VIRGINIA WATER PROTECTION PERMIT PROGRAM REGULATION AND ASSOCIATED VIRGINIA WATER PROTECTION GENERAL PERMIT REGULATIONS

CITIZEN ADVISORY GROUP

MEETING #3 - NOTES - FINAL

MEETING TUESDAY, SEPTEMBER 9, 2014
DEQ CENTRAL OFFICE – 2ND FLOOR – ROOMS B&C

Meeting Attendees

CITIZEN ADVISORY GROUP MEMBERS	*INTERESTED PARTIES*	*SUPPORT STAFF*
Steven E. Begg – Virginia Department of Transportation	John H. Brooks, III – Resource International	Melanie Davenport
Nina Butler – Virginia Manufacturers Association/Mission H2O	Tracey Harmon – Virginia Department of Transportation	Dave Davis
Jason P. Ericson – Dominion Resources Services, Inc.	Thomas .J. Mascia – Troutman Sanders LLP	Mike Murphy
Katie Frazier – Virginia Agribusiness Council	Aaron Revere – Felling Springs LLC/VMBA	Bill Norris
Karen Johnson – The Nature Conservancy (TNC)	Robert Siegfried – Angler Environmental	Ann Regn
Bob Kerr – Kerr Environmental	David Tiller – Virginia Department of Health	Brenda Winn
Chris Moore – Chesapeake Bay Foundation (CBF) (Alternate for Peggy Sanner)	Mark Williams – LUCK Company	*OTHER DEQ STAFF*
Greg Prelewicz – Fairfax Water	Joe Wood – Chesapeake Bay Foundation (CBF)	Trisha Beasley
Mike Rolband – Virginia Homebuilders Association		Lee Crowell
Peggy Sanner – Chesapeake Bay Foundation		Allison Dunaway
Beth Silverman Sprenkle – EEE Consulting, Inc.		Steve Hardwick
Skip Stiles – Wetlands Watch		Scott Kudlas
Andrea W. Wortzel – Troutman Sanders (Alternate for Nina Butler)		Sarah Marsala
		Bert Parolari

NOTE: Citizen Advisory Group Members NOT in attendance: Nina Butler – Virginia Manufacturers Association/Mission H2O; William T. (Tom) Walker – US Army Corps of Engineers

1. Welcome & Introductions (Mike Murphy):

Mike Murphy, Director of DEQ's Piedmont Regional Office, welcomed the members of the Citizen's Advisory Group and members of the Interested Parties to the meeting. He noted the following:

- Please be sure that you sign up on the sign-in sheets so that we have a record of your participation.

- There had been a lot of materials distributed to the group for their review and consideration and he appreciated the efforts of the group to look those materials over in preparation for today's meeting.
- We are operating under a very tight timeline due to the Governor's Executive Order related to the processing of regulations.
- We are still planning on taking proposed language to the December meeting of the State Water Control Board.
- We know that we are asking a lot from this group but we will be coming back to the various "track-changes" documents/language to consider and incorporate suggestions and recommendations from the group – please take the time to review these documents and provide your feedback on these proposed edits.

Discussions by the Group included the following:

- The question was raised whether DEQ would mind if members of the advisory group write a letter to the Governor expressing concern over the timeline for this regulatory action and requesting that more time be allowed for the process. The suggestion was made that the Governor's Executive Order was instead of encouraging public input was restricting that process with the limitations on the timeline for agency action on the regulation. *Staff Response: Members of the group are free to make their concerns known to the Administration, but DEQ will not initiate a request for such a letter.*
- It was noted that the volume of materials and emails that were being distributed in support of the activities of the advisory group related to proposed revisions to the regulations is overwhelming – these are not minor or trivial matters that are being proposed – adequate time should be allowed for the advisory group and DEQ staff to do their best job in evaluating and proposing language.
- There needs to be time to consider the ramifications and often unintended consequences of the proposed revisions.
- These are more than just "housekeeping" changes that are being proposed.
- These are all thoughtful changes but there is a feeling of being overwhelmed by the volume of materials that is being distributed in support of this effort. This type of pace is impossible to maintain and still be able to do a good job on this process.
- It was suggested that the consensus of the group early on was that the system wasn't broken when we started this process. A concern was noted that we may break the system by making these changes on such a fast pace – there may be unintended consequences for our actions. *Staff Response: Our intent is to make things clearer and to make things consistent in the regulation and the general permits. We have not suggested anything that we think breaks the system but that is why this group is here to lend your expertise and experience to the process so that we do understand the consequences of any proposed changes as best we can. We are stuck with having to reissue the general permits due to their expiration dates and we find things that are*

inconsistent between the general permits and the base regulation – we are trying to take advantage of this opportunity to make sure that there is consistency.

- This could be like the 11th commandment when people first see all of these changes – someone will need to be able to explain all of these changes – there are going to be reactions to what people will see at first look as major changes – they will want to know what is really going on? If we, as members of the advisory group are feeling overwhelmed with the timeline and the volume of materials we may not be able to adequately address those comments or concerns.
- It was noted that the timing of DEQ's action is unfortunate because EPA is also undertaking some changes in their rules. The paranoia thought that some are having is that this must be a coordinated effort between DEQ and EPA and that this must be a combined National and State effort. The timing is unfortunate.
- The changes may all be very good but it is difficult to have the time to adequately review and digest the proposals given the current timeline.

Staff Note: Appreciate all of the comments of the group. It is all part of the process – part of what we turn to committee members to do is to help get the word out about the changes that are being proposed and the rational for those changes. What we are trying to do is to incorporate what we have observed with the process over time and are trying to streamline and clarify the process with these proposed revisions.

- The concern over the volume of materials being distributed to the group was reiterated.
- It was noted that the members of the advisory group needed adequate time to be able to process all of the information being distributed and to evaluate the proposed revisions. It was suggested that some of the changes being proposed are more than what is needed to "make things consistent". Time is needed to be able to process these proposals.

Staff Note: We have to reissue the General Permits – there is no debate on that – Certainly, one of the things that we talked about was that we could reissue the GPs "warts and all" knowing that there are things in the GPs that are not consistent with what is in the main regulation and that violate the federal mitigation rule – asking for information we don't need – not getting information we do need – we could do that – that was one of our options.

- So then you could fix it later. *Staff Response: Then we would have to reissue the GPs again.*
- When do the current GPs expire? *Staff Response: They expire in August 2016.*
- There should be plenty of time then to fix all of this stuff. *Staff Response: The time limitation and the driving force behind our current schedule is the mandated time schedule in the current Executive Order.*

Staff Note: What is the sense of the group, if we don't feel we have the time we need to handle anything but the regulation revisions and the revisions to the GPs and only want to address the reissuance of the GPs do we shift this group into a Technical Advisory Group and only do that?

- It was noted that this group has already spend a lot of time on this effort. Let's take the time needed to do it right. *Staff Response: Not sure that we can get more time.*
- If members of the group write to the Governor to request more time for this process – need to have time to consider and evaluate any unintended consequences of taking this action.
- It was noted that the Homebuilders Association and the Commercial Builders are more than willing to go to the Governor to raise concerns over the timeline for this regulatory action if needed.
- A request was made that the members of the group be informed when the conversation with David Paylor has taken place so that they can decide on whether additional contacts with the Governor's Office or the Secretary of Natural Resources Office need to be pursued by members of the Advisory Group.

ACTION ITEM: Melanie Davenport will discuss the groups' concerns with David Paylor and inform him that a lot of good work has been done to date by the group but that there have been concerns raised regarding the time frame for completion of these activities. She will try to represent the concerns noted by the group for his consideration as to possible next steps in the process. She will inform the group when that conversation has taken place and the outcome of that conversation.

- A request was made that information for review and consideration by the group needs to be distributed in a timely manner and there needs to be time for members of the group to contact their member organizations or management teams regarding possible impacts of proposed language changes. With the compressed time schedule it is often difficult to get that needed internal organizational feedback.

2. Special Meeting – Monday, October 6, 2014:

Mike Murphy informed the group that the purpose of the special meeting that has been scheduled for Monday, October 6th – this is a follow-up to discussion from our last meeting regarding the need to have a meeting to discuss only the "surface water withdrawal" revisions being proposed so that additional stakeholders could be invited to attend such a meeting. He noted that there has been a separate notice mailed to the advisory group as well as an identified group of "interested parties" to "Save-the-Date" for that meeting. The meeting will take place at the DEQ Piedmont Regional Office Training Room with a Sign-In at 9:15 A.M. and a meeting start time of 9:30 A.M. The only topic on the agenda for that meeting is a discussion of the proposed revisions to the VWP Regulation that address "Surface Water Withdrawals". He noted that this would be treated as a meeting of the Advisory Group and that the additional stakeholders that had been notified as well as any other parties that attend the meeting in addition to the current Advisory Group members would be treated as "interested parties" and that they would have an opportunity to participate either through a member of the Advisory Group or during a Public Comment period during the meeting. The notification of this meeting was distributed on Monday, September 8th.

3. **Introductions:**

Mike Murphy asked for introductions of those in attendance. He asked all of those in attendance to make sure that they sign-in on the Sign-In sheet so that we have an official log of who attended the meeting.

4. **Process and Schedule for the Day:**

Bill Norris, Regulatory Analyst with DEQ's Office of Regulatory Affairs, briefly reviewed the proposed process and schedule for the balance of today's meeting. He noted that there was a slightly revised agenda for the meeting that was available for the group.

5. **Notes from Previous Meeting (August 22, 2014):**

Bill Norris, Regulatory Analyst with DEQ's Office of Regulatory Affairs, asked the group if there were any edits needed for the notes from the previous meeting of the group on August 22, 2014. No additions or changes were noted.

ACTION ITEM: Staff will mark the Meeting Notes from the August 22, 2014 meeting of the VWP Citizens Advisory Group as "Final" and will post them.

6. **Homework Assignments (Brenda Winn/Bill Norris):**

Brenda Winn noted that the intention was to look at the responses from the committee members to see what stands out as potential follow-up and then look at getting those items on the agenda for the meeting on the 22nd.

Bill Norris noted that there were a number of documents that had been distributed to the group as "homework assignments" that are not noted on the agenda. Those assignments were distributed to the group to allow the members to see some draft language and to make recommendations to the staff as to whether those changes ought to be pursued by staff and ultimately presented to the advisory group for their consideration. He noted that there would be additional items distributed in this manner. He requested that members of the group review and comment on these various documents as soon as possible so that the staff can focus on those items and areas that need to be addressed during this process. He noted that he had received "homework" return emails from only 3 members of the group prior to today's meeting. He noted that included in the "homework assignments" that had been "turned in" that there were some edits and suggestions that had been included that would be reviewed and considered by staff as they compile the track-change versions for review by the group.

7. **Tentative Wrap-Up Meeting Scheduled for October 15th (Dave Davis):**

Dave Davis, Director of DEQ's Office of Wetlands & Stream Protection, reminded the group that there had been an original "wrap-up" meeting tentatively scheduled for Wednesday, October 15th at the DEQ Piedmont Regional Office. He noted that it was looking now that the meeting on the 15th would be needed. He requested that the group make sure that it was on their calendars. The intent is to use this meeting to present all of the track-change documents and proposed revisions for a "final" review by the

group.

8. Review of Topics from the 08/25/14 Meeting – Temporary Impacts (Brenda Winn):

Brenda Winn introduced the first topic from the 08/25/14 Advisory Group Meeting for consideration by the group – "Temporary Impacts". She noted that "track-change" document for "temporary impacts" before the group today contained two major items: "define and clarify what temporary impacts meant" and "the need for those types of impacts to be identified prior to them just they are just taken". She noted that the group would be seeing this again as a homework assignment for further consideration by the group. Her presentation included the following:

9VAC25-210-10. Definitions.

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

"Conversion" means the immediate or gradual change of an existing wetland type to a different wetland type.

[*note: for reference purposes: "*Nationwide Permit General Conditions 23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal: (h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level." - DECISION DOCUMENT NATIONWIDE PERMIT 12: "The conversion of a forested wetland to a scrub shrub wetland does not constitute a permanent loss of waters of the United States, and thus does not count towards the acreage limit, even though it may result in the permanent loss of certain functions, which may require compensatory mitigation."]

Group Discussions Included the following:

- What kinds of changes are considered a "gradual change". *Staff Response: That would be changes that occur "over-time". Repetitive occurrences or actions that result in changes on a site such as shading; flooding; bush-hogging, etc.*

Additional proposed revisions include the following:

"Impacts" means those activities specified in § 62.1-44.15:20 A of the Code of Virginia.

[*note: for reference purposes:* "§ 62.1-44.15:20. Virginia Water Protection Permit. A. Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."]

"Temporary impacts" means impacts to wetlands or other surface waters that cumulatively do not cause a permanent alteration of the physical, chemical, or biological properties of surface waters or the alteration or degradation of existing wetland acreage or functions, and which are specifically authorized in the permit in advance of their occurrence. Temporary impacts include activities in which the impact area is restored to its preconstruction conditions. [*source: adapted from § 62.1-44.5*]

Group Discussions Included the following:

- There was some discussion about the language proposed in the last sentence of the definition of "temporary impacts" – the decision was made to leave it as originally written.

Temporary impacts include activities in which the ground is restored to its preconstruction contours and elevations, such that previous functions and values are restored.

- Questions were raised over the use of the phrase "which are specifically authorized in the permit in advance of their occurrence". It was suggested that the phrase should be deleted.

"Temporary impacts" means impacts to wetlands or other surface waters that cumulatively do not cause a permanent alteration of the physical, chemical, or biological properties of surface waters or the alteration or degradation of existing wetland acreage or functions.

- It was noted that the discussions so far today are a good example of why we need time as a group to go through these proposed revisions and talk them out in a group setting so that the consequences of the changes can be properly considered. We need time to be able to process what is being proposed.

- A concern was raised about the way that the materials were being presented and that at times the full text of a section needed to be reviewed not just those pieces being revised, to be able to evaluate the consequences of a change/revision. *Staff Response: The manner of presentation was an attempt to minimize any confusion and to minimize where possible to volume of paperwork that needed to be reviewed – this is an attempt to focus the discussions on a specific topic for review by the group to consider a specific change - the full text of the regulatory revisions and documents will be presented to the group as sections are completed through the distribution of "track-change documents".*

Additional proposed revisions include the following:

9VAC25-210-180. Rules for modification, revocation and reissuance, extension, transfer, and termination of VWP individual permits.

F. 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 contained in 9VAC 25-210-140, 9VAC 25-210-160, or 9VAC 25-210-170. For VWP permits, a minor modification may only occur in accordance with the following. Activities or developments specific to surface water withdrawals are in 9VAC25-210-(tbd).

e. When temporary impacts are the only change to the permitted project, a minor modification is not required subsequent to issuance to authorize additional temporary impacts to surface waters, provided the following information is submitted in writing to DEQ for review prior to initiating the proposed temporary impacts to surface waters:

(1) The permittee demonstrates to the board that such change is a minimal ecological impact and that the area to be temporarily impacted will be restored to preexisting conditions; and

(2) DEQ's written concurrence is received prior to the proposed additional temporary surface water impacts being initiated.

Group Discussions Included the following:

- It was suggested that the format was confusing. The text identifies in (1) shows what needs to be submitted and (2) is DEQ's response.
- It was noted that this section needs some wordsmithing.

…When temporary impacts are the only change to the permitted project, a minor modification is not required subsequent to issuance to authorize additional temporary impacts to surface waters, provided that the permittee demonstrates to the board that such change is a minimal ecological impact and that the area to be temporarily impacted will be restored to preexisting conditions; and DEQ's written concurrence is received prior to the proposed additional temporary surface water impacts being initiated.

- It was noted that there should be some timeframe associated with DEQ's written concurrence. *Staff Response: There is existing regulatory language related to approval of the compensation plan (690 Part 2 A5) that specify a "within 30 days of receipt" timeframe or it is deemed approved.*
- The "delegation to staff" when reference is made to the board in a regulation was discussed. It was suggested that actual use of the phrase "DEQ staff" would be clearer then a reference to "the board" if the responsibility is delegated. *Staff Response: There are some regulatory guidelines and regulatory drafting language that DEQ has to follow when these references are made but we will look into the use of the terms to see if they can be clarified.*

ACTION ITEM: Staff will look into the use of the terms/phrases "to the board" versus "to DEQ staff" to see if any clarifications can be made to address concerns over confusion in the use of the terms identified by the advisory group.

- The use of the term "minimal ecological impact" was discussed. Do we know or understand what "minimal" means? *Staff Response: The concept has worked wetlands of minimal ecological value for 14 years.* It was noted however that the phrase "wetlands of minimal ecological value" has a definition. "Minimal ecological impact" is not a defined term. It is important to have the term "minimal" included. Trying to determine a definition of "minimal ecological impact" would be difficult.
- Should a size limitation be included?
- It was noted that there should not be a lot of large temporary impacts identified "after the fact" they are normally included in the permit application. *Staff Response: The permittees doing it right do include them in the applications. The issue is those folks doing it without a permit.*

- It appears that the concern is those folks who are doing temporary impacts without a permit/without authorization – as a bypass for violations.
- The real question is what is the size limit that stakeholders and regulators feel is appropriate that people should be allowed to impact temporarily without getting a permit? *Staff Response: The proposed revisions are being suggested through a desire to have flexibility in the program.*
- It was noted that all of the existing permits include numerical values/limits – there has to be a line in the sand.
- The use of the term "restored to preexisting conditions" was discussed. It was recommended that the changes suggested in the definition of "temporary impact" should be considered here for consistency.

…provided that the permittee demonstrates to the board that such change is a minimal ecological impact and that the area to be temporarily impacted will be restored to its preconstruction contours and elevations, such that previous functions and values are restored.; and DEQ's written concurrence…

- It was suggested that the term "written concurrence" should be changes to "written agreement".

…and DEQ's written agreement…

- The consideration of temporary impacts and how the varying geography and terrain in Virginia is addressed by the permittee was discussed. There is a lot of difference in how an applicant deals with varying terrain.
- A concern was noted over the designation of a numeric limit – it was suggested that it is more of a question of geography.

ACTION ITEM: Since it doesn't appear that there is consensus on this topic – the discussion is being tabled until it can be discussed in later sections of the regulations.
PLACE-HOLDER: Need to address concerns raised over the use of the term "surface water" in different sections of the regulations – especially with the proposed shift of materials into a surface water withdrawal section. Is this the right term to use throughout the regulation or should different terms be used? Should it be "surface water" or "state waters"? Will need to consider the definitions of each and there use throughout the regulations. There are a lot of terms that will need to be considered for consistency and proper use throughout the regulations.

9. **BREAK – 10:37 A.M. – 10:55 A.M.**

10. **Review of Topics from the 08/25/14 Meeting – Modifications (Sarah Marsala):**

Sarah Marsala, Surface Water Withdrawal Project Manager with DEQ's Office of Water Supply, presented proposed revisions to address modifications in the VWP Regulation. This was distributed to the group as a "track-change" document through an email distribution. She noted that the proposed revisions that would be discussed today are for modifications for activities that are not specific to

surface water withdrawals. She noted that throughout this section there is linkage language that is included for those requirements that are related to "surface water withdrawals".

Her presentation included the following:

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

9VAC25-210-180. Rules for modification, revocation and reissuance, extension, transfer, and termination of VWP individual permits.

A. VWP individual permits may be modified in whole or in part, revoked and reissued, extended or transferred only as authorized by this section.

B. VWP permits may be modified upon the request of the permittee or upon board initiative when any of the following developments occur. Developments specific to surface water withdrawals are in 9VAC25-210-(TBD).

21. When new information becomes available about the project or activity covered by the VWP permit, including proposed project additions or alterations, that 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;

32. When a change is made in the promulgated standards or regulations on which the VWP permit was based;

;

53. When changes occur that are subject to "reopener clauses" in the VWP permit.

C. A request for a modification, except those addressed in 9VAC25-210-180-E**,** shall include the applicable informational requirements of 9VAC25-210-80.B through submittal of the updated portions of the application that reflect the proposed changes to the project. The board may request additional information as necessary to review and draft the permit**.** If the board tentatively decides to modify a permit, it shall prepare a draft permit incorporating the proposed changes in accordance to 9VAC25-210-120 and be processed in accordance with 9VAC 25-210-140, 9VAC 25-210-150, 9VAC 25-210-160, and 9VAC 25-210-170.C.

D. During the drafting and authorization of a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. VWP permit terms and conditions of the existing permit shall remain in effect during the modification of the permit.

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E. 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 contained in 9VAC 25-210-140, 9VAC 25-210-160, or 9VAC 25-210-170. For VWP permits, a minor modification may only occur in accordance with the following. Activities or developments specific to surface water withdrawals are in 9VAC25-210-(TBD).

1. Correct typographical errors;

2. Require monitoring and reporting by the permittee at a different frequency than required in the VWP permit, based on new information justifying the change in conditions;

. Change a compliance date provided it will not result in a net loss of wetlands or functions and values of surface waters.;

. Allow for a change in permittee provided that a written agreement containing a specific date for transfer of VWP permit responsibility, authorization and liability from the current to the new permittee has been submitted to the board. A VWP permit shall be transferred only if the VWP permit has been modified to reflect the transfer, has been revoked and reissued to the new permittee, or has been automatically transferred. Any individual VWP permit shall be automatically transferred to a new permittee if either one of the following occurs:

1a. The current permittee notifies the board of the proposed transfer of the permit that includes the following:

(1) A written agreement between the existing and proposed permittee containing the date of transfer of VWP permit responsibility, authorization and liability to the new permittee; and

3 (2). The board does not within 15 days notify the existing permittee and the new permittee of its intent to modify the VWP permit.

5. Change project plans that do not result in an increase to permitted project impacts other than allowable by 9VAC25-210-180E.6; 9VAC25-210-180 E.7 Compensation requirements may be modified in relation to the adjusted impacts provided that the adjusted compensation meets the initial compensation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases, mitigation bank usage, or in-lieu fee fund contributions;;

86. Authorize additional impacts to surface waters that are proposed prior to impacting those additional areas, which meet the following requirements:

. Proposed impacts are located within the previously authorized project boundary.

b. The cumulative additional wetland or open water impacts are equal to or less than one-tenth the acreage of originally permitted wetland or open water impacts or 0.25 acre of wetland or open water impacts, whichever is greater. The cumulative additional stream impacts are equal to or less than one-tenth of the linear feet of originally permitted stream impact or 100 linear feet of stream impacts, whichever is greater. One or more minor modifications shall not authorize cumulative additional impacts greater than 2.0 acres of wetland and open water impacts or 1,500 linear feet of stream impacts. The board, at its discretion, may require the proposal for additional impacts be processed as a modification in accordance with 9VAC25-180.B.

c. Documentation is provided demonstrating that the proposed surface water impacts have been avoided to the maximum extent practicable in accordance with the informational requirements of 9VAC25-80[ref A&M section of JPA reqmnts].

. Compensation for the proposed impacts meets the requirements of 9VAC25-80[ref comp section of JPA reqmnts].

e. When temporary impacts are the only proposed change to the permitted project, a minor modification is not required subsequent to issuance to authorize additional temporary impacts to surface waters, provided the following information is submitted in writing to DEQ for review prior to initiating the proposed temporary impacts to surface waters:

(1)The permittee demonstrates to the board that such change is a minimal ecological impact and that the area to be temporarily impacted will be restored to preexisting conditions; and

(2) DEQ's written concurrence is received prior to the proposed additional temporary surface water impacts being initiated.

7. Occur when, subsequent to issuance of a VWP permit, the permittee proposes substitution of all or a portion of the prior authorized permittee-responsible compensation with a purchase of mitigation credits from an approved mitigation bank(s) or an approved in-lieu fee fund. The amount of credits proposed to be purchased shall be sufficient to meet the compensation requirement for which the compensation is proposed to replace.

8. Allow for extension of the expiration date of the VWP permit. Any permittee with an effective VWP permit for an activity that is expected to continue after the expiration date of the VWP individual permit, without any change in the activity authorized by the

VWP permit other than as may be allowed under this section shall submit written notification requesting an extension. The permittee must file the request prior to the expiration date of the VWP permit. VWP permit modifications shall not be used to extend the term of a VWP permit beyond 15 years from the date of original issuance. If the request for extension is denied, the VWP permit will expire on its original date.

G. After notice and opportunity for a formal hearing pursuant to Procedural Rule No. 1 (9VAC25-230-100), a VWP permit can be terminated for cause. Reasons for termination for cause are as follows:

1. Noncompliance by the permittee with any condition of the VWP permit;

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;

3. The permittee's violation of a special or judicial order;

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;

5. A change in any condition that requires either a temporary or permanent reduction or elimination of any activity controlled by the VWP permit; and

6. A determination that the permitted activity has ceased and that the compensatory mitigation for unavoidable adverse impacts has been successfully completed.

H. The board may terminate the permit without cause when the permittee is no longer a legal entity due to death, dissolution, or when a company is no longer authorized to conduct business in the Commonwealth. The automatic termination shall be effective 30 days after notice of the proposed termination is sent to the last known address of the permittee or registered agent, unless the permittee objects within that time. If the permittee does object during that period, the board shall follow the applicable procedures for termination under Procedural Rule No. 1 as referenced above.

HI. A VWP permit can be terminated by consent, as initiated by the permittee, when all permitted activities have been completed or if the authorized impacts will not occur. The permittee shall submit a request for termination by consent within 30 days of project completion or project cancellation. The director may accept this termination on behalf of the board. The permittee shall submit the following information:

1. Name, mailing address and telephone number;

2. Name and location of the activity;

3. The VWP permit authorization number; and

4. One of the following certifications:

a. For project completion: "I certify under penalty of law that all activities and any requested compensatory mitigation] authorized by a VWP permit have been completed. I understand that by submitting this notice of termination that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit."

b. For project cancellation: "I certify under penalty of law that the activities and any required compensatory mitigation] authorized by this VWP permit will not occur. I understand that by submitting this notice of termination, that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP [ ] permit, nor does it allow me to resume the permitted activities without reapplication and issuance of another permit."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by DEQ, and the following certification statement: "I certify under penalty of law that the activities or the required compensatory mitigation authorized by a VWP permit have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit, nor does it allow me to resume the permitted activities without reapplication and issuance of another permit.

IJ. If a permittee files a request for VWP permit modification, revocation and reissuance, or termination, or files a notice of planned changes or anticipated noncompliance, the VWP permit terms and conditions shall remain effective until the request is acted upon by the board.

9VAC25-210-185. Duration of VWP permits.

A. ADuration of VWP permits. VWP permits issued under this chapter shall have an effective date and expiration date that will determine the life of the permit. VWP permits shall be effective for a fixed term based upon the projected duration of the project, the 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. Emergency Virginia Water Protection Permits shall not exceed a duration of one year or shall expire upon the issuance of a regular Virginia Water Protection Permit, whichever comes first.

Group Discussions Included the following:

- A question related to the deletion of the "Act of God" clause was raised. *Staff Response: The intent is to allow for any action that changes the compliance dates including an "act of God" to be treated as a "minor modification". The proposal is to provide that any "administrative changes" would be handled as a "minor modification".*
- It was noted that all of the proposed changes seem to be well done. It was suggested that in order to move this process along that we proceed either section by section or page-by-page or topics. *Staff Response: In order to move this process along – we will proceed page-by-page through the document so that the group can identify any specific concerns that they may have.*
- Support for the new language in 210-180 D was noted. *Staff Response: One of the things that we are trying to do through this process is to try to get consistence from one water permit to another. This process may take a while but the intent is to get some consistence in how permits are handled.*
- Page 5: Current Item #5: There are some needed grammatical corrections. The word "or" needs to be inserted after "9VAC25-210-180 E 6;" and a "period" needs to be added after "9VAC25-210-180 E 7".

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5. Change project plans that do not result in an increase to permitted project impacts other than allowable by 9VAC25-210-180 E 6; or 9VAC25-210-180 E 7. Compensation requirements may be modified in relation to the adjusted impacts provided that the adjusted compensation meets the initial compensation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases, mitigation bank usage, or in-lieu fee fund contributions;

- A recommendation was made to reconsider the incorporation of original "E" into the new "E 4".

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4. Allow for a change in permittee provided that a written agreement containing a specific date for transfer of VWP permit responsibility, authorization and liability from the current to the new permittee has been submitted to the board.

5. A VWP permit shall be transferred only if the VWP permit has been modified to reflect the transfer, has been revoked and reissued to the new permittee, or has been automatically transferred. Any individual VWP permit shall be automatically transferred to a new permittee if either one of the following occurs:

   a. The current permittee notifies the board of the proposed transfer of the permit that includes the following:

      (1) A written agreement between the existing and proposed permittee containing the date of transfer of VWP permit responsibility, authorization and liability to the new permittee; and

      (2). The board does not within 15 days notify the existing permittee and the new permittee of its intent to modify the VWP permit.

6. Change project plans that do not result in an increase to permitted project impacts other than allowable by 9VAC25-210-180 E 6; or 9VAC25-210-180 E 7. Compensation requirements may be modified in relation to the adjusted impacts provided that the adjusted compensation meets the initial compensation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases, mitigation bank usage, or in-lieu fee fund contributions;

- A question was raised over the use of the term “one-tenth”. A 1/10 of a large project could be very large. *Staff Response: What we were trying to do was to make the minor modifications more flexible to use for a variety of projects. Virginia governs a wide geographic area so in some areas an additional 100 linear feet of a stream is a big deal while in others it is not. Wanted to take a dynamic approach to be able to address very big projects that come in with “tweaking” – a little here and a little there – but the cumulative amount of these changes is very large – so we took the approach of looking at a percentage of what was originally permitted as the limit. There is also an ultimate limit included.*
- Concern was noted regarding the language being proposed for the authorization of additional impacts to surface waters and the notification language. *Staff Response: DEQ would still have to notify riparian owners if any additional impacts have "fill" associated with them, so it's not by doing it through a "minor modification" that we wouldn't be notifying them.*
- A concern was noted related to public notification not just notification of riparian landowners. There needs to be a clear mechanism for public review of proposed impacts. There were concerns noted regarding the proposed language in this section.
- The question was raised whether the rational for this type of change in impact language as a result of a reservoir project where the foot print of the project needed some adjustment? *Staff Response: Projects where the threshold limitation as originally drafted were issues were linear projects such as pipelines where there was need for a change but because of the current*

threshold limits it was treated as a Major modification. The proposed language changes here are the starting point for making the process more flexible.

- Where this is evident is on very large phased developments that have their permits for 15 years – they do their original plan for the first few phases for the first few years and have a few tweaks throughout the process – the next phase is done and there are more tweaks and then more tweaks are necessary – you can run into the current threshold limits very quickly – it is more of a longer term project concern – a cumulative concern. *Staff Response: With the current thresholds – once you reach that threshold then every little change is a "major modification" – that is what we are trying to avoid through this proposed revision. 2 acres is the General Permit threshold.*
- The Major Mod process is more like getting an Individual Permit. The Minor Mod is a more streamlined process. The process is not the issue it is the timeline involved in the Major Mod process – it is essentially like filling in a new application for a permit. The time that it takes to secure an approval is the issue.
- It was reiterated that there needs to be an opportunity for public notice and public comment in the process when there are impacts even for minor modifications. It was also noted that the existing language related to threshold limits was preferred over that which staff has proposed. *Staff Response: Would 1 acre be a better threshold limit? Nationwide Permits are 1 acre.*
- RE: Section 6 b – Page 4: This talks about "wetland or open water impacts" and then talks about "stream impacts" but to be consistent something has to be changed here or in the proposed delineation language and proposed monitoring language. The "delineation" language defines "open water" as "wetlands and other surface waters". The "monitoring" language addresses "nontidal wetlands, open waters and non-tidal streams" and misses "other surface waters". There are also some other minor differences contained in these various sections. The use of these terms needs to be consistent. They all need to be consistent.
- There was an agreement that the terms being throughout the regulation need to be checked to make sure that their usage is consistent throughout the documents. We need to make sure that the right terms are being used. There are some slight differences in their usage that needs to be considered.
- It was requested that the use of the term "concurrence" be replaced by "approval" throughout the document as previously noted.

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(2) DEQ's written approval is received prior to the proposed additional temporary surface water impacts being initiated.

- The use of "advanced credits" was discussed as it relates to "compensation". *Staff Response: "Advanced credits" are addressed in the "compensation" section – we could include a reference*

in this section "that purchase of credits would need to be in accordance with the mitigation section" (Section 116 C 1).

- *Staff Note: The idea is to allow a change in the compensation plan as a minor modification.*
- When an applicant wants to simply change from one bank to another because the original bank is already sold out – How does this happen? - Is this spelled out anywhere? *Staff Response: This would be treated as a "minor mod". It is not spelled out but "permit banks" are not currently being written into the permits. Do we need to include the "bank-to-bank" language?* No.
- The new "termination" language was discussed:

H. The board may terminate the permit without cause when the permittee is no longer a legal entity due to death, dissolution, or when a company is no longer authorized to conduct business in the Commonwealth. The automatic termination shall be effective 30 days after notice of the proposed termination is sent to the last known address of the permittee or registered agent, unless the permittee objects within that time. If the permittee does object during that period, the board shall follow the applicable procedures for termination under Procedural Rule No. 1 as referenced above.

- In this section (H) should the term "shall" be used instead of "may"? *Staff Response: This is the language that is used in the VPDES regulations – trying to make sure that the language is consistent across the regulations where possible.*
- What would be an example of an instance where the board wouldn't terminate the permit without cause for the reasons listed? *Staff Response: To terminate the permit and to go through that level of administrative exercise when there is a death and there is no one else looking to get a permit on the site, and there maybe only 8 months left in the permit term – it may be more beneficial from a staff resource issue to let the permit expire.* It was agreed that the word "may" was the appropriate term to use in this case.

11. Review of Topics from the 08/25/14 Meeting – Compensation (Steve Hardwick):

Steve Hardwick provided an overview of the proposed changes to the "Compensation" requirements in the regulations. He noted that the proposed revisions are an effort to bring these requirements in line with the federal mitigation rule. There are some changes in the listing of sequence order of mitigation options. There are a lot of mark-ups in the document but they are essentially pushing through essential changes – one is the sequence of mitigation options and permittee responsible site protection. The first change that he noted was the addition of a new definition as follows:

9VAC25-210-10. Definitions.

"Permittee responsible compensation" means an aquatic resource restoration, establishment,

enhancement, and/or preservation activity undertaken by the permittee to provide compensatory mitigation for which the permittee retains full responsibility.

- A question was raised regarding the use of the phrase "for which the permittee retains full responsibility": Would it be better or clearer to replace this phrase with "which is not met by bank credits or in lieu fee funds"? It was noted that this wording change might be worth looking at. *Staff Response: The proposed language is consistent with the federal mitigation rule. This definition is directly from the federal mitigation rule. Staff will look at the language used to compare with what is in the federal rule.*
- As previously noted: There was a suggestion made that there be a hyphen included in the term "permittee-responsible compensation".

ACTION ITEM: Staff will look at the use of the term/phrase "permittee-responsible compensation" and made the necessary changes to include the requested hyphen.

He continued in his review of the proposed revisions related to "compensation" by providing an overview of the proposed changes to 9VAC25-210-116. The proposed changes to B 1 in this section were discussed:

B. Practicable and ecologically preferable compensation alternatives.

1. An analysis shall be required to justify that permittee responsible compensation is more ecologically preferable than the purchase of mitigation bank credits or in-lieu fee fund credits.

- RE: the phrase "more ecologically preferable" used in B 1: The federal rule doesn't specify that the compensation has to be "more ecologically preferable". *Staff Response: The federal rule leaves it pretty much to the District Engineer's discretion.*
- "More ecologically preferable is not used in the federal rule. Use of the term in DEQ's regulation would be in essence "setting the bar higher" than the federal rule. The term used is "where practicable and likely to be successful and sustainable". It doesn't say that it has to be "better than". *Staff Response: Our current regulations say that we will choose the ecologically preferable alternative for compensation.*
- The concern is over the use of the word "more". How do you make a determination that something is "more" ecologically preferable over something else? The federal rule does not say something has to be "more ecologically preferable", it says it has to be an ecologically suitable site.

- Why are we not just referencing the federal rule? DEQ can't reference a regulation that may change without their control.
- Having a higher threshold for permittee-responsible compensation seems to be consistent and appropriate with the goals of this program.
- The suggestion was made to delete the word "more" from section B 1, to make it consistent with the federal rule.
- *Staff Note: The federal rule says "environmentally preferable".*
- The suggestion was made to change "ecologically" to "environmentally" in this section and throughout the regulation when used in this context.

B. Practicable and environmentally preferable compensation alternatives.

1. An analysis shall be required to justify that permittee responsible compensation is environmentally preferable to the purchase of mitigation bank credits or in-lieu fee fund credits.

ACTION ITEM: Staff will look at the use of the terms "ecologically" and "environmentally" throughout the regulations and make changes where they are deemed appropriate.

He noted that the next sections of the proposed revisions address the protection mechanism/language associated with "permittee-responsible compensation".

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3. The applicant must demonstrate that permittee responsible compensation can be protected in perpetuity via a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act, or, if approved by DEQ, a declaration of restrictive covenants and a long term management plan , including an identified long term steward and adequate financial assurances for long term management, in accordance with the current standard for mitigation banks and in-lieu fee fund sites. If approved by DEQ, permittee responsible compensation on government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans.

- It was suggested that there needs to be some wordsmithing done in this section.
- It was noted that this language appears to come from the mitigation rule but it needs to be fine-tuned.

- It was suggested that there a few other statements in the mitigation rule that might be appropriate to include here.

ACTION ITEM: Steve Begg from VDOT offered to provide specific language and/or specific references from the federal rule relative to the "protection mechanism" requirements that are used to cover governmental entities that might be appropriate to include in this section.

- RE: Long term steward: Is it the intention that the permittee can use either a conservation easement or a deed restriction with a long term management plan and a steward or is it the intention that the long term steward is required for either a conservation easement or a deed restriction? *Staff Response: It was designed to be a hierarchy – 1) the conservation easement act or 2) the restrictive covenant with the long term management plan.* It was suggested that was not consistent with mitigation banks and in lieu fee sites, because they have to have a long term steward regardless of the type of protection they have. You can have a conservation easement but you still have to have a long term management plan with a long term steward. *Staff Response: That was the intent – we need to look at the language and do some wordsmithing to clarify the requirements. A long-term steward is required for both.*
- Need to make sure that the long term steward requirement applies to both a conservation easement and a long term management plan. Some wordsmithing will be needed:

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3. The applicant must demonstrate that permittee-responsible compensation can be protected in perpetuity either via a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act, including an identified long term steward and adequate financial assurances for long term management or, if approved by DEQ, via a declaration of restrictive covenants and a long term management plan , including an identified long term steward and adequate financial assurances for long term management, in accordance with the current standard for mitigation banks and in-lieu fee fund sites. If approved by DEQ, permittee responsible compensation on government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans.

Steve continued the presentation of proposed revisions related to "compensation" found in 9VAC25-210-116 C 1:

C. Compensatory mitigation proposals shall be evaluated as follows:

1. The purchase of mitigation bank credits and in-lieu fee fund credits, when available, shall be deemed the most ecologically preferable form of compensation for project impacts, in most cases. However, permittee responsible compensation opportunities that

prove to be more ecologically preferable or practicable may be considered when the applicant demonstrates satisfactorily that permittee- responsible compensation, in accordance with subsection B 2 of this section, is ecologically preferable.

- "Most" needs to be deleted from the phrase "more ecologically preferable".
- A hyphen needs to be included in the phrase "permittee-responsible compensation". *Staff Response: This change would be consistent with the Corps usage of the term.*
- The term "ecologically preferable" needs to be looked at to see if it should be "environmentally preferable".

C. Compensatory mitigation proposals shall be evaluated as follows:

1. The purchase of mitigation bank credits and in-lieu fee fund credits, when available, shall be deemed the environmentally preferable form of compensation for project impacts, in most cases. However, permittee-responsible compensation opportunities that prove to be more ecologically preferable or practicable may be considered when the applicant demonstrates satisfactorily that permittee-responsible compensation, in accordance with subsection B 2 of this section, is environmentally preferable.

Proposed revisions to 9VAC25-210-116 C 2:

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2. Compensatory mitigation for unavoidable wetland impacts may be met through the following options:

a. Purchase or use of wetland credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia or DEQ approved in-lieu fee released credits;

b. Purchase of in-lieu fee advance credits;

c. Permittee responsible compensation using a watershed approach;

d. Permittee responsible compensation (onsite and in-kind compensatory mitigation);

e. Permittee responsible compensation (off-site or out-of-kind);

f. Restoration of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 2 a, b, c, d or e of this subsection and when consistent with 9VAC25-210-116 A;

g. Preservation of wetlands, when utilized in conjunction with subdivision 2 a, b, c, d or e of this subsection and when consistent with 9VAC25-210-116 A;

h. Preservation of upland buffers adjacent to wetlands, when utilized in conjunction with subdivision 2 a, b, c, d or e of this subsection, and when consistent with 9VAC25-210-116 A.

- It was noted that it was good to see the break-out for advanced credits but the options are listed in what appears to be the order of preference but there is no statement that this is the preferred order of preference. If this is the intent of the rule now - then it should be stated that this is the order of preference. A statement needs to be added to that effect.

ACTION ITEM: Staff will rework this section to make it clear that this is the preferred "order of preference" for meeting compensatory mitigation.

- *Staff Note: The preference language is included in 9VAC25-210-116 C 4.*

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4. Generally, preference shall be given in the following sequence: mitigation banking, in-lieu fee fund, and permittee-responsible compensation. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland acreage and functions or stream functions and water quality benefits.

- It was noted that this language does not include "the breakout of advanced credits". *Staff Response: If this language related to the preference was added to item 2 then could this paragraph be eliminated?* There was some discomfort noted with the elimination of this language. The suggestion was made to move the language from this section above and become either Item 1 or Item 2 since it deals with the current Items 2 and 3.

ACTION ITEM: Staff will look at the incorporation of the "preference" language from Item 4 earlier in section 9VAC25-210-116 C so that it covers both wetland impacts and stream impacts and so it is clearer that this is the order of preference.

- It was noted that the term "open water" is not included in this section. There are times that DEQ requires a lot of mitigation for open water impacts, so we need to know what is required for "open water impacts". DEQ needs to add an additional section in addition to the sections on wetland impacts and stream impacts to make it clear what is required for "open water impacts".

ACTION ITEM: Staff will look into developing language to clarify what is required for compensatory mitigation for "open water impacts" for inclusion in this section of the regulations.

- RE: 9VAC25-210-116 C 2 c: Is "watershed approach" defined? *Staff Response: "Watershed approach" is defined in the federal rule. This is meant to take into account those instances where there is a specific "watershed plan" for an area/region where specific needs are identified in a specific watershed that they can be taken into consideration.*
- Should it just refer to "permittee-responsible compensation"?
- It was recommended that "watershed approach" be added as a definition.

GROUP CONSENSUS: Keep the term and add the definition of "watershed approach" from the federal rule in the definitions section of the regulation.

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2. Compensatory mitigation for unavoidable wetland impacts may be met through the following options:

a. Purchase or use of wetland credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia or DEQ approved in-lieu fee released credits;

b. Purchase of in-lieu fee advance credits;

c. Permittee-responsible compensation using a watershed approach;

d. Permittee-responsible compensation (onsite and in-kind compensatory mitigation);

e. Permittee-responsible compensation (off-site or out-of-kind);

f. Restoration of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 2 a, b, c, d or e of this subsection and when consistent with 9VAC25-210-116 A;

g. Preservation of wetlands, when utilized in conjunction with subdivision 2 a, b, c, d or e of this subsection and when consistent with 9VAC25-210-116 A;

h. Preservation of upland buffers adjacent to wetlands, when utilized in conjunction with

subdivision 2 a, b, c, d or e of this subsection, and when consistent with 9VAC25-210-116 A.

- Regarding items 2 f; g; and h in 9VAC25-210-116 C which refer to restoration of upland buffers adjacent to state waters; preservation of wetlands; and preservation of upland buffers adjacent to wetlands – they all reference back to the fact that they all have to be done with 2 a, b, c, d, or e which makes perfect sense. The question is whether this language is intended to preclude somebody from having preservation of upland buffers adjacent to state waters and preservation of wetlands and preservation of upland buffers adjacent to wetlands included in their compensatory mitigation package? *Staff Response: As long as the compensatory mitigation package meets "no net loss" that's the bottom line.* It is not precluding the use of any of the options or a combination of options.

Steve noted that section 9VAC25-210-116 C 3 does the same thing for streams as C 2 does for wetlands.

- A suggestion was made that items 3 c; d; and e for streams should mirror 2 c; d; and e that were discussed in the previous section.

ACTION ITEM: Staff will look at the language in section 9VAC25-210-116 C 3 c; d; and e and make it consistent with the language found in C2 c; d; and e.

- It was suggested that during this rewording exercise that the concept of consistence with 9VAC25-210-116 A not be lost.

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3. Compensatory mitigation for unavoidable impacts to streams may be met through the following options, as appropriate to replace functions or water quality benefits. One factor in determining the required compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology acceptable to the DEQ.

a. Purchase of stream credits from a mitigation bank or released stream credits from an approved in-lieu fee fund, pursuant to § 62.1-44.15:23 of the Code of Virginia;

b. Purchase of advance stream credits from an approved in-lieu fee fund;

c. Permittee-responsible compensation using a watershed approach;

d. Permittee-responsible compensation (onsite and in-kind compensatory mitigation);

e. Permittee-responsible compensation (off-site or out-of-kind) when utilized in conjunction with subdivision 3 a, b, c or d of this subsection, and when consistent with 9VAC25-210-116 A.

- RE: Item 4:

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4. Generally, preference shall be given in the following sequence: mitigation banking, in-lieu fee fund, and permittee-responsible compensation. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland acreage and functions or stream functions and water quality benefits.

- Why is the preference included here? Shouldn't there be flexibility to allow for local watershed approaches? *Staff Response: The regulations do allow flexibility for local watershed approaches. A local watershed approach would be a subpart of "permittee-responsible compensation. We are reiterating here that banks come first. Earlier we had talked about moving this section upfront in the section to make the order of preference clearer. To make it clear that these are the options that we like and that this is the order that we prefer.*

Steve continued the review of the proposed revisions related to "compensation". He noted that the proposed revisions were to make current use of terms consistent in the regulations related to approval of the funding instrument; approval by DEQ and recognition that it is "compensatory" mitigation.

D. In-lieu fee fund approval.

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

a. Approving use of a fund for a specific project when approving a VWP permit; or

b. Approving the fund's Instrument.

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 acreage and functions or stream functions and water quality benefits by adoption of operational goals or objectives for preservation, creation or restoration;

b. DEQ approval of each site for inclusion in the fund;

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 compensatory mitigation credits contributed for each watershed of project impact;

He reviewed the proposed edits to 9VAC25-210-116 D 4. He noted that the time limit for approvals had been increased from "five" years to 15 years. Language has also been added that elaborate on the types of activities

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4. Such approval may be granted for up to 15 years and may be renewed by the board upon a demonstration that the fund has enhanced wetland acreage or functions or stream functions and water quality benefits through the restoration, creation, enhancement, or preservation of wetlands and their associated buffers and enhanced stream functions and water quality benefits through the restoration, enhancement, or preservation of streams and their associated buffers. Such demonstration may be made with the reports submitted pursuant to subdivision 3 c of this subsection.

- The question was raised as to why the approval time limit was increased? *Staff Response: The 15 years tracks with the expiration period for the permit. The five years that is in the regulation which there before the mitigation rule and doesn't match current practice.*
- It was noted that some members of the group were fine with the "five" year limit on approvals. *Staff Response: The regulations do say that DEQ "may" grant approval up to 15 years.*
- Wouldn't the tendency be to grant a 15 year approval? How would you anticipate that discretion of sometimes "five years" and sometimes "15 years" being exercised? *Staff Response: We would be looking right up front at an instrument that could be approvable for 15 years. But if it is an "instrument" that we have concerns about we would not rely on a "five" year approval but would negotiate to get a better "instrument" in place up front. This is just a proposal right now – it is an administrative fix. Now the regulations have the "five year" limit. We should be negotiating in-lieu fees that are at a highest standard that could be approvable for 15 years.*

He provided an overview of the proposed revisions related to compensation and the use of mitigation

banks and multi-project mitigation sites found in 9VAC25-210-116 E.

E. 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. The bank or multi-project mitigation site meets the criteria and conditions found in § 62.1-44.15:23 of the Code of Virginia:

2. 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;

3. The applicant provides verification to DEQ of purchase of the required amount of credits prior to taking the permitted impacts; and

4. For multi-project compensatory mitigation sites, the VWP permit shall include conditions sufficient to ensure long term monitoring and maintenance of surface water functions and values, including a long term management plan with an identified long term steward and adequate financial assurances for long term management, in accordance with the current standard for mitigation banks and in-lieu fee fund sites.

- Regarding multi-purpose compensatory mitigation sites – VDOT has a whole lot of those types of sites – the concern is that this language could capture all of those sites that are essentially pre-2008 sites. Could language be added so that those sites could be grandfathered? It was suggested that the phrase "established after the effective date of the regulation" could be added to address this concern.

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4. For multi-project compensatory mitigation sites established after (the effective date of the regulation), the VWP permit shall include conditions sufficient to ensure long term monitoring and maintenance…

- What is the difference between a "multi-purpose compensatory mitigation site" and a "mitigation bank" and a "permittee-responsible" site? *Staff Response: It was the "mitigation bank concept" prior to banks becoming more prevalent.* It was a way to get around mitigation

banking. *Staff Response" The regulations and the Corps allow the use of "multi-purpose mitigation" sites but they are real difficult to track and to administer.*

- Is there any need or validity in keeping "multi-purpose compensatory mitigation" sites as a viable option in the future? Should this option/concept be eliminated? *Staff Response: There will be a number of different entities with linear projects where there may be a continued need to retain the use of "multi-purpose compensatory mitigation" sites. The preference of the staff would be to see a "banking" instrument used but that may cause some heartburn with a few folks.*
- It was noted that VDOT would like to retain the possibility/flexibility of being able to utilize "multi-purpose compensatory mitigation" sites. *Staff Response: The large linear projects is probable the one area where this concept may be useful and needed but for everything else a "banking" instrument should be required.*
- It was suggested that some clarity was needed to address concerns raised over the use of "multi-purpose" sites especially related to allowances for governmental agencies and localities and "linear projects".

ACTION ITEM: Staff will look at the possibility of eliminating the use of "multi-purpose compensatory mitigation" sites except for the possibility of some "linear projects".

Steve noted that the final proposed revision to this section was in F:

F. For permittee-responsible compensation the final compensatory mitigation plan must include complete information on all components of the conceptual compensatory mitigation plan detailed in 9VAC25-210-80 B 1 k (5) (b) and (c):

Steve reviewed the proposed revisions related to "compensation" found in the General Permit at 9VAC25-210-130. He noted that this section addresses the 401 Certification process and sequencing and mirrors 116 C 2 and 116 C 3 – any changes that are made in those sections will be mirrored here.

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

1. Require that wetland or stream impacts be avoided and minimized to the maximum extent practicable;

2. Prohibit impacts that cause or contribute to a significant impairment of state waters or fish and wildlife resources;

3. Require compensatory mitigation sufficient to achieve no net loss of existing wetland acreage and functions or stream functions and water quality benefits; and

4. Require that compensatory mitigation for unavoidable wetland impacts be provided through the following options, as appropriate to replace acreage and function:

a. Purchase or use of wetland credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia or DEQ approved in-lieu fee released credits;

b. Purchase of in-lieu fee advance credits;

c. Permittee responsible mitigation using a watershed approach;

d. Permittee responsible mitigation (onsite and in-kind mitigation);

e. Permittee responsible mitigation (off-site and/or out-of-kind);

f. Restoration of upland buffers adjacent to wetlands, when utilized in conjunction with subdivision 4 a, b, c, d or e of this subsection and when consistent with 9VAC25-210-116 A;

g. Preservation of wetlands, when utilized in conjunction with subdivision 4 a, b, c, d or e of this subsection and when consistent with 9VAC25-210-116 A.

h. Preservation of upland buffers adjacent to wetlands, when utilized in conjunction with subdivision 4 a, b, c, d or e of this subsection and when consistent with 9VAC25-210-116 A;

5. Require that compensatory mitigation for unavoidable stream impacts be met through the following options as appropriate to replace functions or water quality benefits; one

factor in determining the required compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology approved by the board:

a. Purchase or use of stream credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia or DEQ approved in-lieu fee released credits;

b. Purchase of in-lieu fee advance credits;

c. Permittee responsible mitigation using a watershed approach;

d. Permittee responsible mitigation (onsite and in-kind mitigation);

e. Permittee responsible mitigation (off-site and/or out-of-kind);

f. Restoration of upland buffers adjacent to streams, when utilized in conjunction with subdivision 4 a, b, c, d or e of this subsection and when consistent with 9VAC25-210-116 A;

g. Preservation of streams, when utilized in conjunction with subdivision 4 a, b, c, d of e of this subsection and when consistent with 9VAC25-210-116 A.

h. Preservation of upland buffers adjacent to streams, when utilized in conjunction with subdivision 4 a, b, c, d or e of this subsection and when consistent with 9VAC25-210-116 A.

- Even though there is a lot of effort in these proposed revisions to mirror the base regulation in the general permit language, there are still a lot of inconsistences between the two with different wording of the essentially the same concepts. There are differences in wording. The wording either needs to be made identical or the reasons for any differences need to be clearly identified. There is a need for consistency. You could also go into the text and refer back to the requirements identified in 116 without having to worry about duplicating the requirements in multiple locations. *Staff Response: There is wordsmithing needed throughout the regulations. It may be preferable to just refer back instead of duplicating the language.*

ACTION ITEM: Staff will look at the proposed language and determine is a simple reference back to the requirements can be included instead of attempting to duplicate the language in multiple locations.

12. BREAK FOR LUNCH – 12:20 to 1:20

13. Review of Topics from the 08/25/14 Meeting – Compensation – As it relates to the Application Section (Steve Hardwick):

Steve Hardwick continued the presentation of the proposed revisions related to "compensation" by addressing the proposed revisions in the Application section of the regulations (9VAC25-210-80). He reviewed the proposed changes in 9VAC25-210-80 B 1 m (1); (2); & (3).

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m. A compensatory mitigation plan to achieve no net loss of wetland acreage and functions or stream functions and water quality benefits.

1) If permittee responsible compensation is proposed, a conceptual wetland compensatory mitigation plan must be submitted in order for an application to be deemed complete and shall include at a minimum: the goals and objectives in terms of replacement of wetland acreage and functions; a detailed location map (for example, a United States Geologic Survey topographic quadrangle map), including latitude and longitude (to the nearest second) and the hydrologic unit code (HUC) at the center of the site; a description of the surrounding land use; 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; groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; wetland delineation confirmation and data sheets and maps for existing surface water areas on the proposed site(s); a conceptual grading plan; a conceptual planting scheme, including suggested plant species and zonation of each vegetation type proposed; a description of existing soils, including general information on both topsoil and subsoil conditions, permeability, and the need for soil amendments; a draft design of any water control structures; inclusion of buffer areas; a description of any structures and features necessary for the success of the site; the schedule for compensatory mitigation site construction; and proposed language for protecting the compensation site or sites, including all surface waters and buffer areas within its boundaries, in perpetuity in accordance with subsection B.1.m(4) of this section.

2) If permittee responsible compensation is proposed, a conceptual stream compensatory mitigation plan must be submitted in order for an application to be deemed complete, and shall include at a minimum: the goals and objectives in terms of water quality benefits and replacement of stream functions; a detailed location map (for example, a United States Geologic Survey topographic quadrangle map), including the latitude and longitude (to the nearest second) and the hydrologic unit code (HUC) at the center of the site; a description of the surrounding land use; the proposed stream segment restoration locations, including plan view and cross-section drawings; the stream deficiencies that need to be addressed; the proposed restoration measures to be employed, including channel measurements, proposed

design flows, types of instream structures, and conceptual planting scheme; reference stream data, if available; inclusion of buffer areas; schedule for restoration activities; and proposed language for protecting the compensation site or sites, including all surface waters and buffer areas within its boundaries, in perpetuity in accordance with subsection B.1.m(4) of this section.

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

- A recommendation was made to make sure that the previous discussions related to "long-term management" and the proposed edits be incorporated in this section too so that there is consistence throughout the regulation as to how a topic is addressed.

ACTION ITEM: Staff will review the discussions and recommendations made by the group to ensure that similar topics are addressed with the same approach and same language as used in other sections of the regulations to ensure consistence.

Steve continued with presentation of the proposed revisions in 9VAC25-210-80 B m (4); (5); & (6):

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(4) Any compensatory mitigation plan proposing permittee responsible compensation shall require a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act, or, if approved by DEQ, a declaration of restrictive covenants and a long-term management plan, in accordance with the current standard for mitigation banks and in-lieu fee fund sites, including an identified long-term steward and adequate financial assurances for long term management. If approved by DEQ, permittee responsible compensation on government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans.

(a) The mechanism for protection shall include the following minimum restrictions: no ditching, land clearing or discharge of dredge or fill material and no activity in the area designated as compensation area with the exception of activities in accordance with the approved final

compensatory mitigation plan, maintenance or corrective action measures.

(b) The mechanism of protection shall include a provision for access the site from a public road.

(c) The mechanism of protection shall be recorded in the chain of title to the property or an equivalent instrument for government-owned lands.

(d) Proof of recordation shall be submitted to DEQ in accordance with the approved final compensatory mitigation plan.

(5) Any compensatory mitigation plan shall include measures for the control of undesirable species.

- Is the intent to include the concept of "on-site preservation" in this process? *Staff Response: That is the intent. It is important for staff to know whether parts of the site are being proposed for "on-site preservation" so that possible future permits or activities on the site can take into consideration that preservation mechanism.*
- There needs to be flexibility for local governments to be more creative in their approached to compensatory mitigation. *Staff Response: Basically what is being required a third-party easement holder or some other mechanism that DEQ approves.*
- The concept of "nothing that is not on the plan will be approved" was discussed.
- The limitations of the use of deed restrictions was discussed. *Staff Response: Prohibiting all activities is not the intent of these proposed revisions.*
- It was recommended that the phrase "unless approved in writing by the DEQ" should be added to this section.
- A recommendation was made to also include the concept of "long-term maintenance" in this section.

(a) The mechanism for protection shall include the following minimum restrictions: no ditching, land clearing or discharge of dredge or fill material and no activity in the area designated as compensation area with the exception of activities in accordance with the approved final compensatory mitigation plan, maintenance or corrective action measures and long-term maintenance plans unless approved in writing by DEQ.

ACTION ITEM: Staff will do some wordsmithing of this section to take into considerations the recommendations of the Advisory Group.

- A recommendation was made to insert the word "to" into 9VAC25-210-80 B 1 m (4) (b):

(b) The mechanism of protection shall include a provision for access to the site from a public road.

Steve continued review of the proposed revisions related to compensation found in this section.

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(6) Any compensatory mitigation plan proposing the purchase of mitigation banking or in-lieu fee fund credits shall include:

(a) The name of the proposed mitigation bank or in-lieu fee fund site;

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

(c) A copy of the bank's or in-lieu fee fun site's serve area map with the impact site indicated;

(d) A certification from the bank or in-lieu fee fund sponsor of the availability of credits.

- Recommendations were made for edits to 9VAC25-210-80 B m (6) (a):

(a) The name of the proposed mitigation bank or in-lieu fee fund program;

- Recommendations for edits to 9VAC25-210-80 B 1 m (6) (c) were made:

(c) A copy of the bank's or in-lieu fee fund site's service area map with the impact site indicated;

- A question was raised regarding the requirement for a certification from the bank or in-lieu fee fund sponsor as noted in 9VAC25-210-80 B 1 m (6) (d). What benefit does that serve? Right now the process is to identify that the bank credit is available now, but there is no grantee that it is going to be available later. The process was supposed to be that the bank preserves it in their

ledger so that they do not sell it to someone else, but that procedure never got implemented. A recommendation was made to drop this requirement. *Staff Response: Staff has discussed removal of this requirement but one of the positives of leaving it in was that it was helpful for the applicant to go through the process to see what credits were out there and the costs and process involved.*

- The requirement for paperwork related to the availability of credits was discussed. *Staff Response: The desire is to have a certification (documentation) that the credits are available within the appropriate service area.*
- The problem is that checking on the availability of credits today doesn't mean that the credits will be available in 6 months.
- It was suggested that "certification" might be the wrong word to use – it may be better to say "documentation" since this is essentially a planning tool. *Staff Response: This is similar to DEQ's internal discussions – it puts the burden on the applicant that they need to check.*
- It was suggested that the certification/documentation of credits should be noted "as of a date certain" – "at the time of application".
- There needs to be some way to confirm the availability of credits at the time of application.
- In lieu of deletion of the requirement the recommended wording changes for 9VAC25-210-80 B 1 m (6) (d) include the following:

(d) A documentation from the bank or in-lieu fee fund sponsor of the availability of credits at the time of application.

- The requirement for a "conservation easement" language was discussed (9VAC25-210-80 B 1 m (4) was discussed. It was proposed that instead of the word "require" that it should be "include". The recommendation was made to include the concept of "implementation prior to authorization".
- A recommendation was made that there be language included to address local governments not just VDOT; DOD; and other governmental entities.
- The suggestion was made that instead of trying to repeat language that a reference be included to the requirements in the "compensation" section of the regulation.

ACTION ITEM: Staff will do some wordsmithing of this section to accommodate the recommendations and discussions of the Advisory Group.

14. Review of Topics from the 08/25/14 Meeting – Complete Application Requirements (Sarah Marsala):

Sarah Marsala provided an overview of the requirements for a "complete application" for an Individual

VWP Permit and the proposed revisions to this section (9VAC25-210-80). She started through a page-by-page review of the proposed revisions.

RE: 9VAC25-210-80 B: A wordsmithing revision was suggested for this section:

B. Informational requirements for all VWP Permit Applications are identified in this subsection with the exception of applications for emergency VWP permits to address a public water supply emergency, for which the information required in 9VAC25-210-(tbd) shall be submitted. In addition to the information in this sub-section, applications involving a surface water withdrawal or a Federal Energy Regulatory Commission (FERC) license or re-license shall also submit the information required in 9VAC25-210-(tbd). The board shall request additional information as needed to evaluate compliance with this chapter.

- In the linking language in B that refers to the FERC license – there were some questions raised regarding FERC licenses versus applications related to surface waters. It was suggested that the group provide any language edits related to surface water withdrawals at the October 6th meeting.

RE: 9VAC25-210 B 1 – Minimum requirements for a complete VWP permit application:

- Some concerns were noted about the requirement for the inclusion of an "electronic mail address" and the requirement for including a "fax number". The group discussed this proposed requirement and agreed that they should be retained. *Staff Response: The caveat for these requirements is that the information needs to be provided "if applicable" and/or "if available"*. It was suggested that an additional caveat of "if appropriate" should be included.
- There was some concerns raised over the listing of an electronic address and the continued need by some to get any correspondence through a mail address rather than electronically. It was noted that the JPA has a check box to indicate that you can check to make sure you do not receive communication electronically.
- It was suggested that since the current term of "if applicable" is working then no change is needed.

RE: 9VAC25-210-80 B 1 e (1) – Physical street address:

(1) The physical street address or nearest street, city or county, zip code, and parcel number used by the locality of the site(s).

- Concerns were noted because of the requirement for a physical street address especially for highway right-of-way projects. If the caveat "if applicable" can be applied then there is no issue with this requirement.

RE: 9VAC25-210-80 B 1 e (6) related to GIS Shapefiles:

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(6) GIS-compatible shapefile(s) of the project boundary, all surface waters and all preservation areas the onsite(s), unless otherwise approved by or coordinated with DEQ, that contain a minimum of two (2) coordinate pairs (grid ticks or property corners). The GIS-compatible shapefile(s) must contain:

i. Be projected using the Virginia State Plane Coordinate System (NAD 1983), North or South Zone, as is appropriate, in US Feet.

ii. Contain a projections (.prj) file for each shapefile.

iii. Be closed polygons with attribute data.

- The caveat of "if applicable" needs to be included in this request for GIS shapefiles – it was noted that VDOT does not current have GIS-compatible shapefiles available. VDOT is not doing shapefiles currently. *Staff Response: The goal of this effort is to get information to support DEQ's GIS efforts.* It was suggested that VDOT could just provide DEQ with their MicroStation AutoCAD Files and let the DEQ staff move/convert that information into a GIS format.
- It was suggested that this doesn't make a lot of sense to require this information at the time of application – it would make more sense to require that it be included as a permit condition. Sometimes there are changes between the time of application and the time of permit issuance that are required. It was suggested that the information related to project boundaries should be requested at the time of application and as a condition of a complete application and the more detailed information about the project site itself could be required as a permit condition. *Staff Response: The benefit of requiring the bulk of the information as a permit condition is that it could be required to be periodically updated when there is a modification to update any site impacts that would not be the case if the information was only included as part of the application process.*
- It was suggested that the other thing that DEQ needs to consider is the survey accuracy requirements of the GIS-compatible shapefiles. Most people in Virginia do not comply with the Corps 1998 guidance memo on accuracy. State law requires that surveys be done by licensed surveyors or by professional engineers under certain circumstances as part of an engineering project. People are just using sub-meter GPS units in wooded areas and the sub-meter GPS is 10 to 50 feet off in wooded areas and randomly off. The data that you are going to get unless you use a specification for accuracy is going to be garbage. *Staff Response: Are there any recommendations to resolve this issue?* There is the 1998 Guidance Memo from the Norfolk that Bruce Williams was updated when he retired in 2005 that never got finished. There is a lot of information out there, but it is more than you would want to put in a regulation. The

fundamental concept in the 1998 guidance was that you have to have a licensed surveyor certify that what has been submitted is at least achieving sub-meter accuracy.

- It was noted that the Corps memo is a couple of pages on "how-to-do-it" – we don't need to get into a "how-to-do-it" discussion in the regulation – we just need to make sure that the standards for accuracy of surveys across the state is reflected in the regulations. It was suggested that DEQ might want to confer with the Department of Professional and Occupational Regulations (DPOR) regarding their standards for accuracy of surveys.
- There is a lot of upland acreage being preserved and wetlands being impacted because of this discrepancy in accuracy of surveys for project sites. There needs to be consistency in what is being asked for and what is being submitted or you are going to get "garbage-in-garbage-out".

RE: 9VAC25-210-80 B 1 d:

- It was suggested that what you really need is the "proposed development and construction schedule". You want to know when the "impacts" are going to occur.
- It was suggested that the phrase "an estimate of the construction timeframe for the project" should be replaced by "This schedule".

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d. Project name and proposed development and construction schedule. This schedule will be used to determine the VWP permit term.

RE: 9VAC25-210-80 B 1 e (4):

- A question was raised regarding the correct term for "Hydrologic Unit Code" and whether the term had been changed in legislation in the past couple of years. *Staff Response: Not "Hydrologic Unit Code" – The Geologic Survey changed the nomenclature for 4th order – but the overarching term is still "hydrologic unit code".*
- It was recommended that the number of digits for the hydrologic unit code needs to be identified. *Staff Response: The number of digits was what was changed in the legislation – it used to be the 8 digit HUC and now it is the 4th Order HUC.*

ACTION ITEM: Staff will include a reference to the requirement for inclusion of the 4th Order HUC.

RE: 9VAC25-210-80 B 1 e (6) i:

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(6) GIS-compatible shapefile(s) of the project boundary…must contain:

i. Be projected using the Virginia State Plane Coordinate System (NAD 1983), North or South Zone, as is appropriate, in US Feet…

- It was noted that somewhere else in the regulations reference is made to the "North Zone" but the "South Zone" is not reference. Consistency is needed. This is in the delineation section.

ACTION ITEM: Staff will search for the occurrence of the terms "North Zone" and "South Zone" and make sure that the references and terminology is consistent.

- The question was raised whether the changes that were being proposed for this section (for the IPs) were also being suggested for the GPs? *Staff Response: Yes – the changes would apply to both IPs and GPs.*
- A concern was raised regarding entities that may not have current access to or ability to provide the specific information requested in the requested format. *Staff Response: Those instances could be addressed through the use of the phrase "or coordinated with DEQ" – "or otherwise coordinated with DEQ". Part of this process of making these changes is an effort to try to close the FOIA loop. In the past a lot of these information items have been institutional knowledge – but reliance on that is not a good idea – over the years that knowledge becomes "a little fuzzy".*

RE: 9VAC25-210-80 B 1 e (6):

- Do you also want off site preservation areas if there is permittee-responsible preservation off-site? *Staff Response: The proposed changes have been modified as presented below for this section. A request was made for the members to look over the proposed language for this section and get back with any suggestions that they may have.*

(6) GIS-compatible shapefile(s) of the project boundary and all existing preservation areas the onsite(s), unless otherwise approved by or coordinated with DEQ, that contain a minimum of two (2) coordinate pairs (grid ticks or property corners). The GIS-compatible shapefile(s) must contain:

RE: 9VAC25-210-80 B g:

g. An alternatives analysis for the proposed project detailing the measures taken during project design and development to avoid and minimize impacts to surface waters to the maximum extent practicable. Avoidance and minimization includes, but is not limited to, steps 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 then minimize adverse impacts to surface waters to the maximum extent practicable. The analysis shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and applied to the proposed activity 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 avoidance and minimization analysis shall include, but will not be limited to, documentation of steps taken or evaluated to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites for the project, that would avoid or result in less adverse impact to surface waters and also documentation demonstrating the reason the applicant determined less damaging alternatives are not practicable.

- If this is just for IPs, the proposed language is okay – but if it is also for GPs the last part that deals with alternative site analysis should not be included in the text that is included in the GPs. Delete phrase "including review of alternative sites for the project".
- A suggestion was made that the phrase "…and the proposed activity, in terms of impacts to water quality and fish and wildlife resources," should be revised to read: "…and the project, in terms of impacts water quality, wildlife, habitat and aquatic resource function…" It was suggested that the three original terms listed are not complete. *Staff Response: The original proposed language tracks with the language found in the statute so we may not be able to make this suggested revision.*

ACTION ITEM: Staff will check the language in the statute regarding the phrase "…in terms of impacts to water quality and fish and wildlife resources…" to make sure it is consistent and tracks with what is in the statute.

RE: 9VAC25-210-80 B h: The intent here is to put all of the items related to describing and discussing the impacts proposed to surface waters into this section.

RE: 9VAC25-210-80 B h (6):

- A request was made to insert the phrase "unless otherwise coordinated with DEQ" in reference to the requirements for GIS shapefiles.

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(6) A delineation map that depicts the geographic area(s) of all delineated and approved surface water boundaries, in accordance with 9VAC25-210-45, and that describes such areas in accordance with subsections B 1 [h] (1) through (3) of this section. GIS-compatible shapefile(s) of the delineation map, following the specifications in subsection B 1 [e] (6), unless otherwise coordinated with DEQ, are to also be provided. Surface waters shall be quantified and types shall be noted according to their Cowardin classification or similar terminology. This requirement may be waived by DEQ, on a case-by-case basis, where the proposed activities are clearly limited to open water areas.

RE: 9VAC25-210-80 B h (1); (2); & (3):

- The use of the term "square feet" was discussed. The idea of making it optional was discussed. Doesn't the current regulation require identification of acres to two decimal places? *Staff Response: Need to retain the reference to "square feet" because of the way the fees are calculated.*
- The requirement for "square footage" when calculating stream impacts was discussed. It doesn't make a lot of sense to look at streams in terms of "square footage of impact. *Staff Response: As noted, the square footage is needed to determine fees.*

ACTION ITEM: Staff will look for consistency in the amount of these things that are looked at and in what units of measurement are used.

RE: 9VAC25-210-80 B h (2):

- The suggestion was made that the phrase "if compensation is required" be added to this requirement:

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(2) Stream impacts quantified (in linear feet and square feet) and identified according to their Cowardin classification and assessed using the Unified Stream Methodology, if compensatory mitigation is required, or most current accepted DEQ stream assessment methodology.

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15. BREAK – 2:29 P.M. – 2:38 P.M.

16. Review of Topics from the 08/25/14 Meeting – Complete Application Requirements – Continued (Sarah Marsala):

Dave Davis informed the group that the plan for the rest of today's meeting is to complete the discussions related to the "Complete Application" section and then any items not covered today that are identified on the agenda will be carried forward for discussion and consideration at the meeting on September 22nd.

Sarah Marsala continued her presentation of the proposed revisions to the "Complete Application" section of the regulations. She started her continuation of the proposed revisions on page 4 of the "Complete Application" document at 9VAC25-210-80 B 1 i: This section addresses the requirements for the "impacts map" which is the "plan view drawing" of the site. This section outlines the information that we would like to see on the "impacts map".

- The separation of the requirement for "cross-sectional sketches" was discussed. The question was raised if "cross-sectional sketches" was put into its own item then why wasn't "profile sketches/drawings" placed into its own item? Do you really need "profile drawings"? Do they provide any useful information? *Staff Response: Profiles are still useful for stream channel impacts and for proposed stream restoration activities. What is needed is a stream channel cross-section profile.*
- It was suggested that what you really want or need to have is a cross-section and a profile of the impact areas. Does DEQ want both or only one of them? *Staff Response: We want whichever one depicts the impacts better so it is more of a "case-by-case" basis.* If that is the case then how do you do a complete application if you don't know which one will be required? We want you to tell us what you want – what you need.

ACTION ITEM: Staff will need to have a discussion regarding "sketches"; "drawings" and "profiles" to identify which are needed and whether some specificity can be included in the regulations as to which one is needed.

- It was noted that the term "dimension" is used in both 9VAC25-210-80 B 1 i (2) and B 1 j – and you already have a scale drawing which essentially removes the need for "dimensions". Historically the agency has accepted "scale drawings" and has not required "dimensions".

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i. Plan view drawing of the project site sufficient to assess the project, including at a minimum the following:

(2) Limits of proposed impacts to surface waters and location of all existing and proposed structures.

j. Cross-sectional drawing(s) of each proposed impact area, which include, at a minimum, north arrow, graphic scale, existing structures, existing and proposed contours, limit of surface water areas, ebb and flood or direction of flow, ordinary high water mark in nontidal areas, mean low water and mean high water lines in tidal areas, impact limits, and location of all existing and proposed structures. Profile drawing(s) with the above information shall be required as appropriate to demonstrate minimization of impacts.

RE: 9VAC25-210-80 B 1 i (4):

- The suggestion was made to delete the term "approximate" as it relates to the limits of any Chesapeake Bay RPAs.
- The suggestion was made to add the phrase "if required" or "unless exempt under the Chesapeake Bay Preservation Act".
- The suggestion was made to replace "or" with "and".

(4) The limits of any Chesapeake Bay Resource Protection Areas (RPAs), unless exempt under the Chesapeake Bay Preservation Act and areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (protected areas).

RE: 9VAC25-210-80 B 1 k (existing B 1 h):

- The suggestion was made to delete this section. The concern is the requirement for a materials assessment for "fill material from off-site areas". Normally don't know where the fill material is going to be coming from especially when a project is permitted years in advance until the project actually starts. Can this be deleted here and made a permit condition? *Staff Response: Staff will look at the requirements and will look to strike it in this section and make it a permit condition for the off-site fill material.*

k. Materials assessment. If dredged material from on-site areas is involved the applicant must provide evidence or certification that the material is free from toxic contaminants prior to disposal, 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.

RE: 9VAC25-210-80 B 1 n: This is a current permit condition in the GPs – the proposal is to include it as a condition in the IPs. It is a straight cut and paste of that information.

- There is needed wordsmithing in this section. Should it be "…associated upland buffers within the proposed project and the compensation areas …restrictive covenant, and other land use protective instrument…"? It was suggested that it could be and/or – because you could do a combination of the available options. *Staff Response: You can't use "and/or" in the regulations.*
- The suggestion was made that the sentence be changed from "within the proposed project or compensation areas" to "within the proposed project and compensation areas". *Staff Response: This change will also need to be reflected in the GP language.*

n. A written disclosure identifying all upland, wetlands, open water, streams, and associated upland buffers within the proposed project and compensation areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (protected areas). Such disclosure shall include the nature of the prohibited activities within the protected areas. This shall include the limits of any Chesapeake Bay Resource Protection Areas (RPAs) as additional state or local requirements may apply if the project is located within an RPA.

ACTION ITEM: Staff will review the changes made to this section to make sure that the changes are reflected in the GPs.

- The question was raised regarding requiring the written disclosure as well as the map. Why are both required? *Staff Response: The intent of requiring both is to obtain any specific language related to those easements so that we need to know what kind of protections there are. We what to know where those areas are located and what type of protections are in place. If you just include that information on a map that there is a "preserved area" but we would not know what kind of preserved area it is without the "disclosure" statement.*

RE: 9VAC25-210-80 B 2: This is the function and values analysis requirements that the group received as part of the "Homework Assignments" distribution. In addition, this requirement is not part of the informational requirements for a complete VWP permit application.

- Reference is made to "a DEQ accepted method". Are you going to tell us what those methods are? What is an accepted method? The need to be able tell a client what the method is was raised. Don't want to submit an application and then have it rejected because the wrong method was used. If there is not a specific "DEQ-accepted method" then don't include it here and let the applicants/consultants pick the method or provide a list of those methods that are acceptable. Or is the point that DEQ wants to be able to provide some input into the process of selecting a method? *Staff Response: DEQ does want to have input in the process of selecting the method that will be used because of the nature of the site and the potential impacts.*
- There is a need to know up front what method of analysis will be required so that the clients can be informed of the costs associated with that method.
- Need to know the specific requirements that are definable for performing one method of analysis over another.
- *Staff Note: What is going to cause us to ask for an analysis? There is going to be some level of review before triggering this request. This is not part of the complete application information requirements those are included in B 1. The process is that DEQ has gotten something in the required information in B1 that has caused us to say that we need to request an analysis of functions and values. So we have looked at something related to the project – at that point does it give us any greater ability to tell what the preferred methodology is going to be? Or are we still gathering information to figure that out? At that stage in the process staff would probably have a better idea as to what method should be used, especially if there was a pre-application meeting. We might then have a better ability to pick a method to better address our specific concerns about a project. At the time we are requesting an analysis are we going to be able to specify a method? Staff would have to be able at that stage to specify a method that should be used. We have so few of these types of projects now (large scale IPs) where we are requiring this type of analysis. We are not requesting this analysis on any GPs.*
- Is it "we don't do it" or "we don't need it"? *Staff Response: We really don't need it unless we are in large impact or unusual impact IPs situations.*
- If DEQ is not using this then why are we requiring it and including in the regulation?
- *Staff Note: As long as the compensation ratio remains set at 2:1 then it really doesn't matter.*
- The group discussed the concept of "what is a DEQ-accepted method" that is appropriate?
- If we are not using an analysis of functions and values then why are we requiring it?

- It was suggested that the functional assessment should be required based on the specific project and the location of the project.
- *Staff Note: This requirement was originally proposed for deletion but the group could not arrive at a consensus so staff developed to proposed revisions to try to address the concerns raised by the various members of the group during a previous meeting of the Advisory Group. It was decided that we should keep the ability to ask for an analysis when it was appropriate and necessary and add it to the permit file.*
- The group continued to discuss the pros and cons and the implications of including this language without the specificity requested by some members of the group over what a "DEQ-accepted method" was. *Staff Response: It is difficult to specify a method until staff sees the details of the project in question. This is part of the conversation with the applicant – it says that DEQ may request an analysis.*
- Maybe more specificity on the process could be included in guidance memo so that there can be some consistency. Management oversight is important to the process and should be clearly identified in guidance. It's important to have a process articulated.
- *Staff Note: We will be requiring a function and value assessment that is fact specific based on the project and the location of the project.*

ACTION ITEM: Staff will review and revise the language related to "a DEQ-accepted method" and provide another version for review by the group.

17. Ranking of Issues by Advisory Group –Issue #11 – Exclusions – Summary Statement (Allison Dunaway):

Dave Davis noted that due to the time constraints that Allison Dunaway will be providing an overview of the "Permitting Exclusions" Topic but that the discussions related to this topic will be delayed until the next meeting of the Advisory Group which is scheduled for Monday, September 22nd.

Allison Dunaway noted that we will not be addressing any exclusion related to surface water withdrawals in this material. Her presentation on Permitting Exclusions included the following:

Issues Identified:

- Some of the exclusions contained in 9VAC25-210-60.A are unnecessary or redundant with other exclusions.
    - Exclusion A.3 & A.4 pertain to other water permit programs and can be consolidated.
    - Exclusion A.11 excludes construction of temporary sedimentation basins which do not involve the placement of fill materials into surface waters or excavation in wetlands. Activities that are not in surface waters do not require a permit; the exclusion is unnecessary.
- Due to vague wording, some exclusions are difficult to implement and explain to the public.

- Exclusion A.5 is unclear as to whether it is referring to only the septic tank itself or all other appurtenant structures. This exclusion results in confusion and having situations in which housing, driveways and utilities require a permit, but only a small piece of the project (the septic tank) does not. The Corps of Engineers typically issues a Nationwide 18 permit for the septic tank, however does not regulate excavation related to the drainfield.

- Exclusion A.7, Normal residential gardening, lawn and landscape maintenance, is worded differently from the associated exclusion under Va. Code §62.1-44.15:21(H). These slight wording differences cause substantial variation in application.

- Some activities with little or no adverse effect on the environment require general or individual permits because there is currently no relevant exclusion within the statute or regulation.
  - Maintenance of purpose-built stormwater structures.

  - Impacts to open waters that do not have a detrimental effect on public health, animal or aquatic life or to the uses of such waters for domestic or industrial consumption, recreation or other uses. Language extracted from the VA Code (62.1-44.15:20.A.3)

- DEQ staff spends significant time and resources determining whether an exclusion applies, particularly in cases stemming from a complaint.
- Exclusions that are related to one another are not grouped together, making it difficult to realize the full extent of exclusions for an activity.
  - A.2, A.8, A.10 and A.12 are all related to agriculture and/or silviculture, but are spread throughout the Exclusions section.

Considerations:

- Revised exclusion language should not be more complex than already exists and should be understandable to the public or regulated community.

Examples of possible revisions:

- Remove redundant or unnecessary exclusions.
  - Consolidate A.3 & A.4 and include an exclusion for the discharge of stormwater authorized in accordance with 9 VAC 25-870 et seq.
- Remove, simplify or clarify to the greatest extent possible exclusions that are lengthy and complex.
  - Remove exclusion A.6 (septic tanks)
  - Reword exclusion A.7 (Normal residential gardening etc.) to mirror the language of Va. Code §62.1-44.15:21(H).
- Add new exclusions or revise existing to include activities with minimal or no adverse impact.
  - Reword exclusion A.9 to exclude the “maintenance of purpose-built stormwater structures”. This exclusion would pertain to maintenance dredging of a pre-existing stormwater pond, or replacing a riser structure, for example. It would not pertain to conversion of surface waters to stormwater structures, such as the conversion of a recreational pond to a stormwater retention/detention facility.

    - Create new exclusion for impacts to open waters that do not have a detrimental effect on public health, animal or aquatic life or to the uses of such waters for domestic or industrial consumption, recreation or other uses. [*Language extracted from the Va. Code § 62.1-44.15:20.A.3*]
- Specify that, upon request by the Board, persons claiming an exclusion must demonstrate that they meet the exclusion.
- Reorganize regulation to group all agriculture/silviculture exclusions together for ease of use (A.2, A.8, A.10 and A.12)

- **RE: A 9** – It was suggested that DEQ consider the inclusion of flood-control structures and lakes to this exclusion language. Some basins are just for flood-control not stormwater retention/detention.

ACTION ITEM: Staff will prepare a track-changes version of the proposed revisions to address Exclusions and send this out for review and consideration by the Advisory Group.

18. Public Comment (Dave Davis):

Dave Davis asked for public comment. No Public comments were offered.

19. Next Meetings (Dave Davis)

The next meeting of the VWP Citizen Advisory Group is scheduled for Monday, September 22, 2014 at the DEQ Piedmont Regional Office – Training Room – Sign-in starts at 9:15 and the meeting starts at 9:30 A.M. – Plan to go until approximately 4:00 P.M.

Monday, October 6, 2014 – Special Meeting of the VWP Advisory Group to discuss VWP Proposed Revisions related to Surface Water Withdrawals – DEQ Piedmont Regional Office – Training Room.

Wednesday, October 15, 2014 – Last Meeting of the VWP Advisory Group – DEQ Piedmont Regional Office – Training Room

20. Meeting Wrap-Up (Melanie Davenport):

Melanie Davenport asked the group whether the group still felt the pressure to finish the work and thought that there is inadequate time to complete the work on this action. This appears to have been a very productive meeting and it appears that we accomplished a lot. Responses from the group included:

- The volume of materials that were being emailed for review and consideration by the group was overwhelming. It is hard to track what goes with what materials.
- There is a whole lot of material that has not been reviewed.
- There is not enough time.

- The emails need to be better organized.
- It was hard to understand why they are getting multiple emails – It is hard to know what to do first.
- It was suggested that the conversation with David Paylor regarding the time frame.
- It was suggested that there was going to be a need for an additional meeting following distribution and consideration of all the materials into a final proposed document.
- There is confusion over what thing to do first with so many emails.
- A request was made to develop a priority list so that the group could make more efficient use of their time.
- A question was raised over what the difference between a RAP and a TAC and a Citizen Advisory Group was? *Staff Response: When you have a General Permit being reauthorized it's a Technical Advisory Committee (TAC); and when you have a regulation that is being developed or revised it is a Regulatory Advisory Panel (RAP) – because of the requirements and language of the APA – this group has been tasked with advising staff on both the General Permits and the Regulation revisions so this is a combined group – so we can up with a new name instead of having a TAC/RAP.*

21. Meeting Adjournment:

The meeting was adjourned at approximately 3:46 P.M.