Virginia Regulatory Town Hall

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Final Regulation
Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-670-10 *et seq*.
Regulation title	Virginia Water Protection General Permit for Facilities and Activities of Utility and Public Service Companies Regulated by the Federal Energy Commission or the State Corporation Commission and Other Utility Line Activities
Action title	Virginia Water Protection General Permit WP-2
Document preparation date	December 7, 2004

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also alert the reader to changes made to the regulation since publication of the proposed. Do ***not*** *state each provision or amendment or restate the purpose and intent of the regulation.*

The purpose of this regulatory action is to revise the above referenced general permit regulation to correct several administrative procedures, clarify application and permitting requirements and allow for a more efficient application review process. Since implementation of this regulation in October 2001, it has become evident that these minor corrections are needed to improve applications for coverage, timeframes for issuance of authorizations, and coordination with the U.S. Army Corps of Engineers State Program General Permit (SPGP-01). No change to the upper thresholds of coverage under this regulation is being proposed.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The changes to 9 VAC 25-670-10 *et seq*. were made by the State Water Control Board at its December 02, 2004 quarterly meeting.

Legal basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

If the final text differs from the text at the proposed stage, please indicate whether the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

The basis for this regulation is provided for in Sections 62.1-44.15 (10) and 62.1-44.15:5 of the Code of Virginia, as well as in 9 VAC-25-210-10 *et seq*., Virginia Water Protection Permit Program Regulation.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The VWP general permits are intended to simplify and streamline the permitting process for activities in State waters that have a minor individual and cumulative impact to the environment. The changes allow for a more efficient and understandable application submittal and review and authorization issuance process. In turn, this allows for greater consistency and predictability for the public.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

Changes to the regulation include:

1. clarification of what is needed to decide that an application is complete, including informational and time requirements;
2. allow for payments to mitigation bank or in-lieu fee funds to be linked to the start of work in jurisdictional areas rather than to the date of authorization issuance;
3. modify the procedure for pre-construction notification;
4. allow the permittee to decrease impacts and associated compensation without having to terminate and reissue their authorization;
5. clarify the section on protection of non-impacted wetlands on the project and mitigation sites;
6. allow for termination of authorizations without penalty when the project does not go forward;
7. clarify exceptions to coverage section for consistency;
8. specify a timeframe for requests for extension or renewal of general permit authorizations;
9. clarify requirements for avoidance, minimization and compensation alternatives;
10. clarify that 2:1 compensation ratio applies to wetland but not stream impacts, which are compensated at a 1:1 ratio;
11. clarify limits to use of multiple general permit authorizations for the same project;
12. clarify requirements concerning threatened and endangered species;
13. clarify the distinctions between temporary and permanent impacts and conversion impacts;
14. clarify lower threshold for reporting only authorizations to include up to one-tenth acre of surface waters, but not more than 300 linear feet of stream channel, to maintain consistency with the U.S. Army Corps of Engineers SPGP-01 requirements;
15. clarify that no conceptual or final compensation plan is needed when compensation is via purchase of bank credits or contribution to an in-lieu fee fund;
16. modify certain construction monitoring requirements;
17. make minor grammatical changes for clarity.

At this time, no changes are being made to the upper thresholds for coverage specified in this general permit regulation.

Issues

Please identify the issues associated with the proposed regulatory action, including:
1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;
2) the primary advantages and disadvantages to the agency or the Commonwealth; and
3) other pertinent matters of interest to the regulated community, government officials, and the public.
If there are no disadvantages to the public or the Commonwealth, please indicate.

The primary advantage of the regulation changes is to increase the usefulness of the general permit to the public. These clarifications simplify and streamline the permitting process for activities in State waters that have a minor individual and cumulative impact to the environment. Further, the regulation changes allow for greater consistency and predictability for the public. There are no disadvantages to the public from the regulation changes.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Changes made to this regulation since the publication of the regulation at the proposed and indicated in brackets in the summary of public comments and DEQ responses listed below.

Public comment

Please summarize all public comment received during the 60-day period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.

The public comment period for the proposed revisions to the above regulations was from July 12, 2004 through September 10, 2004. One public hearing was held at the DEQ Piedmont Regional Office in Glen Allen, Virginia on Thursday, August 26, 2004. One representative of VDOT, one representative of the aggregate mining industry and five DEQ staff attended. The VDOT representative gave oral comments, and indicated that these same comments would be reflected in their written submittal.

A total of 10 written comments were received from citizens; state, federal and local government agencies; and various business, trade, and environmental advocacy organizations by the comment period deadline. Three additional written comments were received by DEQ on September 14, 2004. These comments were already expressed by other groups who made submittals before the comment period deadline, and therefore, have been addressed.

All of the written comments and audiotapes from the public hearing will be kept in the public record for this rulemaking. The public comments presented below have been grouped, where possible, into similar categories for brevity and clarity. A list of acronyms and abbreviations used in this summary is presented at the end.

Definitions (9 VAC 25-670-10):

1. The City of Chesapeake; HRPDC: Definition of "perennial stream" should maintain the language "...that has flowing water year round..." vs. the proposed change to "...that contains water year round…" because many of Tidewater Virginia's intermittent and/or ephemeral, agricultural or man-made ditches could be assessed as "perennial streams" under this proposed language due to high water tables and stagnate water within these drainage facilities year round; definition should be consistent with other regulatory programs providing guidance on this same subject matter, i.e., CBLAD's Sept. 2003 Guidance; there is a need for DEQ staff training concerning the determination and/or confirmation of stream perenniality; DEQ permit writers need to be familiar with "typical" characteristics of perennial streams, since the USACE made it clear during the TAC that they will not be making those types of calls in the field, i.e., perennial vs. intermittent vs. ephemeral.

   Response: The TAC agreed that we should use the same general definition of perennial as CBLAD. Members of the TAC drafted a definition based on CBLAD's definition, but with

additional clarification based on part of the North Carolina definition. We propose keeping the definition that was published in the draft regulation, as follows:

> "Perennial stream" means a ~~stream~~ well-defined channel that ~~has flowing~~ contains water year round ~~in~~ during a ~~typical~~ year of normal rainfall. ~~For the purpose of this chapter, a surface water body (or stream segment) having a drainage area of at least 320 acres (1/2 square mile) is a perennial stream, unless field conditions clearly indicate otherwise.~~ Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.

2. NVBIA: Change the term "Conversion" to "Impairment" to be consistent with 9 VAC 25-210-10.

   Response: We do not agree that these terms have similar meaning. “Impairment” means the damage, loss or degradation of the functions and values of state waters. "Conversion" means changing one type of surface water to another type of surface water, either permanently or temporarily.

3. NVBIA: Replace the term "Permanent Impacts". We believe this definition is too restrictive, and may encourage “Loss of Waters” in lieu of causing impairment. The main concern is that any action, be it less than one tenth of an acre or not, can cause a permanent alteration of the physical, chemical or biological properties of waters. The conversion of an emergent wetland into a forested wetland, and stream restoration activities would be considered a “permanent impact”. We recommend two separate definitions in lieu of this one. First utilize the definition of “impairment” 9 VAC 25-210-10 and requiring a lesser mitigation amount if the jurisdictional area is to remain jurisdictional. Secondly to utilize the Corps of Engineers definition for Loss of Waters of the U.S. This definition has been approved by the DEQ through the 401 Certification process of the Nationwide Permits. This change will be easier for the lay person to understand, and should still allow for secondary impacts to be considered.

   Response: This comment again speaks to a misunderstanding of conversion impact versus impairment. Conversion impacts are already compensated at lesser ratios because the area remains a wetland, and some conversion impacts do not require any compensation provided that functions and values remain the same. The distinction between permanent and temporary impacts is important when looking at coverage thresholds and particularly for utility crossing impacts, and is consistent with federal definitions and use. No change from the definition approved by the TAC is proposed.

4. VDOT: We support DEQ's position on keeping the distinction between intermittent and perennial streams in the regulations.

   Response: Comment noted.

Authorization to Impact Surface Waters (9 VAC 25-670-30):

1. VDOT: In 9 VAC 25-670-30.A.5, should say "Compensation may incorporate preservation or enhancement of wetlands, or preservation, restoration or enhancement of upland buffers…". Include enhancement of wetlands as a mitigation option, as previously included in versions of the regulation submitted to the TAC. The regulation proposed through the entire TAC process indicated that enhancement would be an acceptable wetlands mitigation option when proposed in concert with other forms of mitigation. The public notice version of the regulation does not have any reference to enhancement. We request that this option be reinstated as previously proposed. While VDOT has not proposed any mitigation sites that consisted solely of enhancement, we do have numerous sites where enhancement is a minor component. Enhancement, as defined by VAC 9-25-210-10, "means activities conducted in existing wetlands or other aquatic resources that increase one or more aquatic functions or values". We request that "enhancement" be included in the regulation as previously proposed (Section 30 A5, Section 100 Part I A3).

   Response: By statute, enhancement is not allowed as an acceptable form of compensation for wetland impacts. Therefore this requested change cannot be made.

2. CBF: We recommend revising Section 30 to indicate that the upper thresholds of 1 acre, 500 linear feet and 1,500 linear feet apply to both permanent and temporary wetland and stream impacts.

   Response: Section 30 already has the following language: "Any person governed by this VWP general permit is authorized to impact up to one acre of nontidal surface waters, including up to 500 linear feet of perennial stream channel and up to 1,500 linear feet of nonperennial stream channel for general development activities, …"

   However, DEQ will clarify this issue by changing Section 9 VAC 25-670-30.A.2 to the following: "Impacts[, both temporary and permanent,] result from a single and complete project including all attendant features[~~, both temporary and permanent~~].

Notification (9 VAC 25-670-50):

1. CBF: We recommend that DEQ include in Section 30 of the General Permit language reflecting the DEQ Director's authority to deny authorization without public notice or public hearing.

   Response: This language is already included in the main VWP regulation 9-VAC-25-210-130, VWP General Permits, but for clarity DEQ proposes to add the same language to 9 VAC 25-670-30 as "G" as follows: "When the board determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, the board may require individual applications and VWP individual permits rather than approving coverage under this VWP general permit."

Application for a VWP Permit (9 VAC 25-670-60):

1. The City of Chesapeake: We support the insertion of a 15-day review for completeness on JPAs. We continue to stress the need for consistency within individual regional DEQ permit writers when assessing the "completeness" of JPA packages.

   Response: Comment noted.

2. NVBIA: We believe that adding a map of the project location to the list of required application elements for projects with up to one tenth of an acre would eliminate unnecessary permit authorization delays, and would not cause a substantial burden on applicants.

   Response: Comment noted. DEQ believes this requirement would add unnecessary regulatory burden.

3. NVBIA: In 9 VAC 25-670-60.B.13, we do not approve of the addition of requiring the latitude and longitude of all permanent and temporary impacts. We believe this is overkill. You have been provided project location latitude and longitude, a surveyed delineation, project plans, not to mention construction monitoring photos. This requirement is overly burdensome. We recommend it be deleted.

   Response: We agree that for nonlinear projects the latitude and longitude for the center of the project is adequate; however for linear projects that can extend for many miles, individual latitude and longitudes may be required. We will amend the text to reflect this distinction.

4. CBF: In 9 VAC 25-670-60.B, we recommend additional review of application requirements prior to finalizing the General Permit revisions, such as requirements of the conceptual compensation plan, in order to eliminate or significantly reduce unnecessary regulatory burdens.

   VDOT: For both wetlands and stream compensation plans, we have suggested using phrases such as “as appropriate” and “if necessary” to allow the applicant’s application and plan to be deemed complete by DEQ when certain items are not applicable or necessary for a particular project.

   Response: The informational requirements for a complete application, including a conceptual mitigation plan, were discussed at length by the TAC, and the degree of consensus varied depending on the particular item of information. However, the results from discussion on the conceptual wetland mitigation plan were: "delete need for data sheets but leave in JD requirement; keep water budget and specify that permeability will be an estimate; delete construction schedule; add in description of surrounding land use". For the stream conceptual mitigation plan, the requirement of a proposed construction schedule was deleted.

   DEQ proposes to change 9 VAC 25-670-60.B to the following: "B. The required ~~registration statement~~application shall contain the following information[, if applicable to the project]:…"

5. NVBIA: In 9 VAC 25-670-60.B.16.a, due to the ongoing stream attributes/crediting methodology fine tuning, we have reservations as to the ability to provide the amount of contribution calculation with regards to stream credits in a timely fashion. As some Counties are now requesting proof that all permits have been approved prior to plan approval, we believe this requirement could cause substantial permitting delays. We recommend either removing the submittal requirement prior to issuance statement or removing the requirement of contribution calculation details, and having the applicant commit to in lieu mitigation, and show a commitment from the in-lieu agency stating that it will accept the negotiated outcome.

   Response: According to State statute and regulations, DEQ must have details on compensation prior to issuing a permit or authorization. Therefore, DEQ must know the amount of the contribution. Any delays in receiving this information are the responsibility of the Corps, who gives the estimate.

6. NVBIA: In 9 VAC 25-670-60.B.16.c, we believe the wording change in the third sentence from should to shall is overly restrictive and could cause substantial time delays.

   Response: The language is consistent with State Water Control Law. No change will be made.

7. NVBIA: In 9 VAC 25-670-60.E, "…Such application with new information shall be deemed a new application with regards to application.", minor changes should not require a complete restart of the permit processing which includes agency coordination, especially if impacts have not increased. We recommend changing this to read "Substantial changes or omissions shall be deemed a new application. Minor changes will be subject to a restart of the permitting time frames from the date of information submittal."

   VDOT: As proposed, the regulation indicates that the submittal of additional information to render an application complete will be deemed by DEQ as the submittal of a new application. More appropriately, this new information should be considered as merely that – new or additional information related to an existing permit application. The applicant should not be subjected to submitting a new permit application processing fee for submitting this additional information. The applicant should also not be issued a new permit number. These requirements would be a change in policy with a significant impact on the regulated community with no added value to the permitting process.

   Response: We agree the language is confusing. The intent is to provide a mechanism to stop the regulatory time clock for review of supplemental information, not to require a new application with an additional permit application fee, permit application number, etc. DEQ proposes the following revision to the proposed language: "Where an omission of information is made or incorrect information is provided, the board shall require the submission of the omitted or corrected information and ~~may~~shall suspend processing the application until such time as the applicant has supplied the omitted or correct information.

Such application with new information shall be deemed a new application[, but shall not require an additional permit application fee]."

Compensation (9 VAC 25-670-70):

1. NVBIA: In 9 VAC 25-670-70.B, C, and D, changing the wording from loss to impact will likely require the mitigation of temporary impacts as well as permanent. We recommend changing the wording back to loss, if the State still considers conversion an impact we recommend utilizing the wording "impairment" as defined in 9 VAC 25-210-10.

   VDOT: Please revise or delete the last sentence in 9 VAC 25-670-70.C since it is too restrictive to DEQ and the applicant. Factors other than a stream impact analysis could also be considered when determining the amount of compensation required. For example, best professional judgment, natural channel design techniques and other methods may be more appropriate for impacts to short stream lengths. Also, we caution against using the phrase "scientifically-based" when discussing stream assessment methodologies. The method currently used by the Norfolk District Corps of Engineers is not scientifically based, as it is subjective, poorly defined, and under-tested.

   Response: Typically, temporary impacts are mitigated by restoring an area to pre-existing conditions. However, DEQ has the discretionary authority to require more than restoration as mitigation for temporary impacts. Our use of the term impact rather than loss is consistent with our regulatory authority and our program.

   In relation to this, we note that we need to clarify 9 VAC 25-670-70.D by revising the text to: "Compensation for open water impacts other than to streams may be required at a 1:1 replacement to impact ratio, as appropriate, to protect state waters and fish and wildlife resources from significant impairment.

   We agree that the term "scientifically based" in 9 VAC 25-670-70.C is unclear in that no criteria are given as to what constitutes scientifically based methodologies. Therefore, DEQ proposes to revise the proposed language in 70.C to: "…One factor in determining the required compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology approved by the board."

2. NVBIA: In 9 VAC 25-670-70.E, we recommend the removal of the word impacts after conversion as there is no definition of conversion impact, and replace "conversion' with "impairment". We also question the need for mitigation for "conversion or impairment" as it is not required under the VPDES permitting process for discharges which do "permanently impact/impair" significant portions of state waters. We believe this requirement goes too far and should be rethought, as it appears to be administered arbitrarily. In addition, we recommend a limit be assigned to the alteration of the functions and values of surface water (i.e., any, or more than one). This requirement should be linked to water quality functions only.

DEQ staff requests clarification of 9 VAC 25-670-70.E (i.e., does not include streams) by revising the text to: "Compensation for conversion impacts to wetlands shall be required at a 1:1 replacement to impact ratio, when such conversion results in a permanent alteration of the functions and values of the wetland."

Response: Comment noted. DEQ notes that this requirement should only be for wetlands, not streams; therefore, the text will be changed accordingly.

3. NVBIA: In 9 VAC 25-670-70.G, we recommend adding the wording at the end stating "prior to the start of work". Also, see comment V.

Response: DEQ does not intend for proof of purchase to be submitted until impacts are to occur on the ground, as many projects begin but do not impact surface waters until later in the project schedule. Therefore, the proposed text will be clarified to include a time frame, perhaps something such as: "…The applicant shall provide~~s verification~~proof of purchase or debit to ~~the board of purchase or debiting of the required amount of credits~~DEQ prior to start of work in impact areas."

Notice of Planned Changes (9 VAC 25-670-80):

1. NVBIA: In 9 VAC 25-670-80.B, it could be interpreted that the wording "initial authorization compensation goals" to remain the original acreage numbers. We recommend replacing the word "ratios" in place of goals.

Response: We believe the language as stands is clear, as follows:

> "B. Authorization under this VWP general permit may be modified after issuance if the project results in less wetland or stream impacts. Compensation requirements may be modified in relation to the adjusted impacts at the request of the permittee, provided that the adjusted compensation meets the initial authorization compensation goals."

However, we note that we need to add the following sentence to ensure that DEQ is not responsible for any refunds: "DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases, mitigation bank usage, or in-lieu fee fund contributions."

2. VDOT: We support DEQ's position to allow a change from one mitigation bank to another within the same service area but disagree with DEQ's position of not allowing a change from a mitigation bank to an in-lieu fee (ILF) fund, or a change from a wetland restoration site to a mitigation bank, because: 1) sometimes the mitigation proposal falls through; 2) there is a contradiction between DEQ's support of using ILF funds as an initial mitigation proposal for authorization under the General Permits with no additional information or permitting requirements or restrictions, and DEQ's lack of support for changing to an ILF fund "because there is no guarantee that the ILF fund will acquire or construct a mitigation site within the watershed experiencing the permitted impact or a timeframe for the ILF to complete a given construction project"; 3) the ILF fund proposal requires even less review and consideration

by DEQ staff than a change to another mitigation bank; 4) the extra efforts by the permittee and DEQ for the alternative action (file for a termination, reapply for a permit authorization, pay fee) do not seem to add any value to the permitting process, and the permittee would then have to wait up to 45 days for DEQ to authorize the general permit based on the new mitigation proposal.

Response: While we understand the reasoning behind this comment, we also note that other members of the TAC were equally vehement in their opposition to allowing the switch between a specified mitigation bank and contribution to the Trust Fund for work at an unspecified site. There was also disagreement about switching from on-site restoration to an off-site bank for fund. We are not proposing to change this section further.

Termination (9 VAC 25-670-90):

1. VDOT: We appreciate DEQ's efforts to make the termination process easier and more realistic both for the permittee and DEQ, and we request that DEQ include language that allows the permittee to request termination for a change in mitigation plans that does not otherwise qualify as a planned change (Section 90 and Section 100 Part III K). In this case, the permittee may need to abandon or significantly modify a mitigation proposal rendering the current permit authorization void.

   Response: We agree that there should be a more general option for termination when both parties agree that the permit should be terminated. DEQ proposes to add a third option to 9 VAC 25-670-90.4 for the listed certifications as follows:

   ["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 all activities authorized by a VWP general 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 general 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 general permit authorization, nor does it allow me to resume the permitted activities without reapplication and reauthorization."]

General Permit Conditions (9 VAC 25-670-100, Part I):

1. NVBIA: In 9 VAC 25-670-100, Part I.A.2 and A.3, we recommend changing the wording from "permanent impacts" to "loss of waters" and "impairment". We also recommend changing #3 to add "that cause an increase" after "changes". This will minimize the amount of notices to DEQ, and save both time and cost on the regulated community as well the regulators.

   Response: We do not agree with these comments, for the same reasons stated above.

2. NVBIA: In 9 VAC 25-670-100, Part I.A.4, replace the word “goals” with “ratios”. See previous comment XI.

   Response: We do not agree with this suggested change. Goals refer to more than the compensation ratio; goals also include type of wetlands and their functions and values.

3. The City of Chesapeake: In 9 VAC 25-670-100, Part I.B.4, what is the science behind a three-year monitoring period requirement vs. what may be demonstrated hydrologically within 1-2 years (if the FAC or wetter vegetation is supported)?

   Response: The choice of three monitoring years is to ensure that the hydrology criteria are met while accounting for short-term weather patterns.

4. NVBIA: In 9 VAC 25-670-100, Part I.C.5, we recommend adding the wording “as amended” after 1992, to insure this regulation remains current with any proposed and future changes or amendments to the DCR E&S handbook.

   Response: The registrar requires one specific date for a publication. Note that the 1992 version has not been amended to date.

5. NVBIA: In 9 VAC 25-670-100, Part I.C.8, the removal of the word “flowing” implies that any crossing of any waters be it a concrete ditch, or intermittent stream would require authorization. Many farmers, and residential citizens cross dry ditches, with minimal impact. We feel this change is overly restrictive, and the requirement of E&S controls per the manual is sufficient.

   VDOT: The TAC agreed at the 5/18/2004 meeting that the existing references to flowing waters would remain in 9VAC 25-670-100 Part I C3 and C8. The reason for keeping the reference to “flowing” waters rather than “surface” waters is that these activities are acceptable in surface waters as long as those waters are not flowing. However, in the public notice version of [C.8 in] the regulation, the wording is “surface waters”.

   Response: Based upon these comments and further review, we propose going back to the original language of "flowing" waters.

6. VDOT: 9 VAC 25-670-100, Part I.C.9 was revised since the last version provided to the TAC such that it requires that all temporary impacts to surface waters be conducted on mats, geotextile fabric or other suitable material. This is a change from the existing language that limits this requirement to wetlands only. These practices are the normal and accepted practices for work in wetlands. They are not the normal or accepted practices for work in streams and other open waters. The typical measures used in these areas include cofferdams, causeways, "pump-arounds", etc. This condition should not have been revised. Conditions #C7 and 8 satisfactorily address the measures that need to be taken in streams and other open waters. Condition #C9 should be addressed specifically towards temporary work in wetlands only.

Response: We agree with VDOT that this condition is specific for equipment working in wetlands, and mats, etc. are not used in streams. We will go back to the original language of "wetland areas" instead of "surface waters" in the first sentence of C.9.

7. NVBIA: In 9 VAC 25-670-100, Part I.C.11 and C.12, we recommend the removal of the specific reference to Crown vetch, orchard grass, or weeping love grass, all of these are listed as invasive species on the DCR Invasive Alien Plat Species of Virginia list, and may not be a suitable for the site. The reference to the DCR E&S book should suffice.

   Response: The inclusion of these species is only for stabilization of steep slopes, not the entire area. A subgroup of the TAC drafted the proposed language. VDOT is particularly affected by this condition. The proposed language was accepted by the entire TAC.

   For clarification purposes, DEQ proposes the following revisions: "…All temporarily ~~fills~~impacted streams and streambanks shall be ~~removed in~~restored to their ~~entirety and the affected area returned to the preexisting contours~~original contours within 30 days following the construction at that stream segment, and the banks seeded or planted with the same vegetation cover type originally present along the streambanks, including supplemental erosion control grasses if necessary, except for invasive species identified on DCR's Invasive Alien Plant Species of Virginia list."

8. The City of Chesapeake: We would suggest rephrasing the language of 9 VAC 25-670-100, Part I.C.18 to read, "…A low flow channel shall be constructed, as practical, within the channelized or relocated area…". We realize that this language was already in the permit special conditions but is now applicable to the overall project conditions. We are concerned because this type of design is not always feasible considering right-of-way, easement, and/or hydrologic constraints.

   Response: The requirement for a low flow channel within the project ensures that the channel will function properly and in a similar manner as the impacted channel. DEQ did use "to the extent possible" when requiring meanders, as we recognize the limitations you noted in urban areas, for example.

   DEQ proposes to delete the following from this condition: "The new stream channel shall be constructed following the typical sections submitted with the application. A low flow channel shall be constructed within the channelized or relocated area. The centerline of the low flow channel shall meander, to the extent possible, to mimic natural stream morphology."

9. NVBIA: In 9 VAC 25-670-100, Part I.D.2, this countersinking requirement does not take into account issues with bedrock or very small culverts. We recommend at a minimum utilizing some of the Norfolk District Corps of Engineers new Regional condition regarding countersinking which has allowances for such conditions.

   VDOT: We fully support DEQ's position on the countersinking issue. Requiring countersinking on intermittent streams would be a change in DEQ policy that would

adversely affect VDOT projects due to increased costs, increased right-of-way requirements, additional logistical difficulties, such as geology, topography, access, change in road grade elevations, stream diversions, temporary cofferdams, etc., and additional engineering for hydraulic analyses to determine hydraulic capacity of countersunk pipes – not performed if replacing with same size pipe as existing.

Response: This condition will continue to apply to perennial stream crossings.

The text in 9 VAC 25-670-100, Part I.C.2 will be revised as follows: "No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose of the activity is to impound water. Culverts placed in streams must be installed to maintain low flow conditions. The requirement to countersink does not apply to extensions or maintenance of existing culverts that are not countersunk, to floodplain culverts being placed above ordinary high water, to culverts being placed on bedrock, or to culverts required to be placed on slopes 5% or greater. No activity may cause more than minimal adverse effect on navigation. Furthermore, the activity must not impede the passage of normal or expected high flows and the structure or discharge must withstand expected high flows."

DEQ proposes to delete 9 VAC 25-670-100, Part I.D.2.

10. NVBIA: 9 VAC 25-670-100, Part I.E.1, we believe the replacement of the word “stabilized” with “restored” will cause undue cost and difficulty. Restoring an area brings to mind replacing the exact vegetation types or better to the site, and doing so in 30 days could be difficult during winter months. We recommend keeping the term stabilized.

    Response: The intent of the TAC members is to have these disturbed areas restored with original vegetation[, with the exception of any invasive species that were present,] rather than just stabilized and left as is.

    For clarification purposes, DEQ proposes the following revision: "…and ~~stabilized~~restored within 30 days of completing work in the area, unless otherwise authorized by this VWP general permit. Restoration shall be the seeding or planting of the same vegetation cover type originally present, including supplemental erosion control grasses if necessary, except for invasive species identified on DCR's Invasive Alien Plant Species of Virginia list."

11. NVBIA: 9 VAC 25-670-100, Part I.G.6.a, the implementation of the flagging requirement of the buffer would in many tidal tributaries interfere with navigational activities. In addition, this does not specify what entity would be responsible for inspection of the flagging. We strongly recommend deleting the flagging requirement.

    Response: We do not agree with this comment. The flagging requirement protects surface waters from unauthorized impacts, such as backhoe damage. DEQ has documented many such instances of unauthorized impacts based on review of flagging limits. This is an important enforcement tool.

Conditions for Compensation, Monitoring, and Reporting (9 VAC 25-670-100, Part II):

1. NVBIA: In 9 VAC 25-670-100, Part II.A.2.b, the statement "provided that all impacts are compensated at a 2:1 ratio" contradicts the 9VAC 25-670-70 C, D & E, and could include temporary impacts as well. We recommend clarification of this to mirror the other sections of the regulation, and the exclusion of temporary impacts.

   Response: There is no contradiction. However, DEQ will clarify the text by removing the word "all" and substituting "wetland".

2. NVBIA: In 9 VAC 25-670-100, Part II.A.3, the statement "A site change will require a modification to the authorization" leads readers to believe that a permit modification and process will be required. If the change is just one bank for another, we do not feel a full-blown modification is necessary, and a notice of planned change will suffice. We recommend amending this section to reflect that one bank change for another will not require a full-blown modification provided it is in the same HUC service area.

   Response: The intent was that a change from one bank to another bank does not require a modification, while a change from a bank to a fee fund, or vice versa, will require a modification. The language of Section 90 (Termination) will be revised to reflect this intention; however, Section 80 (Notice of Planned Change) and Part II will not be revised.

3. VDOT: Please include stream restoration as a means of compensation for other surface waters in 9 VAC 25-670-100, Part II.A.3.

   Response: The language will be revised to "…For other surface waters, compensation may incorporate preservation, restoration, or enhancement of stream channels, or preservation, restoration, or enhancement of adjacent riparian buffers."

4. VDOT: In 9 VAC 25-670-100, Part II.A.8.f, please keep the existing language that requires the permittee to provide the "source of hydrology" for the wetlands compensation site. The regulated community universally understands this language. Whereas, the term hydrologic analysis is not defined nor universally understood by the regulated community.

   Response: We agree with VDOT and the original language will be retained.

5. NVBIA: In 9 VAC 25-670-100, Part II.A.8.i, we have found that permit writers will require the plant species National List of Plant species that Occur in Wetlands Regional Indicator status. Adding this required element will save time and effort on compensation plans.

   Response: DEQ permit writers are trained in using the List and are familiar with the indicator status of wetland plants. Most applicants include the indicator status without prompting from DEQ staff. This information is not required by law. No change will be made.

6. VDOT: In 9 VAC 25-670-100, Part II.A.8.j, we object to the reference to the Department of Conservation and Recreation's Invasive Alien Plant Species of Virginia list because: 1) it lists 111 species, many of which are not wetland species and are widespread throughout the Commonwealth, and the language in the regulation therefore requires a plan for each of the 111 species; 2) many of the species that are listed would not be problematic for specific community types and should not be a trigger for implementation of a control plan. We also question the applicability of this requirement for stream restoration, where the target is not a biologically endemic list of upland and wetland species, but a stable stream system with non-eroding banks and a riparian buffer. VDOT understands that providing a nuisance species control plan for wetland restoration is key, in part, to ensuring the success of the planted community, however, this same principle does not apply in establishing an upland riparian buffer.

   VDOT currently employs a three-step methodology for the control and abatement of invasive species that involves 1) Identification, 2) Assessment of the threat and 3) Management. VDOT will attempt to plant native species whenever possible, however, the long-term maintenance of native species in an upland environment appears to be beyond the regulatory authority of the Virginia Water Protection Permit regulations.

   VDOT strongly suggests that this wording be eliminated and a more suitable list of species developed that DEQ truly wants the regulated community to manage against (e.g., purple loosestrife and *Phragmites australis*) and that will cause potential problems in developing and maintaining wetland communities.

   Response: The proposed language does not require an separate plan for each undesirable plant species that may occur on a wetland compensation site, but rather a single general plan on how to abate and control all undesirable plant species that may occur, not just those on the DCR list. The TAC discussed the issue of invasive or undesirable plants at length, and there was no clear resolution. Some members expressed concern that undesirable plants were allowed for slope stabilization in wetland and stream compensation sites, whereas other members agreed that in specific instances, these species were appropriate. DEQ supports the use of non-invasive and desirable plant species whenever possible, and encourages the use of native species, to support other state agency conservation goals. DEQ will take VDOT's approach to management into consideration when drafting any agency guidance.

   Further, DEQ proposes the following clarification to 9 VAC 25-670-100, Part II.A.8.j: ["an abatement and control plan [~~for~~covering all] undesirable plant species, [~~including, at a minimum, the species~~as] listed on DCR's Invasive Alien Plant Species of Virginia list, [~~and including~~that includes the proposed] procedures [~~to notify~~for notifying] DEQ of [~~any undesirable plant species occurrences~~their presence], methods of removal, and [~~successful~~the] control[of any such species];…"]

7. NVBIA: In 9 VAC 25-670-100, Part II.A.8.l, please specify to what depth subsoil amendments/preparations must be detailed (i.e. to the bottom grading elevation, four feet below the bottom grading elevation). This will assist permit writers and mitigation designers in making sure the requirement is adequately addressed, and will minimize permit delays.

Response: The depth of the subsoil amendments sill vary by the type of soil and cannot be specified in a regulation.

8. NVBIA: In 9 VAC 25-670-100, Part II.A.8.n and A.9.l, reference wetlands or waters [Reference streams] should not have required monitoring unless the mitigation site fails on one or more criteria. DEQ states that you have to provide the monitoring plan, success criteria, monitoring goals and methodologies and if you submit a plan that is not up to some conceived (not mandated) requirement, they will request more when it would be easier if you just spelled out what exactly it is you want for forested sites, scrub shrub sites and emergent sites. This regulation goes on further to detail what criteria you use to consider success for hydrology, plant community, but not soils, and there is a mention of weekly hydrology monitoring, but no details on requirements. We highly recommend specific success criteria, and monitoring and reporting requirements and removing the circular reference to success as defined by the approved final mitigation plan.

   VDOT: In 9 VAC 25-670-100, Part II.A.8.n., please insert the word “proposed” in front of locations of photo stations, sampling points, etc., since the actual location of these sites will not be determined until after the as-built plans have been approved. Conditions experienced during or post construction may dictate that the actual locations of these sites be located in different areas than proposed.

   Response: Because this condition addresses the final compensation plan, no items in the plan should be proposed. Any needed changes to the final compensation plan can be handled by contacting the DEQ permit writer for approval. The language will be revised to remove existing occurrences of 'proposed', and the term will not be added to this condition.

9. Wetland Studies and Solutions, Inc.: Insert an additional item in Part II.A.9 in each proposed general permit regulation: "Plan view sketch depicting the pattern and all compensation measures being employed, a profile sketch, and cross-section sketches of the proposed compensation stream."

   Response: The item was inadvertently omitted and will be added.

10. VDOT: Please revise the language in 9 VAC 25-670-100, Part II.A.9.a so that it is consistent with Condition A.8.a. and with Section 62.1-44.15:5D of the Code of Virginia.

    Response: 9.a will be revised as follows: "the goals and objectives of the compensation plan in terms of replacement of stream functions and values".

11. VDOT: In 9 VAC 25-670-100, Part II.A.9.c, include language that specifies that plan sketches should be submitted with the evaluation, and delete “restorative” since it presumes that all stream compensation will be restorative, rather than the other forms of stream compensation, such as preservation and enhancement.

Response: The proposed language will be revised to: "an evaluation, discussion, and plan sketches of existing conditions on the proposed compensation stream, including the identification of functional and physical deficiencies for which the ~~restorative~~ measures are proposed,…".

12. VDOT: In 9 VAC 25-670-100, Part II.A.9.d, it does not specify what methodology is to be used to define stream type. We recommend the Cowardin classification as the appropriate method.

    Response: No methodology was specified because DEQ intended to include flexibility in this condition. DEQ proposes to add "geomorphological" as follows: "…<u>the identification of existing geomorphological stream type being impacted and proposed stream type for compensation purposes;</u>…"

13. VDOT: In 9 VAC 25-670-100, Part II.A.9.g, the regulations require that the final stream compensation plan provide "livestock access limiting measures" and that "[l]ivestock access to the stream and designated riparian buffer shall be limited to the greatest extent practicable". We are concerned that this requirement may be beyond the control of the permittee. For example, VDOT's limits of control end at the right-of-way.

    Response: DEQ will revise this condition to read: "livestock access limiting measures, to the greatest extent possible;".

14. The City of Chesapeake: We recommend incorporating language into this section to allow restrictive convenants and/or deed restrictions the flexibility for "maintenance of drainage outfalls" within the preservation of common areas at project sites because this has been a re-occurring issue within multi-use residential/commercial developments that incorporate wetlands/streams as preservation for mitigation.

    Response: The proposed revision language to 9 VAC 25-670-100, Part II.A.12 accommodates maintenance but does not specify to what the maintenance applies, in order to provide flexibility. DEQ believe the maintenance of outfalls falls under the broad category of maintenance. We run this risk of making this condition more confusing is we start specifying certain activities.

15. VDOT: In 9 VAC 25-670-100, Part II.A.9.l, we recommend deleting the first reference of 'photo points', since the last reference is more descriptive.

    Response: The proposed text will be revised to: "…comparison from year to year; proposed success criteria for appropriate compensation measures; ~~proposed monitoring photo points; monitoring and reporting schedule;~~ location of all monitoring stations including photo stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams."

16. VDOT: 9 VAC 25-670-100, Part II.A.10 and A.11 are redundant. Condition 11 is more generic and appropriate. Therefore, Condition 10 should be deleted.

Response: Condition A.10 will be deleted.

17. VDOT: In 9 VAC 25-670-100, Part.II.A.12, please allow 120 days since for VDOT this action will require review by the Attorney General's office, in addition to surveying the property and incorporating that data onto the plans, which will likely take more than 60 days to complete.

    Response: The proposed text will be revised to: "…Proof of recordation shall be submitted within ~~60~~ 120 days of ~~survey or~~ plat approval."

18. NVBIA: In 9 VAC 25-670-100, Part II.A.13, this requests the submittal of an as built survey of the grading, then another survey is then requested in Part II B 1 & Part II C 6 of essentially the same thing. Surveys are a costly and time consuming endeavor, and we feel only one post grading survey is necessary unless the agency or designer has made modifications to the grading between grading and planting. We recommend removing one of the survey requirements in Part II A 13 or Part II B 1and Part II C 6.

    Response: It appears that Part II.A.13 is a duplicate of Part II.B.1 and Part II.C.6; therefore, Part II.A.13 will be deleted.

19. NVBIA: In 9 VAC 25-670-100, Part II.A.18, this is a circular reference to a requirement that is not well defined. To minimize delays and confusion, it should reference the Corps and DEQ Recommendations for Wetland Compensatory Mitigation Success Criteria.

    Response: Our requirement is more flexible and inclusive; it is not good practice to reference a guidance document in a regulation as that guidance may change before the regulation does.

20. NVBIA: In 9 VAC 25-670-100, Part II.A.20, we recommend removing the reference to the vegetation success criteria in the final compensation plan, and stating "vegetative success shall be based on the following."

    VDOT: In 9 VAC 25-670-100, Part II.A.20.a, please revise the language to allow DEQ the flexibility to approve the success of the compensation site in terms of species composition, even if the plant community types have not reached full maturity, and therefore do not reflect what was proposed in the final compensation plan.

    Response: A.20.a states that "Species composition shall reflect the desired plant community types stated in the final wetlands compensation plan by the end of the first growing season and shall be maintained through the last monitoring year." We believe this is a reasonable requirement, and state of maturity is irrelevant. The condition refers to measuring success of planting a certain community type, such as forest that was specified in the plan (i.e., are you on the right trajectory for success, not whether you have a mature forest).

21. VDOT: In 9 VAC 25-670-100, Part II.A.21, include the term "control" as a method of managing invasive species in addition to removal.

Response: The proposed text will be revised to: "…including the methods of removal and control…".

22. VDOT: In 9 VAC 25-670-100, Part II.A.22, we request that DEQ consider allowing the permittee to undertake certain corrective measures at mitigation sites in advance of receiving approval from DEQ. These corrective measures may be necessary to prevent certain problems from worsening.

    Response: Although VDOT's point is valid, DEQ TAC members expressed concern that inappropriate measures would be taken for corrective action, perhaps by other permittees who are not as familiar with proper actions. Therefore the requirement for advance approval will remain.

23. NVBIA: In 9 VAC 25-670-100, Part II.B.1.b, the language is not clear on what is required in the original ortho-rectified photograph. We recommend the following: begin a new sentence after the word taken, and start the new sentence with All ortho rectified photographs shall clearly… This minor change leaves no room for misinterpretation.

    Response: The proposed language will be changed to "…and all photos shall clearly show…".

24. VDOT: In 9 VAC 25-670-100, Part II.B.3, revise so that it is clear that the permittee does not have to start monitoring on the first day of the growing season.

    Response: The proposed text will be revised to: "Compensation site monitoring ~~for hydrology, soils, and hydrophytic vegetation~~ shall begin ~~at~~ on day one of the first complete growing season (monitoring year 1) ~~following compensatory mitigation~~after wetland compensation site construction activities are completed, …".

25. NVBIA: In 9 VAC 25-670-100, Part II.B.4.c, increasing the required readings from three readings to one reading every 30 minutes for three hours doubles the taxpayer costs of having someone stay out there and complete the sampling from the original requirement. We recommend duplicating the baseline requirement of two hours.

    Response: The required frequency and duration was determined to be scientifically defendable and are based on accepted water quality monitoring methods and analyses. Because other parameters or conditions influence the parameters being measured, a longer sampling duration allows for a more accurate representation of the water quality, especially after in-stream work has occurred. No changes are proposed.

26. NVBIA: In 9 VAC 25-670-100, Part II.B.8.h, we recommend removing the requirement for wildlife observations as it does not appear to have a connection to the impacted wetland site, wetland success, or water quality.

VDOT: Both the wetland and stream compensation plan requirement lists require the permittee to conduct wildlife observations at the compensation sites. While VDOT does collect this information at most of our compensation sites, we feel that this data should be collected on a voluntary basis rather than as a regulatory requirement as it appears to be beyond the jurisdiction of the regulation.

Response: According to the State Water Control Law, the VWP program is to ensure preservation of water quality and fish and wildlife resources. Therefore we believe that it is reasonable to ask for wildlife observations at compensation sites.

27. CBF: In 9 VAC 25-670-100, Part II.[D], we recommend additional review of construction monitoring requirements to further reduce excessive information. We also recommend that DEQ require an as-built survey following construction in combination with site inspections during construction by DEQ staff.

    Response: Based on the TAC meeting minutes, more options were given for the permittee to meet the photographic submittal requirements, at the suggestion of a TAC member. No opposition was expressed.

    A third option will be proposed in Part II.[D].1 as "c": "In lieu of photographs, and with prior approval from DEQ, the permittee may submit a written narrative that summarizes site construction activities in impact areas. The narrative shall be submitted at the end of the first, second, and third months of construction in impact areas, and then semi-annually for the remainder of the construction activities in impact areas, except during periods of no activity within the impact areas." Further, Part II.[D].1.a will be revised to: "~~Photographic m~~Monitoring shall consist of one of the following options:…"; and the title of Part II.[D] will be changed to 'Impact Site Construction Monitoring' to further clarify applicability of the conditions; Part II.[D].1.b will be revised to: "An ortho-rectified photograph shall be taken [by a firm specializing in ortho-rectified photography] prior to construction, …"; and Part II.[D].2 will be revised to: "As part of construction monitoring, photographs taken at the photo stations [or the narrative]shall document …".

    Part II.[D] and [E] do not require the submittal of final plans or an as-built for construction of the project, only construction of the wetland or stream mitigation site.

28. VDOT: In 9 VAC 25-670-100, Part II.C, specify a monitoring frequency for stream compensation sites. We recommend incorporating a requirement of 2 years of monitoring post construction unless DEQ determines otherwise based on the results.

    Response: The proposed text will be revised to include a frequency as a new condition C.6 in Part II, and will be similar to Part II.B.3.

29. NVBIA: In 9 VAC 25-670-100, Part II.C.3: 1) In some cases a permittee could have 11 days to submit reports, and in others they could have 30 days to submit reports. We recommend leaving the language as it was in the original document “within 30 days of each monitoring event.”; 2) a. This is appears to be unnecessarily repetitive with the remainder of the required

elements in b-f already requiring the elements listed in a. We recommend deleting this element and renumber b-f as a-e.; 3) b. The reporting requirements are very confusing in this entire Part. We strongly recommend the following: Firstly clarify by a table or otherwise what exactly it is you want. Secondly remove the word restoration, and replace it with stabilized. Lastly, we recommend minimizing the amount of required monitoring. The cost of conducting monitoring compounds with every monitoring event. This amount of reporting also requires a great deal of review time from the regulatory staff.

Response: DEQ believes the monitoring requirements are clear and were agreed to by all TAC members. [Further, DEQ attaches a Compliance Summary Sheet to each authorization that outlines all monitoring and reporting tasks and due dates.]

30. NVBIA: In 9 VAC 25-670-100, Part II.C.4, the allowance for heavy equipment in the stream during low flow conditions may violate the DCR E&S Manual as required in Part I.C 5, and seems to contradict the intent of Part I.C.8. We recommend deleting the last sentence and replacing it with the following sentence: "These activities shall be conducted in accordance with the DCR E&S manual Third edition, 1992 as amended."

    Response: Using equipment in-stream during low-flow conditions is an accepted stream restoration activity, and if done correctly, reduces the amount of water turbidity and bottom disturbance. Part I.C.5 refers to the correct use and installation of erosion and sediment controls, not to stream restoration techniques. Since Part II authorizes in-stream machinery for stream restoration work, Part I.C.8 is not applicable.

    DEQ proposes the following revision: "Stream channel restoration activities shall be <u>conducted in the dry or during low flow conditions. When site conditions prohibit access from the stream bank, heavy equipment shall be authorized for use within the stream channel.</u>"

31. NVBIA: In 9 VAC 25-670-100, Part II.C.5, to avoid unnecessary trips to the stream compensation site, we recommend specifying that restoration photographs be taken “during the growing season”. This change will make it clear that one of the goals is to monitor how the planted riparian species are growing.

    Response: Photos are not documenting vegetation only. Several trips for photos may be required before, during, and immediately after project completion. The annual update photo may occur at any time of year.

32. NVBIA: In 9 VAC 25-670-100, Part II.C.6, in order to clarify the last sentence we recommend the following change: “Any changes or deviations **from the final compensation plans** in the as-built or aerial survey shall be shown on the survey...”.

    Response: DEQ concurs with the requested change.

33. VDOT: In 9 VAC 25-670-100, Part II.C.7.e, please revise to be consistent with B.8.g, and replace the term “restoration” with “compensation”. Not all stream compensation sites include restoration. The term compensation is more generic and appropriate.

    Response: Stream photo monitoring is not the same as wetland photo monitoring, and therefore, these two conditions are not worded the same. No changes will be made.

34. VDOT: In 9 VAC 25-670-100, Part II.C.7.i, include the as-built survey in the list of items to be compared to the existing stream compensation site conditions.

    Response: The proposed text will be revised to: "Comparison of site conditions from the previous monitoring year and reference site, and as-built survey, if applicable."

35. VDOT: Add a "k" to 9 VAC 25-670-100, Part II.C.7 to require the inclusion of any other reporting items that were approved in the final compensation plan.

    Response: The following text will be added to the proposed language: "k. Any additional submittals that were approved by DEQ in the final compensation plan."

36. VDOT: In 9 VAC 25-670-100, Part II.D.4.b and 4.c, we request the reduction of the duration and frequency of monitoring required prior to a stream channel relocation. VDOT also requests an allowance for monitoring to cease post-relocation once the stream returns to its pre-construction water quality.

    Response: The required frequency and duration was determined to be scientifically defendable and are based on accepted water quality monitoring methods and analyses. Because other parameters or conditions influence the parameters being measured, a longer sampling duration allows for a more accurate representation of the water quality, especially after in-stream work has occurred. No changes are proposed.

37. VDOT: In 9 VAC 25-670-100, Part II.E.3.b, the due dates here appear to conflict with the due dates required in 3.

    Response: The text will be revised to clarify the requirements: "~~After construction begins,~~ ~~e~~Construction monitoring reports shall be submitted to ~~the board~~DEQ ~~within 30 days of each~~ not later than the 10th day of the month following the month in which the monitoring event specified in Part II.D takes place, unless otherwise specified below. The reports shall include~~,~~ ~~at a minimum,~~ the following, as appropriate:…"

Forms:

1. VDOT: The regulation indicates that we are using the VDOT JPA revised on 01/01/04. The revision date should be 10/28/03. Also, please note that the application will likely be revised by the end of the year or in early 2005. We would like to know how that change can be addressed and properly implemented through the regulatory process.

Response: DEQ will revise the proposed language to remove all dates associated with all types of Joint Permit Applications in the "Forms" section of each general permit regulation, such that certain and future revisions of these forms do not continually require making administrative changes to the VWP general permits. The incorporation of published literature citations, including a date of publication, are justified for inclusion within regulation language; however, references to the revision dates of simple paper or electronic forms are not justified due to the administrative burden that is incurred to then change every document that includes such form date references.

Miscellaneous:

1. The City of Chesapeake: We suggest that language/conditions dictating the method of construction concerning wetland and/or stream impacts within the project site(s) be carefully conveyed because these types of conditions can expose localities to potential claims from contractors. I would recommend that DEQ incorporate statements such as "...impacts to downstream surface waters shall be avoided and minimized to the maximum extent practical" vs. dictating the actual construction and/or deconstruction methods for drainage facilities, keeping in mind potential effects that these restrictions may have on project schedules and/or upstream residences.

   Response: DEQ strives to be flexible in the general permit conditions while maintaining protection to surface waters within the Commonwealth. We believe this type of language has been included appropriately throughout the Virginia Water Protection General Permits.

2. VDOT: Please ensure that all references to bank credits allow for the “use of” mitigation bank credits in addition to the purchase of credits, as VDOT owns a number of wetlands and stream mitigation banks that we intend to “use” rather than “purchase” credits from.

   Response: All references will be revised to include "use" as this is consistent with the program regulation language.

3. VDOT: Also, we request that items required in the permit application not be listed as permit conditions. For example, 9VAC 25-670-100 Part II A.8.c. requires a summary of impacts and proposed compensation associated with constructing the compensation site. This information is required in the permit application in order for the permit to be authorized, so it should not also be a permit condition.

   Response: DEQ may consider this suggestion at the time that the VWP general permits come up for renewal in 2007, as a substantial re-write of the regulation text would be required.

4. VDOT: The following comments relate to improving the organization and lay-out of the permit conditions within Section 100…

   Response: DEQ will propose to better organize the conditions in Section 100 when the general permits expire in 2007.

Typographical Errors:

1. DEQ staff noticed that an item was numbered incorrectly in Part II of 9 VAC 25-670-100.

   Response: The correct numbering will be changed to 9 VAC 25-670-100, Part II.B.4.d., instead of 9 VAC 25-670-100, Part II.B.5.

2. In 9 VAC 25-670-100, Part II.B.1 and Part II.C.6, the next to last sentence should read: "…The survey shall be submitted within ~~90~~ 60 days of completing compensation site construction."…

3. VDOT: Various grammar and punctuation corrections are needed in the following Sections of 9 VAC 25-: 60.B.16.d; 80.F; 100, Part I.C.3; 100, Part I.H.3; 100, Part II.A.9.e; 100, Part II.A.9.l; 100, Part II.A.21; 100, Part II.A.22; 100, Part II.A.23; 100, Part II.E.3.a; 100, Part II.E.3.e; 100, Part II.E.6; 100, Part II.K.

   Response: DEQ will take the above into consideration and revise as necessary to correct grammar and punctuation errors.

List of Acronyms and Abbreviations

CBF	Chesapeake Bay Foundation
DCR	Department of Conservation and Recreation
DEQ	Department of Environmental Quality
DMME	Department of Mines, Minerals and Energy
DGIF	Department of Game and Inland Fisheries
HRPDC	Hampton Roads Planning District Commission
NRCS	Natural Resources Conservation Service (U.S. Department of Agriculture)
NVBIA	Northern Virginia Building Industry Association
SPGP	State Programmatic General Permit
TAC	Technical Advisory Committee
USACE	U.S. Army Corps of Engineers, Norfolk District Regulatory Branch
VAA	Virginia Aggregates Association
VAC	Virginia Administrative Code
VCA	Virginia Coal Association
VDOT	Virginia Department of Transportation
VWP	Virginia Water Protection (permit program)
VWPP	Virginia Water Protection Permit
VWRTF	Virginia Wetlands Restoration Trust Fund

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 670-10	N/A	Definitions	Added 3 definitions; deleted 1 definition; and modified 4 definitions for clarity.
9 VAC 670-20	N/A	Purpose and Delegation of Authority	Minor clarification of instructional language.
9 VAC 670-30	N/A	Authorization to	Differentiated between requirements for

		Impact Surface Waters	wetlands and streams; clarified requirement language.
9 VAC 670-40	N/A	Exceptions to Coverage	Clarification of requirement language.
9 VAC 670-50	N/A	Notification	Differentiated between requirements for wetlands and streams; clarified instructional language.
9 VAC 670-60	N/A	Registration Statement	Changed section title; added language to clarify complete application requirements; deleted requirements for unnecessary information; differentiated between requirements for wetlands and streams.
9 VAC 670-70	N/A	Mitigation	Differentiated between requirements for wetlands and streams; clarified mitigation requirement language.
9 VAC 670-80	N/A	Notice of Planned Change	Added language to define a planned change, and under what circumstances such procedures can be used.
9 VAC 670-90	N/A	Notice of Termination	Changed section title; added language to allow a permittee to cancel an authorization; minor clarification of instructional language.
9 VAC 670-100	N/A	VWP Permit and Conditions	Added, deleted, and modified language to clarify general conditions, special conditions, and mitigation and reporting requirements.

Impact on family

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

This regulation will have no affect on the institution of the family and family stability.