

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

## CITIZEN ADVISORY GROUP - MEETING #7 - NOTES - DRAFT

### MEETING MONDAY, NOVEMBER 3, 2014 DEQ PIEDMONT REGIONAL OFFICE – TRAINING ROOM

#### Meeting Attendees

<i>CITIZEN ADVISORY GROUP MEMBERS</i>	<i>INTERESTED PARTIES</i>	<i>SUPPORT STAFF</i>
Nina Butler – Virginia Manufacturers Association/Mission H2O	Tom Broderick – Loudoun Water	Melanie Davenport
Jason Ericson - Dominion	Preston Bryant – McGuire Woods Consulting	Dave Davis
Katie Frazier – Virginia Agribusiness Council	Alicia Connelly – City of Norfolk	Mike Murphy
Bob Kerr – Kerr Environmental	Roger Cronin – Greeley & Hansen LLC	Bill Norris
Greg Prelewicz – Fairfax Water	Justin Curtis - Aqualaw	Brenda Winn
Peggy Sanner – Chesapeake Bay Foundation (CBF)	John DeResa – Prince William County Service Authority	<b><i>OTHER DEQ STAFF</i></b>
Beth Silverman Sprengle – EEE Consulting, Inc.	Steven T. Edgemon – Fairfax Water	Elizabeth Andrews
	Christopher Gill – City of Norfolk	Lee Crowell
	Chris Harbin – City of Norfolk	Scott Kudlas
	Jerry Higgins – Maury Service Authority/VA AWWA	Sarah Marsala
	Evelyn Mahieu – Prince William County Service Authority	
	Dan Savage – Chesapeake Bay Foundation (CBF)	
	Joe Wood – Chesapeake Bay Foundation	
	Mark Williams – LUCK Companies	
	Andrea W. Wortzel – Troutman Sanders (Alternate for Nina Butler)	
	Beate Wright – Loudoun Water	

NOTE: Citizen Advisory Group Members NOT in attendance: Steven E. Begg – Virginia Department of Transportation; Karen Johnson – The Nature Conservancy (TNC); Mike Rolband – Virginia Homebuilders Association; Skip Styles – Wetlands Watch; William T. (Tom) Walker – U.S. ACOE

#### 1. Welcome (Bill Norris/Melanie Davenport):

Bill Norris welcomed the attendees to the meeting and thanked them for being here today. He asked that everyone be sure to sign in for today’s meeting and make sure that their email address was legible so that the materials related to this process can be distributed to all those interested in the process.

Melanie Davenport welcomed everyone and thanked them for their attendance and interest in this process. She brought the meeting attendees up to date on the current status of this regulatory process and the planned schedule moving forward. She noted that Dave Paylor had been informed about the group’s desire for additional time to complete this process and that he is willing to delay taking the proposed regulatory text to the State Water Control Board until their March meeting. She noted that we are still not sure what the consequences for the Director or the agency will be because of missing the Governor mandated deadline for the process but we are willing to accept those consequences so that

the process can be completed. The bottom line is that we are not working towards the original December Board meeting as originally planned but will be working to present the proposed regulation to the Board at their following meeting, which will likely be the end of March.

The plan is to roll out a complete track-change version of the proposed revisions to the group in time for their review and comment prior to an additional meeting of the Advisory Group which has been scheduled for Monday, December 8, 2014 at DEQ's Piedmont Regional Office. The current plan is to allow for time, likely 45 days, for the group to confer with their member organizations for feedback on the proposed changes to the base regulation as well as the General Permit regulation.

## **2. Notes from Previous Meeting related to Surface Water Withdrawals – October 6, 2014 (Bill Norris):**

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 related to the proposed revisions to the VWP regulation related to surface water withdrawals which was held on Monday, October 6, 2014. No edits were suggested.

**ACTION ITEM: The notes from the October 6, 2014 meeting of the VWP Citizen Advisory Group will be marked as “Final” and posted as such to Town Hall.**

## **3. Introductions – Opening Statement:**

Bill Norris asked for introductions from the group.

Mike Murphy, Regional Director for the Piedmont Regional Office asked the group about the process for taking comments from those members of the interested public who were in attendance. He noted that during the previous special meeting of the group where surface water withdrawals were discussed that there had been a somewhat “formal” approach taken to accept comments from the members of the interested public due to the number of folks in attendance at the meeting. He asked the group whether given the more manageable size of the group today whether the group would allow comments to be made by those interested in a more informal manner during today's meeting. The group agreed that input could be made by members of the interested parties following any discussion by members of the advisory group in an informal manner during the course of the meeting as needed. This will allow for a smoother interaction with members of the public during the meeting.

## **4. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Background (Sarah Marsala):**

Sarah Marsala, Surface Water Withdrawal Project Manager, with DEQ's Office of Water introduced the concepts and approach taken by staff on the proposed clarifications specific to surface water withdrawals. She noted the following:

- What has been distributed for discussion today is a “track-changes” version of the regulation components that address surface water withdrawals
- The grey highlighted sections represent those portions and those wording revisions that have been changed since the October 6, 2014 meeting of the VWP Citizen Advisory Group.

- In addition items that have been revised since the distribution of the track-change version of the surface water revisions for this meeting are indicated as “yellow-highlights” on the version of the document that will be discussed today.

**5. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Definitions – “hydrologic regime” (Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "Definitions" section. These included the following:

Sarah noted that this was a new definition that is being proposed for insertion into the main VWP regulation (9VAC25-210-10). This term is used in the regulation but has not been previously defined in the regulation. The proposed definition is from the DMME section of the Code. It is worded exactly as it is in the Code except for the replacement of the last word “transportation” with “transpiration”.

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***Add following definition to 9VAC25-210-10***

"Hydrologic regime" means the entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

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**Group discussions included the following:**

- Where does this term occur in other portions of the regulations? *Staff Response: The proposed definition of “hydrologic regime” is used in the main VWP regulation in terms of compensation and “ecologically preferable” – it is not just a surface water withdrawal related term. It is linked to the definitions used for the surface water withdrawal sections of the regulation.*
- A request was made for a listing of the places within the VWP Regulation where this term is used.

**ACTION ITEM: Staff will prepare a listing/identification of all the places in the main VWP regulation where the term “hydrologic regime” is used and provide that to the group.**

- A concern was raised over the inclusion of the phrase “the entire state of water movement” in the definition of “hydrologic regime”.
- A concern was noted that there was uncertainty over what the term actually means with regard to surface water withdrawals. It was suggested that the term as defined is very broad. *Staff Response: The hydrologic regime is basically a water cycle and that is what the definition is describing.*
- In what other context is the term used?

**ACTION ITEM: Staff will revise the proposed definition of “hydrologic regime” to see if there is**

**a way to clarify what is meant by the term and to clarify how it applies to surface water withdrawals.**

## **6. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawal**

Sarah noted that the proposed changes to the definition of “consumptive use” are the result of comments and discussions from the last surface water withdrawal discussions.

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### **9VAC25-210-300. Definitions for surface water withdrawals**

"Consumptive use" means the use of water withdrawn from a surface water in such a manner that it is returned with substantial diminution in quantity at or near the point from which it was taken.

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#### **Group discussions included the following:**

- This makes the definition more consistent with the definition of “non-consumptive use”.
- It was noted that this change makes it cleaner and clearer.

## **7. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Definitions – “instream flow” (Sarah Marsala):**

Sarah introduced the revised definition of “instream flow”. She noted that the concerns with the previous definition was that it didn’t address the time scale or water volume and only focused on volume. The revised definition includes reference to a time scale and for the volume of water.

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“Instream flow” means the normal volume of water flowing in a stream or waterbody including any natural variations of water levels and flow occurring over time.

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#### **Group discussions included the following:**

- A concern was raised over the use of the phrase “natural variations”. The proposal had been made earlier to use the phrase “current” or “existing” or “unregulated”. *Staff Response: It is not based on consideration of a time when nothing existed on the stream but was designed to address current or existing conditions.*
- If “natural variations” is used does it need to be defined?
- Also, “over time” is not defined.
- *Staff Note: During a review of a project consideration is given to what is in place at the time of the review.*
- The concept of "regulated systems" was raised and discussed.

- A suggestion was made that the definition could be revised to read "...any natural variations of water levels and flow occurring over time, including but not limited to regulated systems."
- The idea of "instream flow" versus "minimum instream flow" was discussed. This needs to consider the water permit process. There needs to be some clarity to recognize permit conditions. *Staff Response: The term "minimum instream flow" is a term that is not used anymore. The current concept is one of "existing instream flow". During a review of the project staff looks at the existing flow and how the proposed project would impact the current conditions – the current existing instream flow. The permit is then developed based on protection of the existing conditions.*
- Does this look at the existing situation take into consideration all of the current permits that might impact the instream flow at that site? *Staff Response: Yes, staff looks at all of the permits in the area and the permit variables that may vary overtime in their review of the potential impacts of a project.*
- *Staff Note: The concept of "minimum instream flow" has not been used in a VWP surface water withdrawal permit in over a decade and a half. Permits have had a seasonality component since the 1990's. The thresholds for the permits are all quantity based. Instream flow is simply a goal in the program to maintain some variability in the system over the course of a year so that there is seasonality to it so that other beneficial uses can be addressed through permit conditions.*
- The concern was noted that "instream flow" is actually included in the definition of "surface water withdrawal" which might be considered as "jurisdictional", which may cause some issues. *Staff Response: The program has had the same definition for 25 years. The VWSP regulation does not include a definition of "instream flow" even though the term is used – so the concept was that there should be a definition added to this section of the regulations. The proposal is to add a definition based on how DEQ staff currently operates related to this program.*
- *Staff Note: The Code reference related to "instream flow" is 62.1-44.15:22 – There are no associated statutory definitions included.*

§ 62.1-44.15:22. Water withdrawals and preservation of **instream flow**.

*A. Conditions contained in a Virginia Water Protection Permit may include but are not limited to the volume of water which may be withdrawn as a part of the permitted activity and conditions necessary to protect beneficial uses. Domestic and other existing beneficial uses shall be considered the highest priority uses.*

- The concept of instream flow was discussed by the group.

**ACTION ITEM: Staff will revisit the definition for possible revision to accommodate the concerns noted by the Advisory Group. Members of the Advisory Group also noted that they would think about the concept and offer suggestions for possible revisions.**

## 8. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Definitions – “safe yield” (Sarah Marsala):

Sarah noted that there had been a lot of discussions at the last meeting regarding the concept of "safe yield". The comments noted that "safe yield" was more of a water works issue but there needed to be more discussion on the proposed definition. Also the definition did not clearly identify how "safe yield" was calculated. All of the comments were considered and staff is not proposing any revisions to the proposed definition. Safe Yield is not just a water works issue; it applies to any water withdrawal that withdraws from the system. DEQ determines the safe yield of a system, VDH does not. DEQ has been working with VDH to clarify the concept and use of "safe yield" and VDH has been working through an Advisory Group process where they have decided to propose removal of the definition of "safe yield" from their regulations, so that there will not be an overlapping of definitions between the agency regulations. This proposed definition does tell you what the safe yield is composed of.

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“Safe yield” means the highest average annual volumetric rate of water that can be withdrawn by a surface water withdrawal during the worst drought of record in Virginia since 1930 under specific operational conditions established in a permit.

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### Group discussions included the following:

- Why is the reference to "worst drought of record in Virginia since 1930" the reference date?  
*Staff Response: That was the reference included in the VDH regulation. The 1930/1931 drought was the last drought of record before the 2002 drought. It represents the worst case meteorologically that had been seen under the existing set of records.*
- What does "that can be withdrawn" refer to? Can DEQ develop guidance to help applicants determine their safe yield number?  
*Staff Response: Staff will consider the development of guidance to assist with this determination.*
- A concern was noted over the use of the phrase "under specific operational conditions established in a permit". At the application stage doesn't the safe yield have to be identified?  
*Staff Response: Yes, the existing "safe yield" at that time has to be identified then when it goes through the review process that "safe yield" is looked at taking into consideration what is being proposed and the existing beneficial uses at the time of the permit to determine what the "safe yield" would be at that time and place. "Safe Yield" is not a static number – it will change based on other existing uses that come into play and any changes in the reference "drought of record". "Safe Yields" may change when projects come up for reissuance based on any changes to the system or changes to the "drought of record" reference. A "safe yield" might also change depending on how a facility plans on operating. Each system has a different set of beneficial uses that have to be taken into consideration with regard to determination of a "safe yield".*
- Historically there is the definition of "safe yield" that is in the current VDH regulations and to the degree that it is no longer being implemented, then why not alter the state Code to reflect the new definition and the why that "safe yield" is being determined? Why not update the state Code?  
*Staff Response: The definition is in the VDH regulations and they are currently proposing to remove that definition from their regulation.*

- Is the definition of "safe yield" found in the VDH sections of the Code? *Staff Response: Unsure whether it is defined in Code or just found in the VDH regulations. The section of the VDH Code that addresses "safe yield" is as identified below. The "definition" of "safe yield" found in "A 2 a & b" of this section.*

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## **12VAC5-590-830. Surface Water Sources; Quantity; Quality; Development Structures.**

*A. A surface water source includes all tributary streams and drainage basins, natural lakes, and artificial reservoirs or impoundments above the point of water supply intake.*

*1. The quantity of water at the source shall:*

- a. Be adequate to supply the water demand of the service area;*
- b. Provide a reasonable surplus for anticipated growth; and*
- c. Be adequate to compensate for all losses, including evaporation, seepage, flow-by requirements, etc.*

*2. The **safe yield** of the source shall be determined as follows:*

- a. Simple intake (free-flowing stream). The **safe yield** is defined as the minimum withdrawal rate available during a day and recurring every 30 years (30 year - one day low flow). To generate the report for this, data is to be used to illustrate the worst drought of record in Virginia since 1930. If actual gauge records are not available for this, gauges are to be correlated from similar watersheds and numbers are to be synthesized; and*
- b. Complex intake (impoundments in conjunction with streams). The **safe yield** is defined as the minimum withdrawal rate available to withstand the worst drought of record in Virginia since 1930. If actual gauge records are not available, correlation is to be made with a similar watershed and numbers synthesized in order to develop the report.*

*Note: Local governments may request this aid from the State Water Control Board (SWCB) by contacting either the Health Department's Office of Water Programs or the SWCB's headquarters office in Richmond.*

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- *Staff Note: There is no reference in the VDH Code regarding "safe yield".*
  - *The group debated and discussed the concept of "safe yield".*
  - *Staff Note: This definition is being proposed to reflect the way that it is currently being applied and the current process that DEQ uses to determine "safe yield". This is a proposal to update the term to reflect its current application.*
  - *It was suggested that this proposal represents a major change from the current VDH concept and definition of "safe yield". Staff Response: The VDH regulations made a reference to a*

requirement to go to DEQ and DEQ will establish the necessary "safe yield" requirements. Under the VDH regulations, since 1995, DEQ has been making the "safe yield" determinations not VDH. VDH in a MOU with DEQ back in the 1990's requested that DEQ come up with Technical Bulletin 355 – "355" included safe yield determinations for every major facility that existed at the time – that was updated after the 2002 drought. It is hard to understand the perception that this is a major change when it reflects the process that has been in place since the 1990's.

- What permit is being referred to? Is it a VDH operational permit or a VWP permit? *Staff Response: This refers to a VWP permit. It was suggested that it might make the definition clearer if it refers to a VWP permit instead of just "a permit".*
- The group discussed the implications of the inclusion of the definition of "safe yield".
- *Staff Note: What we are trying to do through this proposal is to acknowledge the current process that has been used on permits since the 1990's. The idea is to include the term and the concept in the regulation where it is being applied and where it is appropriate – i.e., remove it from the VDH regulations and include it in the DEQ regulations. VDH is proposing to remove the concept from their regulations and DEQ is proposing to include it in theirs through a concurrent process. The assumption is that both processes are going to move forward.*

**ACTION ITEM: Staff will take into consideration the comments made and the concerns raised by the Advisory Group for possible revisions of "safe yield".**

#### **9. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Definitions – “variance” (Sarah Marsala):**

Sarah noted that the definition of "variance" is different than the one that was distributed to the group. After consideration of comments and internal staff discussions the proposed language "or other emergency situation as determined by DEQ" is being deleted. The only authority for a variance is restricted to those involving a "drought".

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“Variance” means a mechanism which allows temporary waiver of the generally applicable withdrawal limitation requirements or instream flow conditions of a VWP permit during a drought ~~or other emergency situation as determined by DEQ.~~

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#### **Group discussions included the following:**

- Are the provisions for variance provided for in Code? *Staff Response: The variance provision is included in the regulation, not in the Code. In the regulation it conditions the provision for a variance on there being a "drought".*
- Could the "emergency language" be left in the definition? *Staff Response: Staff is continuing to look at this but it doesn't appear that DEQ has the authority to include it.*



## 10. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Definitions – “surface water withdrawal system” (Sarah Marsala):

Sarah noted that the existing definition of "Withdrawal System" is being proposed to be revised to a definition of "Surface Water Withdrawal System". The intent is to be able to differentiate from the term "withdrawal system" that is in the Groundwater Regulations. This is to try to eliminate any confusion for those projects that might have both a groundwater withdrawal and surface water withdrawal component.

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"Surface Water withdrawal system" means i) one or more surface water withdrawals located on the same or contiguous properties under common ownership for which the withdrawal is applied to the same beneficial use or (ii) two or more connected surface water withdrawals which are under common ownership but are not necessarily located on contiguous properties that are part of a single and complete project.

### Group discussions included the following:

- Some confusion over the change in this definition and the movement of some of the language to apply to "intake structures" was noted. It was stressed that that is a fairly new definition and there could be examples from a permitting perspective where this could create complications. *Staff Response: The definition is changing because as the regulation currently stands "withdrawal system" and "intake structure" is essentially the same – they are very similar definitions. The way that DEQ currently uses "withdrawal system" is to talk about a system that is being proposed – the components of the "withdrawal system" are covered under "intake structure". The terminology that is being proposed here is essentially the same wording, with a few tweaks, as found in the groundwater withdrawal regulations. We are proposing consistence with another withdrawal regulation. This definition more adequately describes the term as it is currently used in the program. As it is currently proposed to be defined is what we view as a "withdrawal system".*
- It was suggested that DEQ might want to include some examples of what would be considered a "surface water withdrawal system" as a way to clarify this wording. *Staff Response: An example might be that you have a golf course that has 18 holes where there is one system that provides water to all 18 holes of the golf course from a single pond with an irrigation system that distributes the water. Or it may be set up where the first 9 holes are irrigated by one intake and the remaining 9 holes irrigated by another intake but it would all be considered one system. They may not be physically connected but they are part of the same project – part of the same system. Any permit is a withdrawal system that DEQ is permitting. The key is that the projects are "under common ownership" but are not "necessarily located on contiguous properties" but they "are part of a single and complete project".*

## 11. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Definitions – Other Definitions (Sarah Marsala):

Sarah asked whether there were other definitions that the group wanted to discuss. The group raised some concerns and questions regarding the following definitions:

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"Intake structure" means any device or combination of devices that is part of portion of a withdrawal system used to withdraw surface water that is located within the surface water, such as, but not limited to, a pipe, culvert, hose, tube, or screen. a machine, pump, pipe, culvert, hose, tube, screen, or fabricated concrete or metal structure.

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### Group discussions included the following:

- Why is there a long list of specific examples included in the definition? Why is it included? Does this imply that there is a concern or concept that if a permittee makes a change to a pump that a permitting requirement is triggered even if there is no change to the intake structure?  
*Staff Response: All of the examples are already existing language that has been moved from the old definition of "withdrawal system" to this definition where it is more appropriately related to an "intake structure". This is an effort to make the terms reflect how they are currently used and applied. Staff is trying to make the terminology match its current usage.*
- Where is the term "intake structure" specifically referenced? *Staff Response: It is used in the Application section of the regulations.*
- It was noted that it may be good to be able to group things in this manner but it would be wise for DEQ to look at any possible implications of changing that definition.
- The group discussed the possible implications of this change and any implications to the 401 Certification process. *Staff Response: Staff does not feel that this is a major change – the words just have been moved from one definition to another where they are more appropriate based on current usage.*
- What are the implications of this definition change if a permittee just wants to change a pump when there is no change in the amount of the withdrawal; it is strictly an equipment change? Is a new 401 Certification required? *Staff Response: The concern is any potential change in withdrawal volume. The question is whether a change in the pump is going to change the withdrawal volume.*
- *Staff Note: The intent of the 401 Certification is to certify changes in an activity that has the potential to change the physical, chemical or biological properties of a stream. For DEQ it is not the fact that a pump is being changed but is that pump going to withdraw more water, because that is what will either increase the potential to or actually change the physical, chemical or biological properties of the stream. If the intent of a pump replacement is to withdraw more water a permit will be required. If a pump is in the water and you need to work in the stream then a 404 permit would be required. If you need a 404 permit then you need a VWP permit. This is covered by the other side of the VWP permitting program – the Dredge and Fill permit side of the process.*

- It was noted that the Corps has a Nationwide Permit (#3) which allows and provides for maintenance activities and upgrades or changes needed to meet any new engineering standards and safety requirements. So if a new pump is a "hair" different because of some new standard but if you are still only going to permit the volume that is allowed under your current permit then it could be covered under Nationwide 3 or a similar nationwide permit. Under these Nationwide Permits, DEQ has already programmatically approved certain use of those permits throughout the Commonwealth. These are essentially your one stop shop for this type of permitting.
- It was suggested that the materials by which you are withdrawing really doesn't seem to matter. The wording used is "such as, but not limited to..." Is there any benefit to having all of these specific examples laid out in the regulation in this definition? Or, if these examples were removed would it take away the concerns that have been raised about if this or that were changed and still not change the nature of the permitting process based on the intake structure? *Staff Response: It may or may not. That is what we are all wrestling with. Where do we draw the line? Part of what we hope to do the regulation and with the definitions that are in the regulation is to inform people about when it matters and when it doesn't. In the past when we have not clearly spelled things out there have been a number of instances of non-compliance.*
- Is it correct that the replacement of a machine, a pump or pipe or a culvert, etc. does not necessarily negate a grand-fathered exemption unless the intent of the project or activity is to withdraw more water? *Staff Response: That is the way that DEQ has operated.*

**12. BREAK: 11:00 – 11:15**

**13. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Exclusions from permits "A 2"(Sarah Marsala):**

A member of the advisory group raised a question about the inclusion of the term "necessary withdrawal structure" in "A 2" and whether that should be changed to reflect the wording revision in the definitions regard "withdrawal structures".

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2. Any surface water withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal received a § 401 certification before January 1, 1989, with respect to installation of any necessary withdrawal structures to make such withdrawal; however, a permit shall be required before any such withdrawal is increased beyond the amount authorized by the certification.
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- *Staff Response: This language is from the Code and therefore is not being proposed for revision.*

**14. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Exclusions from permits "A 3"(Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "exclusions from permits" section. The proposed revisions include the following:

She noted that the section that she wanted to review with the group was the proposed change to "A 3". During the last meeting there were discussions on this section and there were concerns that the proposed revisions, which were essentially truncating the conditions and trying to clearly state what was required in 2014, might lose something, particularly in the agricultural conditions, so some revisions are being proposed. The proposed revisions break the materials into 2 paragraphs instead of having the requirements lumped and mashed together.

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### **9VAC25-210-310. Exclusions from permits for surface water withdrawals**

A. The following surface water withdrawals are excluded from VWP permit requirements...

3. Any existing lawful unpermitted surface water withdrawal initiated between July 1, 1989, and July 25, 2007 that has complied with the Water Withdrawal Reporting Regulations (9VAC25-200), and which is not subject to other exclusions contained in this section. Any increase in that withdrawal above the limited amount identified in subdivision 3.a shall require an application for a permit for the withdrawal system.

- a. The largest 12-consecutive month withdrawal that occurred in the 10 years prior to July 25, 2007 shall constitute a limit on the withdrawal that is excluded from permit requirements. For agricultural surface water withdrawals that did not report annually as required by the Water Withdrawal Reporting Regulations (9VAC25-200) prior to July 25, 2007, the limit excluded from permit requirements was established for the operations that were in existence during the 10 years prior to July 25, 2007 by estimating the largest 12-consecutive month withdrawal based upon the following information associated with that timeframe:

- i. The area irrigated, depth of irrigation, and annual number of irrigations; pumping capacity and annual pumping time; annual energy consumption for pumps; number and type of livestock watered annually; number and type of livestock where water is used for cooling purposes .

- b. All owners and operators of surface water withdrawals excluded from permit requirements by this section shall annually report withdrawals as required by the Water Withdrawal Reporting Regulations (9VAC25-200). Failure to file annual reports either reporting actual withdrawals or the fact that withdrawals did not occur may result in the owner or operator being required to cease withdrawals, file an application, and receive a permit prior to resuming any withdrawal. Information regarding excluded withdrawal amounts shall be utilized by the DEQ and board to protect existing beneficial uses and shall be considered when evaluating applications for new withdrawal permits.

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### **15. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Exclusions from permits "A 4"(Sarah Marsala):**

4. Agricultural surface water withdrawals that total less than:

a. one million gallons in a single month from nontidal waters.

b. 60 million gallons in a single month from tidal waters.

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**16. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Exclusions from permits "A 5"(Sarah Marsala):**

Sarah noted that after some internal staff discussions that the recommendation is being made to delete the term "solely" from the proposed revision.

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5. Surface water withdrawals from tidal waters for solely nonconsumptive uses.

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**17. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Exclusions from permits "A 6"(Sarah Marsala):**

6. Surface water withdrawals from nontidal or tidal waters, regardless of the volume withdrawn, for the following uses:

a. Firefighting or for the training activities related to firefighting, such as dry hydrants and emergency surface water withdrawals

b. Hydrostatic pressure testing of water tight containers, pipelines, and vessels

c. Normal single family home residential gardening, lawn, and landscape maintenance.

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**18. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Exclusions from permits "A 7; A 8; A 9; & A 10"(Sarah Marsala):**

Sarah noted that these sections were essentially "wordsmithing" changes to clarify the requirements.

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7. Surface water withdrawals placed into portable containers by persons owning property on, or holding easements to, riparian lands.

8. Surface water withdrawals that are located on a property, such that the withdrawal returns withdrawn water to the stream of origin; do not divert more than half of the instantaneous flow of the stream is diverted; have the withdrawal point and the return point not separated by more than 1,000 feet of stream channel separate the withdrawal point from the return point; and have both banks of the affected stream segment are located within that one property boundary.

9. Surface water withdrawals from quarry pits, such that the withdrawal does not alter the physical, biological, or chemical properties of surface waters connected to the quarry pit.

10. Surface water withdrawals from a privately owned agriculture pond, emergency water storage facility, or other water retention facility, provided that such pond or facility is not placed in the bed of a perennial or intermittent stream or wetland. Surface water withdrawals from such facilities constructed in beds of ephemeral streams are excluded from permit requirements

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**19. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Exclusions from permits "A 7; A 8; A 9; & A 10"(Sarah Marsala):**

Sarah noted that this was the "catch-all" provision that had been moved as part of the revision and reorganization of this section.

She noted that there had been a lot of discussion about the inclusion of "2 MGD from tidal waters" in the exclusions listed in #11. The intent and application of that is that it includes both "consumptive" and "non-consumptive" volumes. When we look at a withdrawal it is based on the total volume being pulled through a pipe. Consumptive and nonconsumptive volumes are usually addressed on the permitting side of the program. That's where we look at what is being returned to the stream so that we have a more complete picture of the water budget for the project.

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11. Surface water withdrawals for all other purposes not otherwise excluded by subdivisions 4 through 10 that total less than:

a. 10,000 gallons per day from nontidal waters.

b. two million gallons per day from tidal waters.

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**Group discussions included the following:**

- What was the original proposed revision for this section? *Staff Response: The original proposal read "Surface water withdrawals from tidal waters for all other consumptive purposes that total less than two million gallons per day." It was suggested that seemed to be a substantial*

change with the inclusion of both consumptive and non-consumptive in the determination of the threshold for this exclusion. *Staff Response: That is what is somewhat confusing in this is that you have to read through the entire list of exclusions. The way that DEQ evaluates a withdrawal and the application for an exclusion is the quantity of water that is being proposed to be withdrawn from the system. If you are withdrawing "X" amount then that determines whether or not you qualify for an exclusion or you qualify for a permit. There is the caveat in the exclusions that if that withdrawal is a non-consumptive use, which means that all of the water that is proposed to be withdrawn is non-consumptive from a tidal water then that use is excluded. The key is "what is the purpose of the withdrawal", is it for consumptive or nonconsumptive use. It should also be noted that most withdrawals have both a consumptive and a nonconsumptive component to their withdrawal.*

- The group discussed consumptive purposes and consumptive use and non-consumptive use.
- It was suggested that the proposed revision for this section might be considered a substantive change in the wording but not in the way that DEQ has been interpreting or applying this concept of "consumptive purposes". *Staff Response: Staff believes that the original language was an error based on the last regulatory process.*
- It was noted that there was still a feeling that this is a substantive change to the regulations.
- *Staff Note: The list of exclusions needs to be considered as a total – a project needs to be looked at in regard to each of the exclusion items to determine if it fits into one before jumping to the next possible exclusion item. It should also be noted that all of the original exclusions are still in the list they have just been reorganized and combined with like exclusion categories for clarity.*
- It was suggested that it might be clearer to show where each of the items came from. A suggestion was made that a chart of the changes should be developed to clearly identify the changes that are being proposed and where they originated. *Staff Response: All of the original exclusions are still there they have just been relocated and reorganized and some have been wordsmithed for clarity.*

**ACTION ITEM: Staff will attempt to develop a chart to help the group visualize all of the changes proposed for this section. Staff will look at better ways to use highlighting to show what is "existing language" and what has been revised.**

## **20. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Preapplication procedures (Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "preapplication procedures" section. She noted that there are now "proposed section numbers" throughout this portion of the regulations instead of the previous "TBD" designations. There are no proposed revisions to this section that have not been previously discussed.

**9VAC25-210-320. Preapplication procedures for a new or expanded surface water withdrawals.**

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**21. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Coordinated Review (Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "coordinated review with VMRC" section. The proposed revisions include the following:

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**9VAC25-210-330. Coordinated review with the Virginia Marine Resources Commission on applications for surface water withdrawals**

- A. The Department of Environmental Quality (DEQ) shall coordinate the review of an application for surface water withdrawals that also requires a Virginia Marine Resources Commission (VMRC) permit under Chapter 12 of Title 28.2 of the Code of Virginia with the VMRC in accordance with § 62.1-44.15:5.01 of the Code of Virginia.
- B. The initial application for surface water withdrawals that requires both an individual Virginia Water Protection Permit and a VMRC permit shall be advertised concurrently by the DEQ and the VMRC. When appropriate, such advertisement may be in the form of a joint public notice of the application, prepared by VMRC with the assistance of DEQ, published once in a newspaper of general circulation in the area affected by the proposed activity in accordance with VMRC chapters and policy. Such advertising shall be paid for by the applicant.
- 

**Group discussions included the following:**

- A question was raised over the change of "surface water supply projects" to "surface water withdrawals". *Staff Response: This is to conform to the wording changes made to the definition section and to provide linkage back to the definition of "surface water withdrawal". This is just to be consistent with the current terminology.*

**22. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Duty to Reapply (Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "duty to reapply" section. The proposed revisions include the following:

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**9VAC25-210-350. Duty to Reapply for a Permit for the Continuation of a Surface Water Withdrawal**

- A. Any permittee with an effective permit for a surface water withdrawal shall submit a new**



permit application at least 270 days before the expiration date of an effective permit unless permission for a later date has been granted by the board. If a complete application for a new permit has been filed in a timely manner, and the board is unable, through no fault of the permittee, to issue a new permit before the expiration date of the previous permit, the permit may be administratively continued.

B. The applicant shall provide all information described in 9VAC25-210-340 and applicable portions of 9VAC25-210-80 for any reapplication. The information may be provided by referencing information previously submitted to the department that remains accurate and relevant to the permit application. The board may waive any requirement of 9VAC25-210-340 and the applicable portions of 9VAC25-210-80.B, if it has access to substantially identical information.

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#### **Group discussions included the following:**

- A question was raised whether the "270 day" period was going to remain. *Staff Response: That is the current proposal. The "270 days" is consistent with another withdrawal permitting program – to be consistent with the groundwater program. The time frame is designed to allow staff sufficient time to review a water withdrawal project proposal in a reissuance, so that the analysis that is needed can be conducted. The additional time from "180" to "270" is needed to have sufficient time for staff review, so that administrative continuances don't have to be used.*
- It was noted that the time frame in the current permit is "180 days". *Staff Response: That is correct but when the water withdrawal program issues a permit it is "270 days".*
- Will this affect existing permits? *Staff Response: The proposal is for permits that would be applying after the date of the regulation would have the "270 day" time frame. A permittee would have to comply with the existing permit that they have in place, until the permit was reissued under the new regulation.*
- The group discussed the concept of administrative continuance.
- Why is this concept of administrative continuance needed here? By introducing the concept here are we giving rise to a situation where there is a potential for longer delays? *Staff Response: We are currently allowing administrative continuance in other programs but we do not currently have the ability to provide for an administrative continuance in the VWP program and feel that there is a need to have the option available.*
- It was suggested that the last sentence in "A" addressing "administrative continuance" might be better addressed in a separate section or even in the main part of the regulation instead of in this specific part of the regulations.

**ACTION ITEM: Staff will look at the wording used for administrative continuance in other regulations and in other sections of this regulation and see how this concept matches up with other language in the regulation. Staff might need to consider separating this concept from the rest of the regulatory requirements. This is not a concept unique to surface water withdrawals; it applies to the entire VWP regulatory process. Need to confirm that the language being proposed here is not different from what is being proposed for the main regulation.**

- It was noted that the original intent of separating the surface water withdrawal components out into a separate section was to clarify the requirements and make it easier to understand, but the proposed text of 9VAC25-210-350 B includes a reference back to the "applicable portions of 9VAC25-210-80" seems to create a level of confusion over which portions of 9VAC25-210-80 are applicable. It doesn't seem to clarify which of those sections would apply. In some instances it might be clearer if this section was more of a stand-alone piece without the cross-references back to the main regulation. *Staff Response: The intent is not to have a separate program but to be able to clarify and point out the unique components of a surface water withdrawal permit as they apply to the overarching VWP regulation and requirements – if all of the requirements of the VWP program were included with those unique surface water withdrawal requirements there would be a lot of duplication.*
- It was suggested that the cross-reference section notation might need to be more specific as to which items are applicable to help eliminate confusion.

**ACTION ITEM: Staff will look at the reference back to 9VAC25-210-80 (VWP Application Section) to see if it is appropriate to include additional specific notations to specific items in the list.**

### **23. LUNCH BREAK – 12:00 – 1:05**

### **24. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Application Requirements (Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "application requirements" section. The proposed revisions include the following:

She noted that the proposed revisions to this section now include the addition of "or expanded" to have the language similar to that in the pre-application section.

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### **9VAC25-210-340. Application requirements for surface water withdrawals**

A. Persons proposing to initiate a new or expanded surface water withdrawal not excluded from requirements of this chapter by 9VAC25-210-310, proposing to reapply for a current permitted withdrawal or a Federal Energy Regulatory Commission (FERC) license or re-license associated with a surface water withdrawal, shall apply for a VWP permit.

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**Group discussions included the following:**

- Does the term "expanded" need to be defined? Are there going to examples of what is meant by an expanded surface water withdrawal? *Staff Response: The proposal is to use a term that is already being used in the "preapplication section". The term is not currently defined. "Expanded" in this case refers to an "increase in the volume of a surface water withdrawal".*
- *Staff Note: Expanded refers to an increase in the volume of water or the rate that water is being withdrawn. The term "expanded" is already used in the regulation. Proposing to use existing terminology increase of introducing new terms such as "increased".*
- How does this apply to people who were previously grandfathered? *Staff Response: You would only need to apply for a permit if you were now subject to permit requirements. All this addition does is to acknowledge that anybody modifying a withdrawal or needs a permit modification or are increasing their withdrawal would be covered under these requirements.*
- Concerns were noted over the use of the phrase "not excluded from requirements of this chapter by 9VAC25-210-310". The terminology used in the pre-application section is "For new or expanded surface water withdrawals requiring an individual VWP permit..." A suggestion was made that it might be clearer if the proposed language was "flipped" so that it was a positive statement such as "that requires a VWP permit" or "requiring an individual VWP permit" instead of "not excluded...9VAC25-210-310".

**ACTION ITEM: Staff will look at revising the language in this section to make it a positive statement as suggested by the Advisory Group. The retention of the word "excluded" needs to be considered since this is the "exclusion" section.**

- What does the term "expanded" include? A suggestion was made that the inclusion of a definition of "expanded" should be considered. *Staff Response: The idea is to look at the expansion of a withdrawal component that is under our jurisdiction. Staff will look at the development and inclusion of a definition of "expanded".*

**ACTION ITEM: Staff will look at the development and inclusion of a definition of "expanded" to clarify the requirements.**

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B. In addition to requirements of 9VAC25-210-80, applications for surface water withdrawals or a Federal Energy Regulatory Commission (FERC) license or re-license associated with a surface water withdrawal, shall include:

1. As part of identifying the project purpose, the applicant shall provide a narrative describing the water supply issues that form the basis of the proposed project purpose.
2. The drainage area, the average annual flow and the median monthly flows at the withdrawal point, and historical low flows if available;
3. The average daily withdrawal, the maximum daily, monthly, annual and instantaneous withdrawals and information on the variability of the demand by season. If the project has multiple intake structures, provide for each individual intake structure and the cumulative volumes for the entire system.

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**Group discussions included the following:**

- A question was raised over the inclusion of the requirement in "B 1" for "a narrative describing the water supply issues". It was suggested that this is duplicative of the Water Supply Plan requirements. Should a note be added to indicate that "the applicant may reference the Water Supply Plan for this information"? *Staff Response: That is an existing requirement. The requirement identified in "B 6" provides that "if during the water supply planning process, the need for the withdrawal was established, the applicant may submit said planning process information..."*
- *Staff Note: The narrative request identified in "B 1" is to have the applicant identify what the purpose of their project is. For example, "my purpose is to irrigate my golf course and I need water to do that". This is an overall summary of the proposed use while "B 6" provides the project details.*
- *Staff Note: The genesis of "project purpose" has always been the federal statute related to the 404 program. This has always been a requirement of the federal program. This was carried over to the state program when it was originally established. This is a very defined common concept.*

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5. Information **on flow dependent beneficial uses** along the affected stream reach. For projects that propose a transfer of water resources from a major river basin to another major river basin, this analysis should include both the source and receiving basins.
- a. Evaluation of the flow dependent instream and offstream beneficial uses. Instream beneficial uses include, but are not limited to: the protection of fish and wildlife habitat; maintenance of waste assimilation; recreation; navigation; and cultural and aesthetic values. Offstream beneficial uses include, but are not limited to: domestic (including public water supply); agricultural; electric power generation; and commercial and industrial uses.
  - b. The aquatic life, including species and habitat requirements.
  - c. How the proposed withdrawal will alter flows.

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6. Information on the proposed use of and need for the surface water and information on how demand for surface water was determined (for example, per capita use, population growth rates, new uses, changes to service areas, and if applicable; acreage irrigated and evapotranspiration effects). If during the water supply planning process, the need for the withdrawal was established, the applicant may submit said planning process information,

provided that the submittal address all requirements of 9VAC25-210-360. The board shall deem such a submittal as meeting the requirements of this subsection. For public surface water supply withdrawal projects see also 9VAC25-780-100 and 9VAC25-780-130.

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**Group discussions included the following:**

- *Staff Note: The requirement in "B 6" is to provide information on the proposed use that was identified in the narrative in "B 1". You would be expanding on your proposal, i.e., "I need X amount of water"; "I need water for 18 holes". This would be where you provide details on the proposed use.*
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7. Information describing the intake structure, to include intake screen mesh size and intake velocity,

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8. For withdrawals proposed from an impoundment, provide the following:

- a. Description of the flow or release control structures, including the minimum rate of flow (in cubic feet per second), size and capacity of the structure and the mechanism to control the release.
  - b. Surface area (in acres), maximum depth (in feet), normal pool elevation, total storage capacity and unusable storage volume (in acre-feet).
  - c. The stage-storage relationship. For example, the volume of water in the impoundment at varying stages of water depth.
- 

9. Discussion of how the proposed surface water withdrawal is addressed in the water supply plan that covers the area in which the surface water withdrawal is located, specifically in terms of projected demand, analysis of alternatives, and water conservation measures. If all or a portion of the withdrawn water will be transferred to an area not covered by the plan, the discussion shall also include the water supply plan for the area of the receiving watershed.

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Sarah noted that this item (#9) refers to the application requirements for a proposed surface water

withdrawal project and requesting information from the applicant to discuss how their proposed project fits in with the water supply plan. This language has been revised since the last meeting of the group to reflect comments and concerns noted at the time.

**Group discussions included the following:**

- Would this include a designation of whether or not your project was included in the water supply plan? *Staff Response: Yes, the discussion would be "we are not covered in the plan".*
- *Staff Note: This is the result of a statutory change in 2012 that directs DEQ to consult with and to give full consideration to the water supply plan in reviewing an application. So a guidance memo has been created to discuss how we are going to implement that in coordination with the Water Supply Planning Staff. It is also noted in the guidance document that just because a project is not included in the water supply plan should not be a basis for denying an application. This is an information tool.*
- Is the revised text verbatim from the statute? *Staff Response: Not verbatim but it is in response to the legislative change to the statute. It is designed to be a tool to help in the review of an application.*
- A suggestion was made that "B 9" might be clearer if the language was changed to read "If the proposed surface water withdrawal is addressed in the Water Supply Plan" then provide a discussion, etc. *Staff Response: Then if it is not included then how would someone address that? They would simply say that "it is not applicable".*
- It was suggested that there might be a need for some wordsmithing to clarify this requirement.
- It was suggested that it might be worded to say "Indicate whether your project is included in a water supply plan and if so then provide a discussion of how it is addressed in the plan.
- The information that is needed is "whether your project is included in a water supply or not". An indication "yes or no" as to whether it is included is needed.

**ACTION ITEM: Staff will look at revising the wording of "B 9" to clarify the requirements. Staff requested that the group provide any recommendations for clarifying language.**

- A question was raised as to how "B 6" is different from the requirements identified in "B 9"? *Staff Response: "B 6" is asking for the supporting information for the proposed water demand and proposed use while "B 9" is asking whether the information provided in "B 6" fall in line with water supply planning tool that was developed for the region or locality – how it ties into the water supply plan.*
- It was suggested that it might make "B 9" clearer if a regulatory reference related to the water supply planning requirements was included. *Staff Response: Water supply plan is already defined with a Code reference – would that suffice to clarify this requirement? Yes.*
- *Staff Note: There seems to be some lack of understanding of the relationship between the two processes. The Water Supply Planning Process required localities to identify all demands for all uses – the entire demand pie for a given planning unit. So whether that is one locality or a regional plan, they were required to have a demand for industrial use in their jurisdiction; they*

*were required to have a demand for public water supply; they were required to provide a demand for agriculture – they were required to identify a demand number for the next 30 years for all uses in the water supply planning area. If someone comes in for a permit and say that the total demand for the water supply planning area is 50 mgd – say that the permit is for an industrial user and their demand wasn't taken into consideration during the development of the water supply plan – which isn't that uncommon in the first round of plans. For a variety of reasons it wasn't captured. So when they say that their demand for the next 15 years is 15 mgd and that was not captured in the plan then the total demand for this locality or for this regional plan now is 65 mgd. The Planning Regulation requires that if your demand goes up, you have to amend your plan. That responsibility is on the locality not on the applicant. That is the purpose of this proposed feed-back loop identified in "B 9".*

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10. An alternative analysis for the proposed surface water withdrawal, including at a minimum, the criteria in 9VAC25-210-360.
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Sarah noted that the requirement for an "alternatives analysis" is an existing requirement for all withdrawals and is the foundation of our program – it is reviewed for "avoidance and minimization" and "mitigation of an impact" – it is a critical part of our review.

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11. For new or expanded surface withdrawals proposing to withdraw 90 million gallons a month or greater, a summary of the steps taken to seek public input as required by 9VAC25-210-320 and an identification of the issues raised during the course of the public information meeting process.
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## **25. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Evaluation of Project Alternatives (Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "evaluation of project alternatives" section.

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### **9VAC25-210-360. Evaluation of project alternatives for surface water withdrawals**

- A. The applicant shall demonstrate to the satisfaction of the board that the project meets an established local water supply need. In establishing local need, the applicant shall provide the following information...
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**26. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Applicable VWP Permit Conditions (Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "applicable VWP Permit Conditions" section.

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**9VAC25-210-370. VWP permit conditions applicable to surface water withdrawals**

- A. In addition to the conditions established in 9VAC25-210-90 and 9VAC25-210-100, each VWP permit shall include conditions meeting the requirements established ~~meeting the conditions~~ in this section, where applicable.
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- D. The board may issue permits for new or expanded surface water withdrawals, which are not excluded from the requirements of this chapter by 9VAC25-210-310, based on the following criteria:
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**27. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Modifications (Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "modifications" section. The proposed revisions include the following:

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- A. In addition to the requirements of 9VAC25-210-180-B, VWP permits for surface water withdrawals may be modified when any of the following developments occur:
1. When the board determines that minimum instream flow levels resulting directly from the permittee's withdrawal of surface water are detrimental to the instream beneficial use, existing at the time of permit issuance, and the withdrawal of surface water should be subject to further net limitations or when an area is declared a surface water management area pursuant to §§ 62.1-242 through 62.1-253 of the Code of Virginia, during the term of the VWP permit.
  2. Significant changes to the location of the withdrawal system are proposed such that DEQ determines a new review is warranted due to the potential effect of the surface water withdrawal to existing beneficial uses of the new location.
  3. Changes to the permitted project or the surface water withdrawal, including increasing the storage capacity for the surface water withdrawal, that propose an increase in the maximum permitted withdrawal volumes or rate of withdrawal or [that cause] more than a minimal change to the instream flow requirements with potential to result in a detrimental effect to existing beneficial uses.



4. A revision to the purpose of the surface water withdrawal that proposes to include a new use(s) or modify the existing authorized use(s) that were not identified in the original permit application.
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Sarah noted that "A" provides the linkage back to the proposed revisions to "180 B". The intent in "A" is to tie back to "major modifications".

**Group discussions included the following:**

- A question was raised regarding "changes to the permitted project" in "A 3". Why doesn't the term "surface water withdrawal" capture that concept? *Staff Response: The original proposal was to address this as "the project operation" so it was revised to clarify that it was the "permitted project". This terminology is more in line with the rest of the VWP regulation language.*
- A concern was raised over the use of the phrase "permitted project" in "A 3" and "B 3". The term seems pretty broad. It was suggested that this should be an "increase in storage volume or an increase in withdrawal rate".
- A recommendation was made to include the phrase "that cause" before "more than a minimal change..."
- *Staff Note: Need to consider the discussions related to both "A 3" and "B 3" – overlapping comments and concerns.*
- A recommendation was made to revise "A 3" to read:

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3. Changes to the permitted project or the surface water withdrawal, including increasing the storage capacity for the surface water withdrawal, that propose an increase in the maximum permitted withdrawal volumes or rate of withdrawal ~~or [that cause] more than a minimal change to the instream flow requirements with potential to result in a detrimental effect to existing beneficial uses.~~

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**ACTION ITEM: Staff will need to review the language in "A 3" to determine if there is a better way to word it or to clarify the requirements.**

- The use of the terms "permitted project" versus "operation" was discussed. What is the difference between a "surface water withdrawal" and the "permitted project"? *Staff Response: You could be changing things in the "permitted project" that is not part of the "surface water withdrawal". If you hadn't started construction yet and you are proposing changes to the design that was "permitted" you are not making changes to the "withdrawal" you are making changes to the "permitted project". One of the things that is challenging with authorizing water withdrawals is that most of the public water supplies involve building an impoundment – most of the localities can't get financing through bonds or whatever until they can demonstrate that they have the allocation. So a lot of times they have not done any final designs. They provide a*

*conceptual design as to what they dam is going to look like – then it takes them 2 years to buy the property – then they start to do the final design and find that they have to change from a rolled concrete dam to an earthen dam – and that is going to result in a change to the release structure – these changes really don't impact the amount withdrawn or the amount released but these kinds of things are always stipulated in the permit – so you have to go back and change the permit to reflect the actual proposed activity/facility – what we would like to do is to be able to do that in a way that makes sense to both parties. So that is a change to a permitted project that doesn't affect the withdrawal.*

- So basically a "permitted project" is prior to the actual "withdrawal". *Staff Response: The permitted project is basically what is identified in the details of the permit. So it includes everything that was submitted to DEQ – so if any of those items are changed then the permit has to be changed. These could include application materials; release schedules; general operational conditions/methods; etc.*
- *Staff Note: An agricultural example of this concept of "permitted project" versus "surface water withdrawal" might be the case of a farmer who proposes to place a withdrawal on one side of a stream then because changes in circumstances decides to place the withdrawal point directly across the stream on the other side. The permitted project was for a water withdrawal at a given point in the stream for "X" amount – the change results in it being placed on the other side with no change in the withdrawal amount and essentially no change in location – just on the other side of the stream. So it is a different parcel so the permit had to be amended.*

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B. Minor modifications may be made in the VWP permit for surface water withdrawals without following the public involvement requirements of 9VAC 25-210-140, 9VAC 25-210-160, or 9VAC 25-210-170. Any request for a minor modification shall be in writing and shall contain the facts or reasons supporting the request. Minor modifications may only occur in accordance with 9VAC25-210-180.E and the following items specific to surface water withdrawals:

1. Minor changes to the location of the withdrawal system, as determined by the DEQ, and thus not warranting a new review of the effect of the surface water withdrawal to existing beneficial uses.
2. Allow for temporary changes to instream flow requirements or operational requirements to address situations such as withdrawal system improvements, environmental studies, or as otherwise determined appropriate by DEQ.
3. Changes to the permitted project or the surface water withdrawal that will result in a decrease or no change in the permitted withdrawal volumes or rates or [that cause no more than a] minimal change to the instream flow requirements with no potential to result in a detrimental effect to existing beneficial uses.
4. Changes to the monitoring methods or locations of monitoring sites for instream flow requirements or surface water withdrawal requirements.

## Group discussions included the following:

- A question was raised over the phrase "or more than a minimal change to the instream flow requirements with the potential to result in a detrimental effect". Can a permittee make a demonstration that a small increase in storage capacity would be considered a minor modification? *Staff Response: Yes – if you are increasing storage capacity but it doesn't impact stream flow and there is no increase in the storage capacity for the surface water withdrawal it would be considered as a minor modification.*
- So as long as you don't increase your maximum withdrawal and stay within the permit limits and don't have any more than a minimal change to the instream flow requirements you would still qualify for a minor modification. *Staff Response: That is correct.*
- Does DEQ have a set of criteria that would be used to assess whether or not there is a likelihood of a resulting detrimental effect? A concern was noted that the proposed language for "A 3" and "B 3" appear to be open ended in regards to the "minimal instream flow portion" and potential detrimental effects. Is there a way to not make it open-ended? Is there a way to set it out in regulation what DEQ is looking for? *Staff Response: The way this is normally addressed is through a cumulative impact analysis.*
- *Staff Note: The last sentence in "B" is proposed "kick-out" language that would be needed if*
- The concern is that by including this new variable "the potential or lack of potential to result in a detrimental effect" that could be considered a substantial change to the requirements. It is introducing some discretion on the part of the applicant and DEQ. Not certain that is what we want to do here. *Staff Response: There is nothing in the current regulations that addresses modifications of withdrawals, so this is all new language. What we were trying to do was to differentiate between projects which should be going through a major modification versus those that could qualify for a minor modification process.*
- The concern was noted that there seems to be an open-ended concept being proposed here.
- *Staff Note: In other programs what constitutes a "minor modification" is clearly identified, we do not have that in this regulation. We could treat every change to a permit as a major modification. We are trying, by the development of this language, to establish the mechanism to provide for minor modifications for certain activities with no potential to result in a detrimental effect to existing beneficial uses. So the question is should everything be treated as a major modification or not? We are trying to bring into concert how we look at other permitting actions in other programs. Is the group okay with this concept?*
- It was noted that overall the concept makes sense but some wordsmithing and clarification is needed.
- The group discussed the concept of providing for the use of a minor modification process.
- It was suggested that the phrase "or that causes not more than a minimal change".
- The group discussed the idea of deleting the last part of the sentence in "B 3" so that it would read:

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3. Changes to the permitted project or the surface water withdrawal that will result in a decrease or no change in the permitted withdrawal volumes or rates or [that cause no more than a] minimal change to the instream flow requirements with no potential to result in a detrimental effect to existing beneficial uses.

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**ACTION ITEM: Staff will need to review the language in "B 3" to determine if there is a better way to word it or to clarify the requirements.**

- A question was raised over the phrase "operational requirements" and what was meant by the term. A suggestion was made to try to tie this down to a permit by including the phrase "as referenced in the permit" as a way to clarify the requirements.
- *Staff Note: These changes are being proposed as a way to allow for the flexibility to identify what can be done under a minor modification and what activities are considered major modifications.*

**ACTION ITEM: Staff will review the language of this section and section "A" to see if there is a way to clarify the language taking into consideration the comments and concerns raised by the Advisory Group. A request was made that the Advisory Group provide any recommendations or suggestions for clarification of these requirements.**

#### **28. Review and Discussion of Track-Change Revisions of 9VAC25-210 Specific to Surface Water Withdrawals Topics – Variance from Permit Conditions (Sarah Marsala):**

Sarah introduced the proposed clarifications specific to surface water withdrawals in the "variance from surface water withdrawal permit conditions" section.

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#### **9VAC25-210-390. Variance from surface water withdrawal permit conditions**

A. For public water supplies. The board may grant a temporary variance to any condition of a VWP permit for a surface water withdrawal for a public water supply to address a public water supply emergency during a drought. A permittee requesting such variance must provide all information required in the application for an Emergency Virginia Water Protection Permit identified in 9VAC25-210-340.C-.

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#### **29. Final Comments:**

**In terms of process and timing the following was noted:**

- The next meeting is scheduled for Monday, December 8<sup>th</sup>.
- Sarah Marsala noted that her goal is to take the discussions and comments made during today's meeting and to make edits to the sections of the VWP Regulation addressing surface water

withdrawals that has been presented today and get that version to Brenda Winn for inclusion in the full VWP Regulation document as soon as possible.

- Brenda Winn indicated that her goal is get a version of the full document with or without the surface water withdrawal components and one of the General Permits (690) out to the group by Friday. The changes to 690 that will be distributed will be incorporated into the other General Permit documents but 690 will serve as the template for the proposed changes. The goal is to try to get those materials distributed to the group by Friday. The thought is that the group would then have approximately 2 weeks to review the materials prior to the next meeting of the Advisory Group. The meeting on December 8<sup>th</sup> will be used to review the whole document or the majority of the changes that have not been previously discussed in a meeting. We will need to think about the process that will be used for the discussions at the December meeting. The hope is that by Friday or at the latest Monday that the group will receive a complete copy of the full regulation with the water withdrawal components and the GP to review. That would give everyone 28 days to review and come to the meeting on the 8<sup>th</sup> prepared to discuss.
- The idea of having to have another meeting of the Advisory Group was raised. It was suggested that DEQ should schedule one and then if it wasn't needed as a result of the meeting on December 8<sup>th</sup> that it could be cancelled.
- Any thoughts on the process that should be followed for the meeting on the 8<sup>th</sup>? It was suggested that we should just plan on going through the documents page-by-page and try to just focus on those topics that the group feels need to be addressed further.
- It was noted that one of the things that DEQ would like to get out of the meeting on the 8<sup>th</sup> and if needed the meeting in January is to be able to articulate whether we have some degree of consensus or whether there are still points that we don't have agreement on – because that is essentially the guts of our presentation to the Water Board.
- A suggestion was made that the process for the meeting on the 8<sup>th</sup> should be page-by-page as discussed but that any items where there is not a consensus should be set aside until all of the consensus items have been identified so that those more contentious items can be further discussed without losing focus on the process. That way we can get through the entire document.
- It was suggested then that the January meeting could be used either to complete the review of the document that we didn't get through at the December meeting or to address maybe a hand-full of non-consensus items in an effort to reach consensus.
- All comments and suggestions from the group should be developed individually and presented to the group during the discussions at the December 8<sup>th</sup> meeting.
- The version that will be discussed at the meeting on the 8<sup>th</sup> will be DEQ's best approach to the proposed regulations based on comments and suggestions from the group and based on staff internal discussions.
- It was noted that the committee members need to make the commitment to read through the whole proposed regulation and be ready to discuss it at the December 8<sup>th</sup> meeting. It was also suggested that instead of a comment of "I don't like this" or "this language doesn't work or make any sense" that the comment should include suggestions on how to make it make sense –

on how it can be revised to work. We all need to be ready on the 8<sup>th</sup> to wade through all of the proposed language and reorganizational changes.

- It was noted that this is a "proposed regulation" and that once it gets through the Water Board and Executive Review that there will be further opportunities to comment on it at the official "proposed stage" of the process.

### **30. Public Input Time/Public Comment Time (Bill Norris/Mike Murphy):**

The following comments were made during the informal public input/public comment period:

#### **Mark Williams – Luck Stone: Representing the Virginia Transportation Construction Alliance –**

- Discussed the definition of "surface water withdrawal".

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"Surface water withdrawal" means a removal or diversion of surface water ~~from a waterbody~~ in Virginia or from the Potomac River for consumptive or nonconsumptive use thereby altering the instream flow or hydrologic regime of the surface water. Projects that do not alter the instream flow or that alter the instream flow but whose sole purpose is flood control or storm water management are not included in this definition.

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- Noted a concern about the use of the term "hydrologic regime" – there are a lot of things that can alter the "hydrologic regime". A solar project or a tall building could impact the "hydrologic regime".
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"Hydrologic regime" means the entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

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- The term "hydrologic regime" should not be included as if applied in a broader scope than intended or anticipated. Is this really the term that you should be using.
- In what other context is this term used in the VWP regulation?

**Bob Kerr** – Maybe we should consider changing the term to "hydrologic regime of the surface water" in the proposed definition – then it may make a little more sense as it relates to surface water withdrawals. The term by itself is very broad.

**Katie Frazier** – Do we need to consider adding a sentence that clarifies that we mean the "hydrologic regime of the surface water"? Are we trying to address the "physical withdrawal of water"?

**Dave Davis** – Maybe we need to have two different definitions of "hydrologic regime". We need to see where else it is used in the regulations and how it is applied.

**ACTION ITEM: Hydrologic Regime: Staff Research:**

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**Parts of -210 that refer to ‘hydrologic regime’.** It appears that the proposed definition for hydro reg is good as a stand-alone definition. The proposed def/rev to surface water withdrawal clarifies the intent to apply hydro reg to surface waters.

It appears that hydrologic regime in the compensation section (-116.B.2) and exclusions (-210-60.8.b) is based on the corps’ regulatory exemptions. The corps does not define it, but they do refer to water circulation [§ 230.23 Current patterns and water circulation. (a) Current patterns and water circulation are the physical movements of water in the aquatic ecosystem. Currents and circulation respond to natural forces as modified by basin shape and cover, physical and chemical characteristics of water strata and masses, and energy dissipating factors.] I think the proposed is in line also with what USGS defines as hydrologic cycle and/or a regime in general. <http://water.usgs.gov/wsc/glossary.html#R>

**Exclusions:**

8.b. Activities which bring a new area into agricultural or silvicultural use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If the activity takes place outside surface waters, it does not need a VWP permit, whether or not it is part of an established agriculture or silviculture operation.

232.3.c.1.(ii)(B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation.

**Compensation**

116.B.2. Such analysis shall include, but is not limited to, the following criteria, which shall be compared between the impacted and replacement sites: water quality benefits; acreage of impacts; distance from impacts; hydrologic source and regime; watershed; functions; vegetation type; soils; constructability; timing of compensation versus impact; property acquisition; and cost. The analysis shall compare the ability of each compensatory mitigation option to replace lost wetland acreage and functions or lost stream functions and water quality benefits.

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**31. Next Meeting:**

**The next meeting of the VWP Citizen Advisory Group is scheduled for Monday, December 8, 2014 –DEQ Piedmont Regional Office – Training Room – Sign-In: 9:15 A.M. – Meeting Start Time: 9:30 A.M.**

**A Doodle-Poll will be developed for consideration of a meeting date for the Advisory Group in January.**

**32. Meeting Adjournment:**

**The meeting was adjourned at approximately 2:45 P.M.**