instream flow levels resulting from the permittee's withdrawal of water ~~[is are]~~ detrimental to the instream beneficial use, and the withdrawal of water should be subject to further net limitations or when an area is declared a Surface Water Management Area pursuant to §§ 62.1-242 through 62.1-253 of the Code ~~[of Virginia]~~, during the term of the VWP permit; ~~;~~

~~8. When the level of discharge of a pollutant not limited in a permit exceeds the level which can be achieved by available methodology for controlling such discharges;~~

~~9. When the permittee begins or expects to begin to cause the discharge of any toxic pollutant not reported in the application; or~~

~~10. When other states were not notified of the change in the permit and their waters may be affected by the discharge.~~

9 VAC 25-210-200. Transferability of VWP permits.

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

A. Transfer by modification. Except as provided for under automatic transfer in subsection B of this section, a VWP permit shall be transferred only if the VWP permit has been modified to reflect the transfer or has been revoked and reissued to the new ~~owner~~ permittee.

B. Automatic transfer. Any VWP permit shall be automatically transferred to a new ~~owner~~ permittee if:

1. The current ~~owner~~ permittee notifies the board within 30 days ~~in advance~~ of the [~~proposed~~] transfer of the title to the facility or property;
2. The notice to the board includes a written agreement between the existing and [~~proposed new owner~~ new] permittee containing a specific date of transfer of VWP permit responsibility, coverage and ~~liability~~ between them liability to the new permittee, or that the [~~seller existing permittee~~] will retain such responsibility, coverage, or liability, including liability for compliance with the requirements of any enforcement activities related to the permitted activity; and
3. The board does not within the 30-day time period notify the existing ~~owner~~ permittee and the [~~proposed new~~] owner permittee of its intent to modify or revoke and reissue the VWP permit.

9 VAC 25-210-210. Minor modification.

A. Upon request of the permittee, or upon board initiative with the consent of the permittee, minor modifications may be made in the VWP permit without following the public involvement procedures.

B. For [~~Virginia Water Protection Permits~~ VWP permits, a] minor modification may only:

1. Correct typographical errors;
2. Require monitoring and reporting by the permittee at a ~~greater~~ different frequency than required in the VWP permit, based on new information justifying the change in conditions;
3. Change an interim compliance date in a schedule of compliance to no more than ~~420~~ 180 days from the original compliance date and provided it will not interfere with the final compliance date;
4. Allow for a change in ownership or operational control when the board determines that no other change in the VWP permit is necessary, provided that a written agreement containing a specific date for transfer of

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9 VAC 25-210-40 through 9 VAC 25-210-260; adding 9 VAC 25-210-45, 9 VAC 25-210-115, and 9 VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

VWP permit responsibility, coverage and liability from the current to the new permittee has been submitted to the board;

5. Change plans and specifications ~~where no change in discharge limitations in the permit are required that~~ do not result in an increase to permitted project impacts;

6. Occur when facility expansion, production increases and modification will not cause significant change in the discharge of pollutants; ~~and~~

7. Delete VWP permit limitation or monitoring requirements for specific pollutants when the activities generating these pollutants are terminated.; ~~[and]~~

8. Occur when subsequent to issuance of a VWP individual [or general] permit, the permittee determines that additional wetland or stream impacts are necessary, provided that the [unavoidable] cumulative increase in the acreage of wetland impacts is not greater than 1/4 acre and the [unavoidable] cumulative increase in stream impacts is less than 50 linear feet, and also provided that the additional impacts are fully mitigated at ratios not less than compensatory mitigation ratios for the original impacts[; and .]

~~[9. Occur when subsequent to issuance of a VWP general permit, the permittee determines that additional wetland or stream impacts are necessary, provided that the cumulative increase in impacts does not exceed the maximum limit of wetland and stream impacts authorized by the appropriate VWP general permit, the acreage of wetland impacts is not greater than 1/4 acre and the unavoidable cumulative increase in stream impacts is less than 50 linear feet] and also provided that the additional impacts are fully mitigated at ratios not less than compensatory mitigation ratios for the original impacts.]~~

9 VAC 25-210-220. Waiver of [a] permit VWP [permits permit].

A. ~~In applications where the State Water Control Board determines that a proposed activity or activities will have minimal or no environmental consequence, a waiver of the requirement for a permit may be granted.~~

B. ~~The applicant and the Corps of Engineers will be notified of this decision. Waiver of the requirement for a permit shall be considered when:~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

- ~~1. The impact of the proposed activity is of minimal environmental consequence;~~
- ~~2. The impacts of the proposed activity are temporarily in nature and recovery of the beneficial use of the area is ensured; and~~
- ~~3. The impacts of the proposed activity will be fully and successfully mitigated by the applicant such that additional conditions imposed by the board are unnecessary.~~

~~A. The board may waive permitting requirements when the board determines that [a proposed project impacts] an isolated wetland [that] is of minimal ecological value [as defined in 9 VAC 25-210-10. Any person claiming this waiver bears the burden to demonstrate that he qualifies for the waiver.]~~

~~B. The board may waive the requirement for a VWP individual permit when the proposed activity qualifies for [an Abbreviated Standard Permit a permit] issued by the [U.S. Army Corps of Engineers USACE] and receives a permit from the [Virginia Marine Resources Commission VMRC, pursuant to Chapter 13 of Title 28.2 or Chapter 12 of Title 28.2 of the Code], and the activity does not [involve impacts impact to nontidal surface waters or] instream flows.~~

9 VAC 25-210-230. Denial of the VWP permit.

~~A. The board shall make a decision to tentatively deny the VWP permit if the requirements of this chapter are not met. Basis for denial include, but are not limited to, the following:~~

- ~~1. The project will result in violations of water quality standards or will impair the beneficial uses of state waters.~~
- ~~2. As a result of project implementation, shellfish waters would be condemned in accordance with 9 VAC 25-260-5 et seq.~~
- ~~3. The project that the applicant proposed fails to adequately avoid and minimize impacts to state waters to the maximum extent practicable.~~
- ~~4. The proposed compensatory mitigation plan is insufficient or unsatisfactory for the proposed impacts [and fails to achieve no net loss of existing wetland acreage and function].~~

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

5. The Department of Game and Inland Fisheries indicates that natural or stockable trout waters would be permanently and negatively impacted by the proposed activity.

6. The proposed activity is prohibited by 9 VAC 25-210-50.

7. The effect of project impacts, together with other existing or proposed impacts to wetlands, will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

[8. Failure to submit the required permit fee in accordance with 9 VAC 25-40-80 B 1 n.]

~~A. B. The applicant shall be notified by letter of the staff's board's preliminary decision to recommend to the board denial of tentatively deny the VWP permit requested.~~

~~B. The staff shall provide sufficient information to the applicant regarding the rationale for denial, such that the applicant may, at his option, modify the application in order to achieve a favorable recommendation, withdraw his application, or proceed with the processing on the original application.~~

C. Should the applicant withdraw his application, no VWP permit will be issued.

~~D. Should the applicant elect to proceed with the original project as originally proposed, the staff shall make its recommendation of denial to the executive director for determination of the need for public notice of board may deny the application and advise the applicant pursuant to Procedural Rule No. 1 (9 VAC 25-230-10 et seq.) of the applicant's right to a formal public hearing to consider the denial as provided for in accordance with Procedural Rule No. 1 (9 VAC 25-230-10 et seq.).~~

PART V.

ENFORCEMENT.

9 VAC 25-210-240. Enforcement.

The board may enforce the provisions of this chapter utilizing all applicable procedures under the ~~[law-Law]~~ and § 10.1-1186 of the Code [of Virginia].

PART VI.

MISCELLANEOUS.

**9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)
9 VAC 25-210-250. Delegation of authority.**

The ~~executive~~ director, or a designee acting for him, may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code ~~[of Virginia]~~.

9 VAC 25-210-260. Transition.

~~Upon the effective date of this chapter the following will occur:~~

~~1. Procedural Rule No. 3 (9 VAC 25-240-10 et seq.) will be superseded. A. All applications received [after] the effective date of the new regulation [May 20, 1992 from VDOT on or after August 1, 2001, or all other applications received on or after October 1, 2001,] will be processed in accordance with these new procedures.~~

~~2. B. Section 401 Water Quality Certificates issued prior to December 31, 1989, have the same effect as a [Virginia Water Protection Permit VWP permit]. Water Quality Certificates issued after this date will remain in effect until reissued as Virginia Water Protection Permits.~~

DOCUMENTS INCORPORATED BY REFERENCE

Virginia Stormwater Management Handbook, First Edition, 1999, Volume I, Chapter 3, Department of Conservation and Recreation.

Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report.

[Virginia] Forestry Best Management Practices [(BMP) Guide] for [Water Quality in] Virginia [Technical Guide], Third Edition, 1997, Department of Forestry.

Virginia Agricultural Best Management Practices (BMP) Manual, Revised June 2000, Department of Conservation and Recreation.

Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, Department of Conservation and Recreation.

[Guideline for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230 (Federal Register December 24, 1980).]

NOTICE: The forms used in administering 9VAC 25-210-10 et seq., Virginia Water Protection Permit Program Regulation, are not being published due to the large number of pages; however, the name of each form is listed

9 VAC 25-210-10 et seq. Virginia Water Protection Permit Program Regulation (amending 9 VAC 25-210-10 and 9VAC 25-210-40 through 9VAC 25-210-260; adding 9VAC 25-210-45, 9VAC 25-210-115, and 9VAC 25-210-185; repealing 9 VAC 25-210-20 and 9 VAC 25-210-30)

below. The forms are available for public inspection at the Department of Environmental Quality, 629 E. Main Street, Richmond, Virginia, or at the office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia.

FORMS

~~DEQ Department of Environmental Quality Water Division Permit Application Fee.~~

~~Local Government Ordinance Form (eff. 8/93).~~

~~Local, State, Federal Joint Permit Application NAOFM-1065 VMRC 30-300 (rev. 1/00).~~

~~Virginia Scoping Coordination Federal and State Agencies--Joint General Permit, Form AES 03-1.1 (eff. 9/94).~~

Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia.

VA.R. Doc. No. R00-201; Filed February 6, 2001, 9:04 a.m.

Certified True and Accurate: _____ Date: _____

Dennis H. Treacy, Director, DEQ